Maurice Blackburn Pty Limited
ABN 21 105 657 949
Level 20
201 Elizabeth Street
Sydney NSW 2000
PO Box A266
Sydney South 1235
DX 13002 Sydney Market Street
T (02) 9261 1488
F (02) 9261 3318

8 November 2013

Access to Justice Arrangements
Productivity Commission
PO Box 1428
CANBERRA CITY ACT 2601

Also By Email: access.justice@pc.gov.au

Dear Sir/Madam

Response to Access to Justice Arrangements Issues Paper

1. Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 27 offices throughout Victoria, New South Wales, Queensland, Australian Capital Territory and Western Australia. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (total and permanent disability claims), negligent financial and other advice, commercial litigation and consumer and commercial class actions.

Maurice Blackburn employs over 800 staff, including approximately 300 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as is it the firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

The firm has a small wills and estates practice but otherwise the legal services we provide are to assist people to claim compensation for loss and damage suffered by another's negligence or other allegedly wrongful conduct.

2. Avenues for Dispute Resolution and the Importance of Access to Justice

2.1 The legal services provided by Maurice Blackburn include the provision of initial advice (often for free) and client representation. The representation of a client's interests will be effected by adopting a range of strategies including preparing and presenting submissions (to the respondent, an insurer, internal and external complaints resolution schemes), negotiating directly with opponents, their lawyers or insurers and appearing in tribunals and courts. We use many extra-judicial strategies to achieve positive early outcomes for our clients if it is in their best interests to do so. As a rule, we encourage clients to attempt to resolve their issues

before commencing formal proceedings and, once commenced, we will seize every possible opportunity to mediate or negotiate an acceptable resolution for our clients.

2.2 People come to Maurice Blackburn because they have identified that they have a legal problem and that the problem may be assisted by seeing a lawyer. We do not underestimate the difficulty that many of our clients had prior to recognising that they had a legal problem and that seeing a lawyer was the right thing to do. We expect that there are many thousands of people who are not able to identify when their problem is one that may be helped by seeing a lawyer.

2.3 Our advice service is provided first by paralegals through a telephone response centre and web based enquiry services that refer people to the service that is, in the opinion of the referrer, best for that person. If the person's problem is one that is best served by those working in a community legal centre, legal aid, an industry based dispute resolution scheme or corporate complaints service, then that referral will be offered. If the enquiry is one best addressed by a lawyer employed by Maurice Blackburn then the referral will be made to the appropriate lawyer and again, in many cases, the first consultation will be conducted without charge.

2.4 This submission will respond to the following parts of the Issues Paper:

- The benefits of an accessible civil justice system;
- The transparency of costs;
- Timeliness;
- User friendliness;
- Court rules;
- Early resolution strategies;
- Courts;
  - Model litigants;
  - Obligations to encourage cooperation;
  - Procedures that impede access;
  - Resource imbalances;
  - Discovery;
  - Case management;
  - Pre action requirements;
  - Costs and securities.
- Lawyers;
  - The regulatory framework;

- Billing practices.

- Funding;
  - Contingent billing;
  - Litigation funders;
  - Class actions.

2.5 At the outset it is worth noting that for a national practice providing similar services in a number of Australian jurisdictions the failure of the political process over almost 25 years to achieve national legal profession legislation is lamentable. It is recognised that the attempts by State and Territory politicians to introduce uniform legislation have been partially successful but inter-jurisdictional differences remain significant and impose unnecessary costs. For example, the restrictions on advertising differ significantly between Victoria, New South Wales and Queensland and make it very difficult for a law firm that is trying to inform the public of services available for them to do so in a cost effective manner.

3. Legal Needs

3.1 Many people with legal problems face significant hurdles in their interactions with the legal system. First, as identified in the Issues Paper, recognising that a problem has a legal solution is, in itself, difficult for many. Secondly, for those who do recognise that they have a legal problem, finding someone to ask for assistance can be difficult although it is noted that in a number of Australian jurisdictions there are telephone advice lines supported by Government and NGOs. Many private law firms provide referral assistance without charge.

3.2 When a person finds a lawyer who recognises and understands the legal problem further problems can then arise, including:

- The person cannot afford to pay a private lawyer;
- The person is not eligible for civil legal aid;
- The person cannot use a community legal centre, either because the legal problem is not appropriate or the person does not live near a community legal centre;
- The significance of the legal problem does not, on a cost/benefit basis, warrant the expenditure on the lawyer;
- The cost/benefit of using legal services is such that lawyers are not willing to assist on a reduced fee or conditional fee basis.

3.3 Examples of legal problems that many people will find difficult to address for one or other of the above reasons include:

- Bad quality services for consumers and small businesses;
- Breaches of contract, such as denial of consumer warranties;

- Injuries caused by negligent acts or faulty products which fall below relevant statutory thresholds;

- Individual or collective consumer or commercial claims where the total value of the claims is less than $500,000 (but higher than the jurisdictional limit of industry funded dispute schemes).

3.4 Examples are too many and complex to detail but suffice to say that there are many people who contact the Maurice Blackburn Response Centre who are advised that their problem is one in which we are unable to act on a conditional fee basis. The resources required to ensure that our clients are given adequate representation may often be considerable. Unless a claim is for substantial damages, a private practitioner must charge on a fixed fee or hourly basis, with the payment to be made in advance or within 30 days of the work being done. There are many people who are not willing or are not able to pay the fees on an ongoing basis. Many of these people will miss out on legal services.

4. The Costs of Assessing Civil Justice

4.1 Where the risk/reward equation means that the pursuit of the claim is likely to succeed and pay for the legal fees and associated costs (disbursements) it is likely that the claimant will be able to find a lawyer who will act on a conditional fee basis. This is discussed further at section 13 below.

4.2 The conditional fee arrangement is, in New South Wales, one in which the lawyer is able to charge the ordinary hourly rate without uplift only on success. In Victoria and Queensland on success the lawyer can charge an uplift of 25% on the ordinary hourly rate. In the latter jurisdictions there is, at least, some compensation for the lawyer who accepts that acting on a conditional fee basis presents a very real risk that the lawyer will work hard and allocate substantial resources and never be paid. In New South Wales the risk/reward equation tilts towards risk only. This necessarily results in fewer cases being able to be taken on under conditional fee arrangements in that State.

4.3 In personal injuries actions, the law in each of the jurisdictions in which Maurice Blackburn practices differs and differs so substantially that in Victoria, Queensland and the ACT we are able to offer services for large numbers of claimants for whom, in NSW, we cannot give any assistance either because their claims are defeated by unduly high thresholds or that the risk/reward equation means that it is just not worth pursuing the claim for damages even though it may be meritorious.

4.4 This problem is not caused by unduly high legal fees but by statutory constraints on personal injuries damages payouts. This problem extends to claims for personal injuries compensation under Commonwealth Law, most notably, the provisions in the *Competition and Consumer Act (Cth) 2010*.

Timeliness and Delays

4.5 The length of time that it takes to resolve a civil dispute depends, of course, on the nature of the dispute and the avenue pursued to resolve it. State and Federal statutory authorities, internal and external dispute resolution schemes, tribunals and courts each present different challenges.

Simplicity and Usability

4.6 Again, the various different avenues that can be pursued to resolve disputes vary enormously as to their 'user-friendliness'. Some statutory authorities and industry dispute resolution schemes have procedures that make them quite accessible and in which disputes can be resolved relatively quickly while the superior courts continue to offer a 'Rolls Royce' service that is appropriate only for the most substantial claims.

4.7 The fact that there are so many potential avenues to pursue, depending on the problem, is itself a factor that increases the complexity for those wanting to resolve a civil dispute. The only solution to this problem is for well-trained referral services to be available to consumers of legal services. Most jurisdictions have relatively competent referral services provided by a combination of Government (for example in NSW Law Access), Legal Aid, community legal centres and private lawyers, although they appear to be underfunded.

4.8 Each jurisdiction presents its own issues. This submission will consider procedures in the superior courts only (see section 11).

5. Is unmet need concentrated among particular groups?

5.1 It is quite obvious to those working in Maurice Blackburn's Response Centre and lawyers and other staff in the firm who provide pro bono and volunteer assistance through an array of community legal services that unmet legal need is not limited to the marginalised but is a significant problem for all but the most wealthy. If it was not for the private legal profession being prepared to take substantial risks conducting cases on a conditional fee basis only the wealthy would have any meaningful access to the justice system.

5.2 As it is, those cases that can be properly conducted on a conditional fee basis represent a relatively small proportion of the legal problems that need addressing. legal aid commissions, community legal centres, community justice centres, consumer organisations and NGOs all provide legal advice and assistant services but there are many who miss out as these services are underfunded.

6. Avenues for Improving Access to Justice

6.1 Early resolution of disputes is clearly a good thing but the limited availability of cost effective advice services means that many early resolution practices will simply accentuate the disadvantage of the less powerful and less resourced person resulting in dispute resolution without just outcomes.

6.2 There is a very real need for properly funded information and advice services. As well, Government regulatory authorities must be properly resourced and trained to ensure that an array of legal disputes that need to be resolved are properly addressed in a manner that ensures that where a systemic wrong has been committed the victims are properly compensated.

6.3 A functioning, efficient and competitive third party litigation funding system must be part of the suite of solutions to the problems of a lack of access to justice. It is a private sector solution that provides plaintiffs whose cases warrant funding with access to financial resources to allow them to run cases they could not otherwise afford. Third party litigation funding is not a complete panacea for the problem of

access to justice simply because funding is currently only available for claims in excess of $1m. It is possible that with enhanced competition in the litigation funding market innovative solutions will extend its reach. Litigation funding is discussed in section 13 below.

6.4 Allowing lawyers to charge contingency fees would substantially improve access to justice and ensure a proportionality of fees to risk and outcomes. Current conditional costs arrangements constrain lawyers' rewards regardless of the risk they undertake in a given case. This has the impact of imposing restrictions on the number of cases that can be undertaken on this basis. In an environment where concerns are raised that in some instances costs are disproportionate to recoveries in the civil justice system it seems entirely counter intuitive that the one means of charging which would ensure proportionality is currently prohibited. Contingency fees are discussed in section 13 below.

7. Preventing Issues from Evolving into Bigger Problems

This submission will not address these issues.

8. Effective Matching of Disputes and Processes

This submission will not address these issues.

9. Using Information Mechanisms to Best Effect

This submission will not address these issues.

10. Improving the Accessibility of Tribunals

This submission will not address these issues.

11. Improving the Accessibility of Courts

11.1 In this section the submission will relate only to District or County courts, the Supreme and Courts of Appeal in the states, the Federal Court of Australia, the Full Court at the Federal Court and the High Court of Australia.

The conduct of parties in civil disputes and vexatious litigants

Model Litigant Guidelines

11.2 Governments, government agencies and statutory authorities (and their lawyers) have been required, since 2005, to comply with 'model litigant guidelines'.[1] The guidelines impose an obligation to, amongst other things, deal with claims promptly, to not cause unnecessary delay, to make an early assessment of prospects and to pay legitimate claims without litigation. As well, the obligation is to avoid, prevent and limit the scope of legal proceedings wherever possible and, where not possible, to keep the costs of litigation to a minimum. This includes:

- Not requiring a party to prove something that the agency knows to be true;
- Not contesting liability if the dispute is really about quantum;

[1] See the Commonwealth Model Litigant Guidelines: *Legal Services Directions 2005* made under Section 55ZF of the *Judiciary Act 1903 (Cth)*

- Considering alternative dispute resolution;
- Not taking advantages of a claimant who lacks the resources to litigate a legitimate claim;
- Not relying on technical defences;
- Apologising where the agency has acted improperly.

11.3 Maurice Blackburn has represented plaintiffs and applicants in a number of jurisdictions against Commonwealth, State and Territory agencies and yet it is the exception rather than the norm in which we see any evidence of compliance with the model litigant guidelines.[2]

11.4 It is recommended that the model litigant guidelines be reinforced in a manner that gives opponents standing to complain that the guidelines have not been complied with. This could be done by an amendment to the Judiciary Act that imposes a sanction on a government agency if a court finds non-compliance.

Case Management Guidelines

11.5 The courts in which Maurice Blackburn's lawyers practice have legislatively imposed case management guidelines. These were introduced in response to recommendations of law reform commissions.

11.6 In the Federal Court of Australia Part VB of the *Federal Court of Australia Act 1976 (Cth)* entitled 'Case Management in Civil Proceedings' provides, amongst other things, that the overarching purpose of the civil practice and procedure provisions in that court are to facilitate the 'just resolution of disputes according to law as quickly, inexpensively and efficiently as possible'. Parties before the court are obliged to act consistently with the overarching purpose (s37N) and the court is given power to give directions consistent with it (s37P).[3]

11.7 Most courts subject to the overarching purpose, including the Federal Court, have introduced practice directions consistent with it. For example, in the Federal Court, Practice Note CM1 provides for the individual docket system which enforces the principals of the overarching purpose. CM17 introduces various steps associated with the conduct of representative proceedings that are consistent with the overarching purpose.

11.8 It is the experience of lawyers in this firm that the effectiveness of these reforms tends to depend on the individual judicial officer before whom an action is being conducted. It is Maurice Blackburn's submission that judicial officers should be encouraged to actively engage in the conduct of matters before them and to

[2] Extreme examples are in our social justice cases: for example, a case taken for Shayan Badraie, a minor, in which a claim for compensation against the Minister for Immigration was aggressively resisted for many years. It was ultimately settled after 6 weeks of trial in the Supreme Court of NSW for which the Commonwealth paid over $1 million in costs. Another is our acting for Dr Mohamed Haneef whose complaints of false imprisonment and claims for compensation for injury were settled only after unprecedented publicity and a change of government. More recently, in the matter of *Konneh v State of New South Wales (No 3)* [2013] NSWSC 1424 young people arrested and detained by mistake are claiming compensation yet the State has made two strike out applications and has appealed two decisions unfavourable to it, causing the action to run for years.

[3] In NSW, s56 of the *Civil Procedure Act 2005 (NSW)* provides that the overriding purpose of the Act and the rules is to facilitate the just quick and cheap resolution of the real issues in the proceedings. The section provides that a court must seek to give effect to this overriding purpose and parties must assist the court to do so. In Victoria, sections 7 & 8 of the *Civil Procedure Act 2010 (Vic)* make similar provision

enthusiastically enforce the overriding principles to ensure that cost and delay do not frustrate the quick and just resolution of the case before them.

11.9 It is recommended that court processes be reviewed in all jurisdictions to ensure that government parties comply with the model litigant guidelines and that all parties comply with the overarching or overriding purpose.

11.10 Obligations to encourage cooperation between the parties should be, in our opinion, both strengthened and expanded.

Court Processes

11.11 There are a number of court practices and procedures that currently impede access to justice including:

- The strict adherence to overly formalistic pleadings of a case;
- The unnecessary insistence on parties appearing on list days only to have minor timetabling issues resolved when this could have been done by telephone;
- Excessive time and resources being devoted to interlocutory disputes.

11.12 The solution appears to be to adopt less rigorous procedures for the making of claims, to direct judicial officers to actively case manage matters before them and to determine the less substantive interlocutory disputes either on the papers or, unless there are exceptional circumstances, to determine such applications after brief hearings and without the need for complex evidentiary standards to be met.

11.13 The Law Council of Australia's Case Management Handbook that appears in the Federal Court's web page (www.fedcourt.gov.au/law-and-practice/case-management-handbook) is an important development in this regard and its recommendations and suggestions to assist in the early identification of the issues, to improve discovery processes and to streamline the presentation of evidence should be encouraged.

Discovery

11.14 While discovery can be important in substantial cases it is not considered that discovery is a matter of significant concern. The current discovery rules, at least in the Federal Court, when applied correctly and honestly interpreted, enable parties to access justice rather than frustrate it. In particular, concerns about the burden of discovery in a relatively small number of mega-commercial cases and class actions should not prompt unnecessary limitations on the process of discovery across the court system.

11.15 In substantial claims, such as class actions, discovery can be a burden but it is an essential step in the road to a just resolution. Claimants in class actions are substantially disadvantaged by the information imbalance and discovery is an essential step to address this. For example, a class that claims to have suffered loss due to a public company's failure to comply with its continuous disclosure obligations[4] will have enough information to plead wrongdoing but, without

[4] see s674 *Corporations Act 2001 (Cth)*

discovery, will struggle to identify the date on which the material information ought to have been disclosed to the marketplace and other aspects of the claim.

11.16 Amendments to the Federal Court Rules on discovery made in 2011 address previous concerns. Further steps which can be taken to reduce the discovery burden in the very large commercial cases and class actions include:

(a) requiring defendants to file affidavits and or provide testimony regarding their internal reporting lines, their document storage systems and other matters relevant discovery process (such as categories of high level reports which might obviate the need for discovery of source documents); and

(b) in appropriate cases, appointing independent court experts to liaise with the parties in the development of a discovery regime suited to the particular needs of the case. Such experts could speak with plaintiffs regarding the kinds of documents they required and then be provided with access to defendants electronic and other document storage systems to devise practical ways of ensuring relevant documents are identified without imposing an excessive burden on defendants.

11.17 The attitude of the Supreme Court of NSW, that discovery is an undue burden for defendants, means that it will not be a preferred jurisdiction for substantial actions.

Confidentiality Constraints

11.18 Plaintiffs in the superior courts that are alleging corporate wrongdoing are often faced with a significant barrier to justice when a previous or current employee of the defendant indicates that he or she is willing to provide information to the plaintiff but is subject to common law and contractual confidentiality constraints. As was noted by the Victorian Law Reform Commission Civil Justice Review this issue needs to be addressed to enable plaintiffs to take evidence from such people without being restrained for aiding and abetting a breach of the common law or contract.[5]

11.19 It is recommended that the Productivity Commission propose amendments to the Federal Court of Australia Act along the lines of that recommended by the VLRC Civil Justice Review at [76] – [79] on pages 424 and 425.

11.20 An alternative, but less comprehensive solution, may be to amend s 1317AA of the *Corporations Act 2001 (Cth)* to make it clear that the protection provided to Whistleblowers extends to:

(a) past employees and officers of the corporation, and to

(b) disclosures made to legal practitioners who act for an interested party on the condition that the legal practitioner be restrained from using the information disclosed without leave of the Court.

[5] Civil Justice Review Report 14 Victorian Law Reform Commission pages 419 – 425 see Campbell J's decision in *AG Australia Holdings Limited v Burton & Anor* (***Burton***) (2002) 58 NSWLR 464

Reforms in Court Procedures

The Docket System

11.21 As noted, case management strategies adopted by the courts make a significant difference to this firm's ability to adequately represent the interests of our clients in the superior courts. The Federal Court uses the individual docket system, (or, as the Issues Paper identifies it the 'individual list model') whereas the NSW Supreme Court uses the 'master list model'.

11.22 The master list model is based on an assumption that it enables the court to have many procedural steps in the conduct of litigation addressed by less experienced judicial officers leaving the limited number of judges to concentrate on the hearing of substantial cases.

11.23 It is our experience that actions in the Federal Court that uses the individual docket system are less cumbersome and more efficiently managed than those in the NSW Supreme Court that uses the matter list model.

Pre-action Requirements

11.24 The Federal *Civil Dispute Resolution Act 2011* imposes an obligation on the parties to attempt to resolve disputes before commencing proceedings and those who do so must complete a 'genuine steps statement'. While complying with this legislation is not difficult our experience suggests that it gives opponents an opportunity to frustrate the resolution of claims by suggesting and engaging in unrewarding extrajudicial procedures that do not, and were never intended to, conclude in a reasonable resolution.

11.25 If the intention of the *Civil Dispute Resolution Act* was that disputes would be resolved sooner than previously, it appears that pre-action requirements have not, in our opinion, been effective. The only impact of the requirements has been to add another layer of costs and provide an opportunity for defendants to cause delay.

The Fast Track

11.26 The Federal Court's "Fast Track"[6] is an impressive example of a superior court moving decisively to address mounting concerns that justice delayed is justice denied.

11.27 Whilst the Fast Track approach will not be suited to all forms of litigation, for some cases it represents a more efficient means of dispute resolution.

Costs Awards and Court Fees

11.28 Court fees including filing fees and hearing allocation fees have become prohibitive for many. For example, in a recent action being conducted in the Federal Court, our commercial client has been required to pay $32,000 to have its claim set down for 10 hearing days from 10 March 2014. The hearing of a class action concerning allegedly defective hip implants has been listed for 10 weeks from 2 June 2014 in the Federal Court. The action is being conducted by Maurice Blackburn on a conditional fee basis for over 1,500 clients of Maurice Blackburn (and three other law firms) and a further 2,000 group members. The representative applicants are

[6] Practice Note CM8

natural persons with very low incomes yet it is expected that a hearing allocation fee will be levied in the order of $150,000, a sum which is payable even if the hearing ultimately does not proceed, as it will not if the action settles prior to hearing. Options for waiver of these fees are not available. Fee deferral is not adequate.

Security for costs in unfunded class actions

11.29 When parliament enacted Part IVA of the *Federal Court of Australia Act* 1976, which introduced provisions allowing for class actions, it made a conscious decision to preclude costs orders against group members. Only the lead or representative applicant would be liable for costs if the action was unsuccessful. The policy choice which underlay this approach was that the class action system is not an elaborate form of multi-party litigation with all the attendant costs, but a representative procedure where the determination of common issues in the lead applicant's case would bind the group. It was the intention that the group members would not be required to take any step until the determination of those common questions.

11.30 In *Madgwick v Kelly* [2013] FCAFC 61 the Full Court of the Federal Court concluded that security for costs could be imposed upon an open class of investors in a managed investment scheme because the lawyers for the applicant had retainers with 12.8% of the class. The judge at first instance had found that most of the known group whom were relatively well off. There were no findings about the wealth of the unknown group members. When security for costs claim went back to the first instance judge he provisionally determined that the applicant would need to lodge over $6.5 million in security. This sum, if ultimately imposed, will stifle the class action.

11.31 The inevitable consequence of the decision in *Madgwick v Kelly* is to undermine the utility of the class action regime and impose significant, if not insuperable hurdles on applicants in class actions unless they have the benefit of third party litigation funding. These people are now faced with the prospect of having to find millions of dollars just to have their action heard. The applicant will not be able to find this money alone so it will have to come from a class of persons over whom they have no control and of whom most are unknown.

The Use of Technology

11.32 There are many, many members of our community who now have access to the internet and use email. It is surprising therefore that some courts and tribunals have been slow to facilitate electronic communication including electronic filing of court documents. This is an issue relevant to particular courts but must not be allowed to continue.

11.33 It is also the case that many disputes, at least of interlocutory nature, could be quickly resolved by the use of conference calls through facilities available on the internet.

12. Effective and Responsive Legal Services

A Responsive Legal Profession

12.1 This submission will not address this issue save to say that it is time for the restrictions on contingency fees to be removed. This is developed in section 13 below.

Legal Assistance Services

12.2 This submission will not address these issues.

Legal Assistance Services Funding

12.3 This submission will not address these issues.

Pro Bono

12.4 Maurice Blackburn and its lawyers give many hundreds of hours per year to the community and our clients. This is done by:

(a) community involvement, such as volunteering in community legal centers, participating in Management Committees and Boards of NGOs, and assisting welfare groups through a Community Social Responsibility Program;

(b) free legal advice and assistance through our Response Centre and by our "first consultation for free" policy in many areas; and

(c) our substantial Social Justice Practice.[7]

13. Funding for Litigation

13.1 It is important to note that in all Australian jurisdictions, lawyers are able to charge their clients in the following ways:

(a) Pay as you go, in advance or within an agreed period of time and this can be done by:

- hourly rates billed at regular intervals (after 6 minutes);
- fixed fees for the whole of an action or for stages of the work.

[7] For statistical purposes, if we do not include the Response Centre service or the first consultation for free service, in our Social Justice Practice in the 2012-2013 financial year, at least $835,000 worth of services was performed. $720,000 in fees and $115,000 in disbursements which would have been billed to the client had the work not been undertaken pro bono. The actual value of fees is higher because not all lawyers who undertake pro bono work record time for their ordinary fee-earning activity. The time spent by those lawyers on pro bono work is therefore not recorded. These figures also do not include the expense of staffing our Social Justice Practice with one full time lawyer and one part time legal assistant exclusively dedicated to pro bono work (which is approximately $160,000 per year plus on costs).

A meaningful pro-bono per-lawyer average is not able to be calculated for the firm as a whole but for those lawyers in the Class Actions department, we have calculated that 54.5 hours per lawyer of pro bono work was undertaken in the 2012-2013 financial year. Maurice Blackburn has 10 key practice areas. Time recording is not standard practice in seven of these areas, since their clients are not charged by time. The time spent by those lawyers on pro bono work is therefore not recorded. Hours are only recorded by three areas, one of which - Class Actions - is the provider of more pro bono work than is done across the board.

The per-lawyer metric is an inappropriate comparator against other firms. This is because the mix of pro bono work done by Maurice Blackburn is significantly different to that of other firms, and is focussed on clients whose demand would not be met by them. For example, litigious employment disputes are a significant part of Maurice Blackburn's pro bono work but many other firms do not perform this work on such a basis. Maurice Blackburn's pro bono work is also exclusively litigious, unlike many other firms whose pro bono work consists mostly of advice work (eg DGR applications and Governance).

(b) Conditional fees in which part or all of the work is charged only on success. This may include disbursements and, in all but NSW, an uplift on the usual hourly rate can be charged for the deferred fee component;

(c) Conditional fixed fees for the whole action or for stages of the work.

It is not permissible in Australia for lawyers, as opposed to third party litigation funders, to charge "contingency fees" being fees charge only on success and set as a proportion of the damages recovered.

Contingent Billing

13.2 It is time that the ban on lawyers charging contingency fees is removed from the Legal Profession Acts in each jurisdiction in Australia, or at least, the proposed national legal profession legislation should not ban such fee arrangements.

13.3 To enable lawyers to charge "Percentage Based Contingency Fees" will help more people to have their claims for compensation heard and determined than is possible at present. It will improve access to justice.

13.4 Contingency fees align the interests of the lawyers with those of their clients. The incentive for both parties is for the largest payout in the shortest possible time. Time billed becomes irrelevant, while inefficiencies and delay become the enemy of the lawyer as well as the client, whereas in traditional litigation, lawyers who are paid by the hour benefit from the convoluted road taken to resolve disputes.

13.5 As noted above, in an environment where concerns are raised that legal costs are disproportionate to the amounts involved in civil disputes it is counterintuitive to ban the one form of charging which ensures proportionality.

13.6 The availability of contingency fees will complement the legal services assistance sector and the litigation funding industry by providing an additional model by which complex and substantial claims, such as consumer and commercial class actions, can be funded.

13.7 Arguments against contingency fees usually boil down to two propositions:

(a) Contingency fees will prompt an increase in frivolous and unmeritorious "US style" litigation; and

(b) Contingency fees create an insuperable conflict between the lawyers fiduciary duty to the client and their financial interest in the outcome of a case.

13.8 There is no necessary link between contingency fees and unmeritorious and frivolous litigation. The greatest disincentive to such litigation is the loser pays costs rule. Jurisdictions such as Ontario in Canada and more recently the United Kingdom demonstrate that the introduction of contingency fee arrangements together with the retention of a loser pays costs rule will see an increase in access to justice without an explosion of frivolous claims. The US, on the other hand, does not have a loser pays costs rule, has a more activist judicial culture and a greater willingness to award exemplary (as opposed to compensatory) damages; all of which provide considerable incentives to potential litigants to "chance their arm".

13.9 Under conditional costs arrangements the vast bulk of plaintiff litigation in Australia is already conducted in circumstances where the lawyer has a financial interest in the outcome of the case. The scale of that interest in a large unfunded class action

can be tens of millions of dollars. The economic incentives of such arrangements are worse than they would be if contingency fees were charged because the lawyer's financial interest is to accept an offer which is made at whatever level of offer would justify their fee. Yet, in practice, lawyers routinely recommend the rejection of offers which would be in their financial interest to accept because they do not regard the offers to be in the best interests of the client. In the many thousands of conditional costs cases run and settled every year by private lawyers the financial interest of the lawyer in the outcome of the litigation does not present any insuperable difficulty in relation to conflict of interest, nor is there evidence of such difficulties in those jurisdictions which permit contingency fee arrangements.

13.10 Contingency fees will also introduce much needed competition into the litigation funding market where barriers to enter that market are substantial. Currently funding commissions are in the range of 25% to 40% with lawyer's fees (in class actions) averaging 12%. If lawyers are permitted to charge contingency fees the overall costs to the consumer are likely to be substantially less than the combined costs of a third party funder and lawyer. Commercial litigation funders, driven by their desire for high margins to cover their substantial risks, are constrained to fund actions that are predicted to recover at least 3 times their estimated outlay. If a class action, for example, is likely to cost a funder $4m to conclude, it will not be underwritten by a commercial litigation funder unless the recovery is likely to be greater than $30m. A law firm considering an action for which costs and disbursements may total $4m, should be willing to conduct a meritorious claim on a contingency fee basis if the expected recovery is greater than $16m, as party and party costs should also be recovered on success.

13.11 The legal assistance sector is starved of funds and unable to assist any but the most marginalised. Lawyers acting on a conditional fee basis help a lot of people but the risks associated with larger cases, such as class actions, are too much to expect a law firm to carry without a proper upside. Contingency fees offer this. As well, Litigation funders operate outside of the legal regulatory system whereas lawyers acting on a contingency fee basis are well and truly in it and, for class actions at least, the arrangements will be subject to supervision of the court.

13.12 If contingency fees were to be introduced in Australia it could be done so in a similar manner to that in Ontario and the United Kingdom with the loser pays costs rule and constraints on percentage recoveries. As well, limits can be imposed on the sort of actions in which such fee arrangements may be used. It would also be sensible for the courts to have a supervisory role in the approval of contingency fees in substantial actions, such as class actions.

Litigation Funders

Benefits of Litigation Funding

13.13 The development of a functioning and effective litigation funding market has provided a private sector solution to the problem of promoting access to justice.

13.14 Litigation funding operates in three primary areas:

(a) insolvency;

(b) class actions; and, to a much lesser extent,

(c) general commercial litigation.

13.15 In each of these areas, litigation funding has allowed meritorious cases to be run which would otherwise have been beyond the financial resources of those on the plaintiff side.

13.16 In insolvency cases, litigation funding allows administrators and liquidators to pursue recoveries on behalf of creditors which would not be possible if recourse could only be had to the assets of the insolvent company. In class actions, litigation funding provides an indemnity for adverse costs to the lead plaintiff (who otherwise has to risk exposure to those costs for a potential individual recovery which is usually a fraction of that exposure) and provides access to capital beyond the resources of the law firm running the case. In the commercial context, litigation funding provides a means for small to medium enterprises to take on larger defendants where the capital constraints of the SME would otherwise not permit this to occur.

13.17 In addition, litigation funding promotes an equality of arms between plaintiffs and very large well resourced corporate defendants ensuring cases are determined by reference to their merits rather than by the use of attrition strategies.

13.18 A further benefit of litigation funding is to create greater economic certainty for defendants. Where class actions are funded, security for costs will be routinely ordered to be provided by the funder in contrast to the ongoing uncertainty surrounding the circumstances in which security will otherwise be ordered. Enforcing adverse costs orders in unfunded class action litigation will often be virtually impossible, particularly if the applicant is a natural person. Litigation funding provides the defendant with greater certainty that a costs award in its favour will be paid.

Benefits of a Competitive Market

13.19 Australia's litigation funding market is currently dominated by IMF (Australia) Limited. Funding commissions vary between 25% and 45% of successful outcomes. Benefits to consumers from enhanced competition include:

(a) funding of cases which IMF would not fund; and

(b) reduced commissions.

13.20 Cases which have been successfully funded where IMF (Australia) Limited chose not to fund include the Multiplex (settled for $110m), Nufarm[8] (settled for $43.5m) and NAB[9] (settled for $115m) class actions. Cases where funding competition has resulted in reduced commissions include the Centro[10] and Nufarm actions.

13.21 The outcomes for consumers of litigation funding are likely to be improved by increasing competition in the market, such as improved transparency and a reduction in commissions. It follows that regulation of litigation funding should aim to enhance competition.

[8] *Hadchiti v Nufarm Ltd* (NSD 1847/2010)
[9] *Pathway Investments Pty Ltd v NAB* (SCI 2010 06249)
[10] *Kirby v Centro Properties Pty Ltd & Ors* (VID 326 and 327 of 2008) and *Vlachos and Ors v Centro Properties Pty Ltd & Ors* (VID 366/2008)

13.22 It also follows that competition will be increased if law firms are permitted to fund litigation either by way of the provision of funds to separate litigation funding vehicles or by means of contingency fees.

13.23 Maurice Blackburn has provided funds to a separate litigation funding vehicle, Claims Funding Australia Pty Ltd. CFA currently has an application before the Federal Court of Australia for approval of a co-funding arrangement in the Equine Influenza class action.[11]

13.24 If CFA is allowed to fund, consumers will benefit. In the cases it has agreed to fund so far its commissions have been at the bottom end of the commercial range (25% in Equine Influenza, 24.5% in Allco[12], 30% in Shearpond[13]). In Shearpond it is funding a case for an SME which otherwise could not obtain funding. In Allco it is co-funding a case which otherwise would have seen a limitations date expire without the commencement of proceedings.

13.25 Another way to promote competition would be to allow contingency fees. Third party litigation funding ensures that in funded litigation there are at least two separate entities (the funder and the lawyer) each of whom must make a profit. In a class action this will often mean a consumer pays 35% in funding commission together with legal fees in the order of 12%. As noted, if lawyers were permitted to charge contingency fees costs to the consumer would be reduced.

Regulation

13.26 At present litigation funding is regulated by a combination of general prohibitions on misleading or deceptive conduct and unfair or unconscionable contracts, the recently introduced conflict of interest regulations[14] and court supervision of insolvency practitioners and class actions.

13.27 As with all areas of legitimate economic activity, regulation should be kept to the minimum necessary to prevent significant and real prospects of abuse. It should not impose unreasonable barriers to entry. The history of litigation funding in Australia provides no evidence of widespread or significant abuse. Three aspects of the context in which litigation funding occurs are likely to ensure this remains the case:

(a) litigation funding is not an investment product whereby a promoter requires an investor to put cash up front on the promise of future returns. On the contrary, litigation funding is predicated on the promoter putting cash up front and the consumer putting up none;

(b) in the insolvency and commercial cases, litigation funders deal with sophisticated clients who can be expected to look after their own interests or have advisers who will;

(c) in the class action context, the consumer's interests are safeguarded by the law firm and, ultimately, by extensive court scrutiny of funding arrangements and settlements.[15]

[11] *Clasul Pty Ltd & Ors v Commonwealth of Australia* (NSD 368/2013)
[12] *Blairgowrie Trading Ltd & Ors v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) & Ors* NSD 1609/2013
[13] *Shearpond Pty Ltd v Atune Financial Solutions Pty Ltd & Ors* (VID 254/2013)
[14] *Corporations Amendment Regulation 2012 (No 6)*
[15] See for example: *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 2)* [2013] FCA 1163

13.28 It is not therefore surprising that complaints regarding funding do not come from the consumers who have benefited from funded actions but rather almost entirely from defendants or those representing them. Calls for extensive regulation come from the same sources. IMF is also keen to see enhanced regulation but it should be noted that IMF is not concerned about barriers to entry in the litigation funding market.

13.29 Calls for increased regulation of litigation funding have generally made three points:

(a) litigation funding needs to be regulated to prevent a US style explosion of class actions;

(b) regulation is needed to ensure litigation funders meet their financial obligations;

(c) regulation is needed to manage conflicts of interest between the interests of litigation funders and those of their clients.

13.30 Over the course of the last 21 years Australia's class action system has provided victims of mass wrongs with real remedies without US style excess. Maurice Blackburn is Australia's largest plaintiff class action practice and has recovered $1.1 billion in settlements in the past 12 years. Many of those settlements were in cases involving allegations of serious corporate misconduct. Acceptance of the utility of the class action regime can be seen in the increasing participation of institutional investors in shareholder class actions,[16] the extensive participation of businesses in cartel class actions and in comments from both the ACCC and ASIC accepting the role of class actions as a complementary private enforcement activity to their own regulatory role[17].

13.31 There is no evidence that litigation funding has led to any explosion of class actions. Class actions constitute about 0.1% of all litigation in Australia. On average only 14 per annum class actions are commenced[18] and of these, less than half are funded by litigation funders. In a recent paper[19] Allens Linklaters accepted there had been no "explosion" in shareholder class actions. The maintenance of Australia's loser pays costs rule will ensure class action growth remains moderate.

13.32 Litigation funders are almost invariably required to lodge substantial sums by way of security. In the Multiplex action security was $4m then later increased to $5m. In the recent NAB class action $6.2m in security was awarded and in the current Equine Influenza class action the funder provided security for $2.25m by consent. Defendants complain that security for costs does not necessarily cover all their costs on a solicitor own client basis, but such security should extend only to costs on a party and party basis. As these amounts demonstrate security for costs provides a useful de facto capital adequacy requirement. What should not occur is the

[16] For example, in the recent NAB class action MLC, its wholly owned subsidiary, participated in the action on behalf of investors who had invested in its parent because it regarded itself as having a fiduciary obligation to do so.

[17] Cooper J, ASIC Deputy Chairman, *Corporate wrongdoing: ASIC's enforcement role,* 2 December 2005; also Legg, M, *ASIC's nod to class actions may backfire,* The Australian, 12 April 2012 reporting comments of ASIC chair Greg Medcraft; and interview with Graeme Samuel (ABC Radio National PM Program 17 July 2006) re settlement of Vitamins class action.

[18] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes – First Report* (2009), 15-16, and Vince Morabito, *An Empirical Study of Australia's Class Action Regimes – Second Report* (2010), 17.

[19] Allens Linklaters, *Shareholder class actions in Australia,* August 2013

imposition of requirements which erect such barriers to entry as to narrow the litigation funding market to one perhaps two providers.

13.33 The Law Council concluded, in its June 2011 position paper, that the third party litigation funding industry ought to be subject to ASIC guidelines or further regulation. Since that date, the government has introduced the Corporation Amendment Regulation 2012 (No. 6) which, from 12 July 2013, imposed requirements on litigation funders to have in place arrangements to address potential conflicts of interest. ASIC has a supervisory role and has published a regulatory guide (RG 248) to assist funders to comply with the regulation.

13.34 The current regulations have addressed the issue of conflicts of interest and if one properly considers the reasons suggested for further regulation the inescapable conclusion is that increased supervision by courts is the best solution to the perceived problems.

13.35 Other reasons suggested for further regulation of third party litigation funders are:

(a) *To ensure that third party litigation funders should not perform legal work*:

While this concern is legitimate we do not know of any examples in practice in which a third party litigation funder has offended anyone by performing legal work and legislation already prohibits it. All third party funders pay lawyers to act for the funded party and it is those lawyers who must take the responsibility to ensure that their clients are properly advised. The involvement of lawyers is a sufficient safeguard to address this concern.

(b) *To ensure that funders do not exercise excessive control over the conduct of funded proceedings*:

The High Court in *Fostif*[20] accepted that some control by a funder was acceptable. It is our submission that as long as funding agreements give ultimate control to the funded party or group then the lawyers acting for them must ensure that their duty to the court and their duty to the clients take precedence over any relationship with a litigation funder. These potential conflicts are addressed by ASIC Regulatory Guide 248 and can be enforced by the court (if brought to its attention) or Legal Services Commissioners and Law Societies (if the subject of a complaint).

(c) *The fairness of funding agreements*:

As noted above funding agreements are currently subject to general prohibitions on misleading and deceptive conduct and on unconscionable or unfair contracts. Further, the courts have jurisdiction and power to review the terms of funding agreements as an incident of their general control of the litigation before them.

(d) *The size of commissions*:

The amount being charged by litigation funders as their commission for funding claims has been, in some actions, quite high. One must note that the commissions earned by funders are reflective of the fact that the risk includes the risk of paying substantial costs if the case is run and lost. To the extent that commissions are unreasonably high, this is a matter that can be, and

[20] *Campbells Cash and Carry Pty Limited v Fostif Pty Limited (*2006) HCA 41

should be, addressed by improved competition in the litigation funding market. Increased regulation will not improve competition, on the contrary, it will stifle it. With improved competition and judicial security will come improved transparency. As noted, the relaxation of the ban on lawyers charging contingency fees would also add a further competitive dimension.

Class Actions

13.36 The Federal Court class action regime was introduced in March 1992 in Part IVA of the *Federal Court of Australia Act 1976 (Cth*) (FCA). Victoria introduced a very similar regime in Part 4A of the *Supreme Court Act 1986 (Vic)* in 2000[21] and in March 2011 the NSW legislature introduced a similar, but marginally enhanced regime, in Part 10 of the *Civil Procedure Act 2005 (NSW).*

13.37 The regime is designed to give these courts an efficient and effective procedure to deal with multiple claims, as was said in the second reading speech to Part IVA:[22]

> *"Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action. The second purpose of the bill is to deal efficiently with the situation where the damages sought by each claim are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with individual actions."*

13.38 It has also been said, in Canada at least, that a further goal of class actions is to:

> *"serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public."*[23]

13.39 The Australian regimes provide that class members (or group members) are represented by the class representative if they fall within the definition of the group. They are automatically class members and, unless they opt out, they will be bound by the decision in the representative proceeding, whether or not they consent to being a group member.[24] All group members must be given the opportunity to opt out of the proceeding.[25] If they do so, they are not bound by any judgment in the proceeding[26] nor are they able to participate in or benefit from any settlement. That is, they do not have to "join" the class action to be covered by it and bound by it but

[21] An attempt by the Supreme Court to provide for a regime under the Supreme Court Rules was previously held to be an invalid exercise of power. See: *Mobile Oil Australia Pty Ltd v Victoria* [2002] HCA 27

[22] *Federal Court of Australia Amendment Bill* 1991, Second Reading Speech, Commonwealth of Australia, *Hansard*, House of Representatives, 14 November 1991, p. 3174; *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255; See also, M.R. Thomson, '*Courts and Tribunals Legislation (Miscellaneous Amendments) Bill 2000*, Second Reading Speech', Victoria, *Hansard*, Legislative Council, 4 October 2000, p. 429.

[23] *Hollick v Toronto (City)* (2001) 205 DLR (4th) 385 SCC at 397. See also Shueh Hann Lim *Do litigation funders add value to corporate governance in Australia?* (2011) 29 C&SLJ 135

[24] For example see section 33E of the FCA.

[25] Section 33J of the *FCA Act*.

[26] Section 33ZB of the *FCA Act*.

if they do not opt out, they will be so bound.[27] Under an opt in regime group members must take a positive step at the outset to benefit from the action.[28]

13.40 Of course, if an individual class member in an opt out regime wishes to benefit from a successfully settled class action, that person will, at some stage, need to take a positive step to participate. This may be as simple as completing a form and sending it to the class representative's lawyers.

13.41 Successful Australian class actions have, in the main, compensated people suffering injuries from defective products and those misled into poor investments.[29] There have also been four cartel class actions to date, three of which have settled.[30] Class actions seeking compensation for other causes have been successfully concluded.[31]

13.42 Consumers who complain of excessive fees are using the class action facility to have their claims properly considered. In *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, the High Court has rewritten the law on penalties in favour of consumers of standard banking facilities. More recently, victims of excessive interest rates charged by a pay day lender have banded together to take on Cash Converters in two class actions.[32]

13.43 Where the state fails to act, or acts without power or by exceeding power, and damage is caused, class actions may be the most effective tool to obtain relief for those who suffer loss.[33]

---

[27] As described by Finkelstein J (at first instance) in *P Dawson Nominees Pty Ltd v Multiplex Ltd* ([2007] FCA 1061 at [17]), opt out models are sometimes favoured because they can ensure that "*unsophisticated claimants as well as those who through timidity or ignorance of legal proceedings will not take the necessary step to be included in the group may still have the benefit of the litigation"*

[28] As provided for in the Group Litigation Order procedures England and Wales

[29] Defective products: *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, *Darcy v Medtel Pty Ltd (No 4)* [2004] FCA 1599 (pacemakers); *Casey v DePuy International Limited* [2010] FCA 617 (prosthetic knees); *Stanford* v *DePuy International* Federal Court NSD 213/2011 (hips). Misleading borrowers: *Bass and Another v Permanent Trustee Co Ltd and Others* [1999] HCA 9 (the NSW Homefund class action). Misleading investors: *Lukey v Corporate Investment Australia Funds Management Pty Ltd* [2003] FCA 1602; *Spangaro v Corporate Investment Australia Funds Management Ltd (No 2)* [2003] FCA 1363; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19; *O'Sullivan v Challenger Managed Investments Ltd* [2008] NSWSC 602; *Rod Investments (Vic) Pty Ltd v Clark (No 2)* [2006] VSC 342; *Cadence Asset Management Pty Ltd v Concept Sport Limited* [2006] FCA 944; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029; *Watson v AWB Limited* (No 7) [2010] FCA 41; *Hobbs Anderson Investments Pty Limited v Oz Minerals Limited (No 2*) [2011] FCA 1506; *Kirby v Centro Properties Limited (No. 6)* [2012] FCA 650; *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168; *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028.

[30] Vitamins (*Darwalla Milling Co Pty Ltd and other v F Hoffman-La Roche Ltd and others,* (2006) 236 ALR 322); Cardboard boxes (*Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd,* [2011] FCA 671); Air cargo (*Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd,* FCA, VID 903 of 2009); Rubber chemicals (*Wright Rubber Products Pty Ltd v Bayer AG,* FCA, VID 837 of 2009)

[31] Tobacco licence fee recovery following *Roxborough and Others v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68;; *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399; The Longford gas plan explosion class action (*Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 244)

[32] *Gray v Cash Converters International Limited and others* Federal Court Nos. 2089 of 2013 and 2090 of 2013

[33] Examples include an action against a government instrumentality, Therapeutic Goods Administration, that successfully settled in 2011: *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 (25 March 2011); A class action in NSW for young persons who claim that they were falsely imprisoned when the police acted without power has recently had a decision that suggests that the State has no defence for at least half of the group: *Konneh v State of NSW (No.3)* [2013] NSWSC 1424; a recently filed class action in the Federal Court against the State of NSW for failure to act on allegations that intellectually disabled and psychiatrically damaged residents of a licenced premises were being badly treated: *McAlister bhlr NSW Trustee and Guardian v State of NSW and others* Federal Court No. 1968 of 2013. See also *Regent Holdings Pty Ltd v State of Victoria and another* [2013] VSC 601.

13.44 The class action facility has also been used for victims of mass torts that are not limited to product liability claims.[34] There are some major recent examples. The most substantial is a class action being conducted in the Supreme Court of Victoria by residents and businesses who suffered horrific injuries, loss and damage in or around Kilmore East and Kinglake in Victoria on Black Saturday, 7 February 2009.[35] Another class action for the Horsham victims the Black Saturday bush fire settled[36] and an action on behalf of residents and businesses of Murrindindi and Marysville who were injured on that day has recently been commenced. A massive class action is likely to proceed against the State of Queensland for the alleged mismanagement of the Wivenhoe Dam that caused such extraordinary flood damage in 2011 and a class action against the Commonwealth has commenced in the Federal Court for those businesses caught up in the equine influenza outbreak in 2007.

13.45 These are each impressive examples of how class actions can be effective and are considered to be so by the community who are enthusiastic participants in such claims.

13.46 The cost of conducting class actions is substantial. There is scope to improve the efficiency of the procedures relating to their disposition as discussed above. However, it is worth noting that percentage of lawyers fees in class actions, which average around 12% of settlement or judgment outcomes, is indicative of a system which is meeting the goal of promoting the efficient determination of multiple claims and providing real access to justice.

14. Personal injuries thresholds

14.1 We have had the benefit of seeing the submission made by the Australian Lawyers Alliance dated 8 November 2013 and we endorse the submissions made concerning personal injuries thresholds and personal injury law reform recommendations.

Yours faithfully

MAURICE BLACKBURN

[34] Two claims were made in the past decade for classes who suffered serious illnesses caused by negligence: *Hilton v Melbourne Underwater World Pty Ltd and Ors* [2004] VSC 357 and *Georgiou v Old England Hotel Pty Ltd* [2006] FCA 705;
[35] *Mathews v SPI Electricity and SPI Electricity* [2012] VSC 66
[36] *Thomas v Powercor Australia Ltd* [2011] VSC 614