

Bond University

Bond Law Review

Volume 34

Issue 3

2022

Litigation Financing — Untangling the Gordian Knot — The Future of Law Reform

David Millhouse
Bond University

Follow this and additional works at: <https://blr.scholasticahq.com/>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 Licence](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Litigation Financing — Untangling the Gordian Knot — The Future of Law Reform

DAVID MILLHOUSE*

Abstract

Litigation funding is used to increase access to justice for those otherwise unable to prosecute a claim to uncover and remedy incompetence, reckless or egregious behaviour. Litigation can also be misused, perhaps as a strategic tool, and in the formulation of legal tactics in class action litigation. The financing of shareholder and other class actions has created substantial media interest. Media reporting can have a negative feedback loop acquiring influential global momentum of its own (for instance in director's insurance) whereas legal scholarship, even when reported, does not. Legal scholarship is not replete with empirical analysis so in the present debate, published empirical analysis by this and other authors should be heeded. Reforms to date illustrate how the confluence of class action law, other litigation funding law, and managed investment scheme (MIS) law is problematic and unresolved — a Gordian Knot which in the absence of exemptions can only be untied by significant reform of the legal architecture. There are three constituent elements of litigation financing — (a) promotion of the MIS (or alternative litigation financing which may constitute a MIS) to general members, being mostly 'retail' financial consumers; (b) The class action, being a registered MIS with a 'wholesale' representative plaintiff; and (c) the litigation financing and associated stakeholders. Some proposed reforms are politically contested. Australian present and proposed practice deviates from preferred practices in other jurisdictions emulating divergences seen in comparative fiduciary and best interest law which generate additional director risk where there are cross-border investments. Law reform options to better

* Senior Honorary Adjunct Research Fellow, Faculty of Law, Bond University. Some of this research was originally supported by an Australian Government Research Training Program Scholarship in fulfilment of the requirements of the degree of Doctor of Philosophy in the Faculty of Law, Bond University. This research is available online from the Bond University Library. Other of the authors' publications are in the sources cited and at www.drdaavidmillhouse.com.au. I would like to acknowledge the useful commentary provided in the peer review process and to members of faculty who have assisted in the development of this paper.

provide for the interests of general member plaintiffs are proffered for debate.

I Introduction

This paper provides an insight into present Australian litigation financing law, a summary of proposed new law, insights into how comparative international law and domestic law reform may make for a statutory regime which better meets the needs of stakeholders, including litigation funding scheme participants, funders, and the boards of defendant organisations. This paper recommends an alternative approach to the distribution of monetary proceeds arising from successful plaintiff litigation based upon internationally accepted benchmarks for venture capital investment rather than the ad hoc recommendations of present legislation.

Section 2 analyses the importance of empirical research in policy formulation. Section 3 maps the important work of the ALRC as a stepping-stone to future policy. Section 4 builds upon the ALRC work and proposes substantive reform in the litigation financing industry. Section 5 analyses how the legal services industry, in its various litigation financing roles (including the provision of capital), seeks to earn various forms of financial reward. This is to the discomfort of some, finding its various roles create unmanageable conflicts of interest, and facilitate transfer of weaknesses in MIS law into the litigation funding industry. Section 6 raises policy issues when dealing with plaintiffs who are unsophisticated financial consumers. Section 7 reports the statistical correlations between cause and effect. Section 8 identifies the Gordian Knot in which litigation finance industry participants find themselves and how fiduciary law is intertwined with the statutes. It identifies cause and effect relationships where statutory provisions have resulted in egregious behaviours. Section 9 briefly surveys litigation financing trends in other jurisdictions. Section 10 analyses the 2022 litigation funding reform proposals. Section 11 proposes a litigation funding financial reward proposition based on international norms in the venture capital industry. Section 12 proposes additional reform options. Section 13 states the need for statutory intervention to resolve the Gordian Knot.

A. Background

Different stakeholders have markedly different and conflicting opinions. Those opinions are influenced by the source of capital — being law practice-provided on a no-win no-fee, contingency (in Victoria), or third-party litigation funder basis. Even participants in the latter have different views as to how the law should operate. This partly arises from financial interests of litigation funders who are beneficiaries of the diminished role of the common law protections of maintenance and

champerty. It also arises from director and trustee concerns about the alleged increase in the volume of litigation, its cost in money, board time and director's insurance premiums. Similarly, it drives up the cost of financial advice partly from global reinsurer risk re-rating generally but also from the extant (formerly administered by FASEA)¹ unlimited relevant provider liabilities arising in the *Corporations Act* which broaden the interpretation of who provides financial advice,² and includes those who provide advice on litigation financing managed investment schemes (MIS) to consumers.

B. *Litigation Financing as MIS*

Litigation finance of itself is not new. Its securitised third-party form dates to 2001 in Australia with the first offshore financing in 2006. The UK, Canada and USA have developed significant litigation financing infrastructures. Its governing law varies in different Canadian provinces and US states but in both jurisdictions, federal rules require a court certification procedure, yet to be implemented in Australia. Estimates of the volume of litigation finance available to plaintiffs and the compound annual growth rate (CAGR) of this asset class vary wildly, in Australia and other countries. Sources of litigation finance are many and varied with no central database, although there is one under construction.³

There is a distinction between a class action (being a regulated legal process supervised by the Federal or State Supreme Courts) and litigation funding (being, since 2020, defined as a MIS). Litigation funding is not restricted to special purpose MIS. It is also provided (within or outside of a MIS) by law firms operating on a contingency (Victoria only) or no-win, no-fee basis. Law firms billing on such bases provide a funding service and a legal service. No-win, no-fee arrangements may not include an adverse costs indemnity to the clients or protection from plaintiffs providing security for costs.⁴ Presently, whether these financings are MIS relies on general law interpretations. Such distinctions in legal practice between Australian jurisdictions prompted the Paterson Inquiry to propose the Federal Court be the sole Australian jurisdiction.

Australia has four differing overlays of investor or client typology — categorisations which do not always reflect their financial

¹ Financial Adviser Standards and Ethics Authority, now disestablished.

² *Corporations Act 2001* (Cth) s 921U.

³ Project Litigus, information provided privately to author.

⁴ Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (10 June 2020) [10.8] ('*Paterson Inquiry*').

competencies.⁵ These typologies include ‘professional’, ‘sophisticated’, ‘wholesale’, and ‘retail’.⁶ Separately, the interpretation of retail investor was extended to include financial comprehension.⁷ These interpretations are required to be made by ‘relevant providers’.⁸ A relevant provider can be any person or entity licensed and engaged in transactional personal advice to (the former) FASEA’s interpretation of retail client. It can include stockbrokers, accountants, lawyers (in the litigation financing products) as well as traditionally termed financial advisers or wealth managers. The significance of these distinctions is contextual but in broad terms, ‘retail investors’ cannot be sold financial products designed for ‘wholesale investors’. In litigation financing MIS, this is actually the end result because of the nature of the representative plaintiff. The Design and Distribution Obligations (DDO) of the *Corporations Act* in force from 5th October 2021 applies to all financial products sold in Australia to retail investors or financial consumers.⁹ The DDO adds ‘financial consumer’ to these typologies.

There is a distinction between the class action of itself and the process of attracting members to it in order to obtain the financing. That process is the selling of a financial product — the MIS. This is known as a ‘bookbuild’. Since it is targeted to mostly retail clients, that process should attract DDO attention, even if the resulting class action itself with a representative plaintiff(s) does not.

Litigation financing schemes as MIS, whilst categorised as financial products for ‘wholesale’¹⁰ investors, may not be exempt from the DDO.

⁵ See, eg, David G Millhouse, *Corporate Governance in Non-Bank Financial Entities* (LexisNexis Butterworths, 2019) 194 [4.17]–[4.30] (‘Corporate Governance’). See also below n 114.

⁶ David G Millhouse, *Directors and Officers — Strategic Leadership or Bondage?* (2020) *Enterprise Governance eJournal*, Centre for Commercial Law, Bond University 7. See also Pamela Hanrahan (2018) ‘Legal Framework for the Provision of Financial Advice and Sale of Financial Products to Australian Households’ *Royal Commission in the Banking, Superannuation, and Financial Services industry* (Background Paper 7).

⁷ David G Millhouse, ‘Best Interest Duties of Financial Advisers — More Law, More Confusion’ (2020) *Enterprise Governance eJournal*, Centre for Commercial Law, Bond University 11.

⁸ *Corporations Amendment (Professional Standards of Financial Advisers) Act 2017 (Cth)* s 910A.

⁹ *Corporations Act 2001* (Cth) pt 7.8A s 994. The purpose of DDO is to provide an appropriateness test for retail investors and financial consumers by a target market determination (TMD), made available free of charge, to the potential target market consumers of financial products and credit products. See *Corporations Act 2001* (Cth) s 760A(aa). It applies to all financial products sold in Australia regulated by the *Corporations Act*, *Corporations Regulations*, *ASIC Act* and *National Consumer Credit Protection Act*. Every issuer and distributor of these products must provide their target market determination for each of those products separately prior to their distribution. A reasonable steps requirement extends its application of retail product distribution beyond those consumers in the TMD.

¹⁰ The four differing overlays of investor typology — professional (*Corporations Act 2001* s 9 reg 7.6.02AE); sophisticated (ss 708(8), 761GA); wholesale (being not retail) (ss 761G(4), 761G(7)(c)(ca), reg 7.128.02AB); retail (ss 738D, 760A, 761G, 994A(1), 1012E). The retail/wholesale typology includes a financial comprehension test (see generally s 921U). The DDO extends these typologies to include financial consumers and consumers of financial products without defining them. A person may be a retail client for some purposes but a

This arises from the inclusion of ‘financial consumer’ — which is undefined in s 994 of the *Corporations Act* and may capture ‘wholesale investors’ unless ASIC specifically provides an exemption.¹¹ To date, it has not done so including for MIS sold through business introduction services, being specifically included in DDO regulation. An ‘operator’ of a scheme may need to prepare a target market determination (TMD) in addition to that prepared by the responsible entity (RE) of the scheme.

The heritage of ‘financial consumer’ stems from the *National Consumer Credit Protection Act*.¹² The NCCPA, the *Corporations Act* and the *ASIC Act* were amended to further regulate the sale of financial products to retail consumers of those products. The financial products regulated by these three statutes include almost all those essential to modern life. Litigation financing products sold to retail clients which are not MIS should be regulated separately under existing law but would still be regulated by DDO.

C. *Lawyers as Financial Product Providers*

It is yet to be tested whether advice provided by the plaintiff lawyer in respect of their financial product (eg a group costs order or contingency fee arrangement where the lawyer has a financial interest) would result in *Corporations Act* s 921U relevant provider liability due to their role in selling a financial product.

[I]f lawyers are the funder, they will be constantly faced with decisions on how and when to disclose specific conflicts to clients, and how and when to advise clients against the lawyers’ own interests. The resulting minefield is unlikely to be entirely transparent, nor easily regulated.¹³

D. *Interface with Fiduciary Obligations*

The incremental broadening of interpretations and those that are required to make determinations is now of fundamental concern in MIS regulation. It interfaces with the unresolved debate as to whether litigation financing MIS plaintiff lawyers (acting for the representative plaintiff rather than the general members of the litigation) have a fiduciary or other duty to those other members. Many of those other members (not SMSF’s) are retail clients and are certainly financial consumers. Mostly they will not be wholesale clients but the representative plaintiff is.

wholesale client for others. A Self Managed Superannuation Fund (SMSF) trustee director may be retail personally, but the SMSF is not. See generally Pamela Hanrahan, ‘Legal Framework for the Provision of Financial Products to Australian Households’ *Royal Commission in the Banking, Superannuation, and Financial Services Industry* (Background Paper 7).

¹¹ *Corporations Act 2001* (Cth) s 994L.

¹² *National Consumer Credit Protection Act 2009* (Cth) (‘NCCPA’).

¹³ Submission 23 Litigation Capital Management 22 cited in *Paterson Inquiry* (n 4) [14.76].

Mum and dad investors signing up to a litigation funding agreement as part of a class action can never hope to have the sophisticated understanding of corporate law of financial products that their lawyers and funders possess.¹⁴

There is almost always an asymmetry of knowledge and power which should, but may not, enliven fiduciary obligations of some of the other stakeholders. At law, these members have an ‘interest’ in the litigation funding scheme but are themselves represented by the representative plaintiff.¹⁵ These interests are usually only treated contractually in complex documentation and, despite the then Corporations Regulations¹⁶ have involved manifest conflicts of interest.

E. *Shareholder Class Actions*

Whether alleged lack of public enforcement (by ASIC and APRA) has led to the growth of private enforcement and the litigation financing that supports it is open to debate. It is not an argument restricted to Australia.¹⁷ Supposed lack of public enforcement in shareholder actions has been in part attributed to lower coronavirus-induced statutory standards of disclosure requiring plaintiff proof of fault (and temporary removal of strict liability for public and private civil claims unless the lack of disclosures is intentional, reckless or negligent). These may become permanent subject to a review after two years by an industry expert.¹⁸ If not, continuous disclosure standards are accompanied by strict director liability for company and director breaches (with some safe harbour protections),¹⁹ resulting in ‘a plaintiff-friendly class action system and one of the most onerous continuous disclosure private enforcement regimes on the world’.²⁰ In reality, these frustrations for directors are more likely to be consequences of the egregious behaviours exposed in Royal Commissions, Parliamentary Inquiries, and by the Courts. Analysis of the latter demonstrates considerable public enforcement action by the ASIC.

¹⁴ *Paterson Inquiry* (n 4) xv.

¹⁵ *Corporations Regulations 2001* (Cth) sb-cl 5C.11.01(4) cited in *Paterson Inquiry* (n 4) [16.22] fn 29.

¹⁶ *Corporations Amendment Regulation 2010* (Cth) (No 6) (‘Corps Reg’).

¹⁷ See, eg, Amanda Rose, ‘Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5’ (2008) 108(6) *Columbia University Law Review* 1301.

¹⁸ *Paterson Inquiry* (n 4) rec 29 [17.136]. See especially *Treasury Laws Amendment Measures No.1 Act 2021* (Cth).

¹⁹ See generally *Paterson Inquiry* (n 4) [17.25]–[17.99]. See especially tab 17.2 [17.58].

²⁰ *Paterson Inquiry* (n 4) [17.54] citing U.S. Chamber Institute for Legal Reform, Submission 21, 2.

F. *Law Reform*

Law reform has already occurred with the inclusion from 22nd August 2020²¹ of litigation financing within the MIS provisions of the *Corporations Act*, previously exempted in 2013 provided there were conflicts of interest management processes in place.²² The Regulation imposed further conditions on the Australian Financial Services Licence (AFSL) holder banning legal representatives of the plaintiff from having or seeking to obtain a material interest in the ‘funder’ or ‘funding entity’, and requiring divestments of the same had it occurred.²³ These conditions pre-dated the reform of the *Legal Profession Uniform General Rules* which are considerably more permissive.²⁴ More reform is likely, arising from the research previously conducted by the Australian Law Reform Commission (ALRC)²⁵ and the Paterson Parliamentary Joint Committee Inquiry.²⁶ These reports follow earlier research by the Productivity Commission in 2014.²⁷

II Empirical Analysis — Separating Fact from Fiction

The financial press has been replete with calls for interventions into the class action industry. As an example, in a succinct op-ed, Albrechtsen²⁸ identified four reform needs including remediation of the ‘director’s and officer’s insurance crisis’. Similar issues exist with the cost of professional indemnity insurance for financial advisers with blame being attached to class action litigation.²⁹

Poor insurability is likely to ‘suffocate entrepreneurial [endeavour] and investment and growth-focussed decisions in Australia, as boards become more risk averse’.³⁰ Australian directors are potentially

²¹ *Corporations Amendment (Litigation Funding) Regulations 2021* (Cth) (‘*Litigation Funding Regulations*’).

²² See above *Corps Reg* (n 16).

²³ See above *Litigation Funding Regulations* (n 21) regs 7.6.01AB(2), 7.6.04(1)–(2).

²⁴ *Legal Profession Uniform General Amendment (Managed Investment Schemes) Rules 2015* (NSW) sch 1 [1] 91B; *Consolidated Regulations 2015* (NSW) reg 91BA. See below nn 95–109 and accompanying text.

²⁵ Australian Law Reform Commission, *Integrity Fairness and Efficiency — An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, December 2018). (‘*Integrity Fairness and Efficiency*’).

²⁶ *Paterson Inquiry* (n 4).

²⁷ Australian Government Productivity Commission, *Access to Justice Arrangements* (Report No 72 vol 2 (2014)) (‘*Access to Justice*’).

²⁸ Janet Albrechtsen, ‘This Lavish Lawyers’ Picnic Must be Brought to an End’, *Commentary, The Australian*, (Sydney, June 24 2020) 10.

²⁹ See, eg, Sarah Kendall, ‘Compensation Firm Slams AMP’s Arrogance’, *Daily News, Investor Daily*, (Sydney, 6 July 2020).

³⁰ Marsh Pty Ltd, Submission No 14 (‘*Marsh Submission*’) to *Paterson Inquiry* (n 4) 6[D]. See also Marsh Pty Ltd, Submission to the Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* ‘Directors’ and Officers’ Liability Insurance’ (27 July 2018).

exposed to liabilities arising from ‘more than 600 pieces of legislation’.³¹ Marsh says,

It is not just publicly listed companies that are experiencing premium and retention increases and reduced capacity, [claiming] [t]he effects of litigation funded class actions have rippled through all D&O policies, as well as management liability policies commonly purchased by [SMEs]...³²

Important risks for SME’s, including securities claims and special excess limits for non-executive directors ‘have been restricted or removed’ from previous directors’ and officers’ (D&O) coverage.³³ Reliance on a company deed of indemnity may be possible (not always)³⁴ but its efficacy relies on solvency and liquidity, or the establishment of a trust or reserve available to directors and officers as self-insurance. Whether trustee directors can be indemnified from superannuation trust assets has recently been tested.³⁵ The directors can create a fund from member contributions to meet their otherwise unfunded personal liabilities but cannot incur those costs directly in the fund. *AusSuper* is a superannuation contextual decision and not necessarily applicable to trusts structured as MIS. However, it represents value-shifting (known in the European Union (EU) jurisdictions as ‘tunnelling’) from beneficiaries to the trustee and thence to the trustee directors. Value-shifting has occurred in MIS,³⁶ and did so under present MIS law. To quote Hayne, ‘entities and individuals acted in the ways they did because they could ... experience shows that conflicts between duty and interest can seldom be managed; self-interest will almost always trump duty.’³⁷

‘*AusSuper*’ illustrates why trustee governance reform of industry superannuation funds is desirable to prevent both avoidance of the implementation of the intent of statutory amendments³⁸ and to better protect fund member beneficiaries from the capital inadequacy of the trustee (in this case share capital of \$12.00), arguably leading to value-shifting or tunnelling. The decision in *AusSuper* met with an immediate parliamentary response.³⁹ The case highlights the disparity in capital

³¹ *Marsh Submission* (n 30) 4[B].

³² *Ibid* 3 [A].

³³ *Ibid* 3 [B].

³⁴ *Millhouse* (n 5) 71 [2.85].

³⁵ *Australian Super Pty Ltd v McMillan* [2021] SASC 147 (*‘AusSuper’*).

³⁶ See, eg, *ASIC v Australian Property Custodian Holdings Limited (No 3)* (2013) FCA 1342 [463].

³⁷ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation, and Financial Services Industry* (2018) ch 1 s 1.1, 2-3 (*‘Hayne Final Report’*).

³⁸ There are a number of relevant statutory amendments to the *Corporations Act 2001*(Cth) and *Superannuation Industry (Supervision) Act 1993* (Cth): these arise from *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) and *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth).

³⁹ See Patrick Durkin, ‘Liberals Furious as APRA, ASIC Called to Task’, *Australian Financial Review* (Sydney, 3rd February 2022) 9.

adequacy requirements of a Responsible Entity (RE) (required to hold sufficient Net Tangible Assets (NTA)) and that of a superannuation corporate trustee. A RE (required for a registered MIS) is a single point of responsibility for the operation of the MIS. It holds scheme property on trust for scheme members and has contractual duties (eg adherence to the scheme constitution), statutory duties (eg *Corporations Act*), and fiduciary duties — in effect a corporate trustee for those MIS structured as trusts. RE NTA regulatory reserves are very different from prudential regulation applied to superannuation funds, and are only a measure of financial standing, not its or the schemes' financial viability.

Scholarly empirical analysis of class action litigation⁴⁰ does not support the claims made by Marsh or similar claims in the financial press that the prevalence of class actions alone result in premium increases and coverage limitations. Questions therefore arise as to the underlying reasons for the rise in premium costs and the reductions in cover. Evidence based analysis is essential.

Morabito, based on his data contends, 'no balanced or objective assessment of the volume of class action litigation in Australia could possibly lead to the conclusion that there has been an explosion in the number of class actions filed in Australia.'⁴¹

His research also shows that 'after 2018 there has been a decrease in the number of (a) Australian class actions; (b) federal class actions; (c) Australian funded class actions; and (d) federal funded class actions.'⁴² It is shareholder class actions that seem to be the subject of financial press and insurer attention, including claims that shareholder class action litigation was not originally proposed to be an outcome of Pt IVA (of the *Federal Court Act 1976*).⁴³ In the four class action jurisdictions analysed,⁴⁴ there have been 634 class actions over Morabito's study period of 27 years and 4 months. These concerned 420 disputes.⁴⁵ Of these, 122 were shareholder cases involving 63 companies or groups,⁴⁶ only 9 of which involved financial services and products. He also reports a declining trend in shareholder class actions declining from 44.7% of all actions in 2016–17 to 32.2% in 2019–20.⁴⁷ Of the 122, 67% were brought against the companies only, not the directors. In only 4.9%

⁴⁰ Vince Morabito, 'An Evidence-Based Approach to Class Action Reform in Australia — Shareholder Class Actions in Australia — Myths v Facts' (Research Paper, Department of Business Law and Taxation Monash Business School, November 2019) 9 <ssrn.com/abstract/3484660> ('Myths v Facts').

⁴¹ Vince Morabito, Submission No 6 to the Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and Regulation of the Class Action Industry*, (10 June 2020) 4 ('Submission No 6').

⁴² Ibid.

⁴³ Morabito, 'Myths v Facts' (n 40) 9. See also below n 53.

⁴⁴ Federal Court, Victoria, NSW, and Queensland Supreme Courts.

⁴⁵ Morabito, 'Myths v Facts' (n 40) 12–13 tab 1.

⁴⁶ Ibid 15–16 tab 2

⁴⁷ Ibid 16.

of the cases, the actions were brought against the directors alone.⁴⁸ The proportion of cases joining directors in the action have declined from 18.8% of the total sample to 10% of cases filed in the 2018–19 financial year.⁴⁹ Morabito has updated this data with media reporting 69 class actions filed in the year to 2021, similar to the 64 reported in 2018–19. Of these, and for the second year, more than half were consumer claims (some financial product based) rather than shareholder claims.⁵⁰ This continues the declining trend in the proportion of shareholder class actions.

Morabito's data leads to the conclusion that there needs to be a more thorough government review of the D&O insurance sector, perhaps by the ACCC or Productivity Commission into the underlying issues contributing to both insurance availability and cost. A review may determine whether this historical data is an accurate predictor of future trends and whether increasing D&O costs are a consequence of previous underpricing.

A review may also address the issue of transparency. Sound policy requires evidence-based research — Professor Vince Morabito concluded the 'Federal Court has not had complete adherence to the principles of open justice with respect to the judicial review of settlement agreements in class actions'.⁵¹ Further, 'during the 27 years of operation, no reliable information was available for more than half (55.8%) of the 159 approved settlement agreements ...'.⁵² The ALRC reported similar lack of empirical evidence arising from confidentiality orders, undisclosed information and consequential lack of data transparency.⁵³

Legal analysis demonstrates the very broad application in private law of class actions⁵⁴ in seeking redress to imbalances of power. These are not only shareholder or investor originated actions.⁵⁵ Since inception to 2016, of the 329 Pt IVA proceedings in the Federal Court, only 89 were on behalf of investors.⁵⁶ From a director perspective, every organisation needs a potential class action risk analysis.⁵⁷

⁴⁸ Ibid 19.

⁴⁹ Ibid.

⁵⁰ Allens Linklaters, 'Class Action Risk in 2021' (30 March 2021) <www.allens.com.au/insights/2021/03/class-action-risk>.

⁵¹ *Paterson Inquiry* (n 4) [11.97] citing Vince Morabito, 'Class Actions: Looking into the Fishbowl — Open Justice and Federal Class Action Settlements', (2019) 93(6) *Australian Law Journal* 446.

⁵² *Paterson Inquiry* (n 4) [11.98].

⁵³ Ibid [11.100]. See especially *Paterson Inquiry* (n 4) [11.96]–[11.111] rec 17 and *Integrity, Fairness and Efficiency* (n 25) [3.2]–[3.12].

⁵⁴ Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons — An Australian Study' (2016) 35(1) *Civil Justice Quarterly* 61.

⁵⁵ Morabito, 'Submission No 6' (n 41) 3.

⁵⁶ Morabito, 'Myths v Facts' (n 40) 87.

⁵⁷ See, eg, Morabito and Ekstein, (n 54) who identified class action proceedings brought on behalf of refugees and migrants, persons with intellectual disabilities, children and young

III The Australian Law Reform Commission 2018 — Steps to Reform

Historically, since the introduction of the class action provisions in March 1992,⁵⁸ third party litigation funders did not require an AFSL but were and are subject to general law interventions and court oversight designed to protect the interests of the plaintiffs.⁵⁹ In July 2013, litigation funders were specifically exempted ... from the requirement to hold an [AFSL]...⁶⁰ Their exemptions extended to ch 5C of the *Corporations Act* and the *National Consumer Credit Code*.⁶¹ These exemptions have been supported by scholarly opinion if there is a net benefit argument to the plaintiffs,⁶² by the ALRC (initially)⁶³ and by ASIC.⁶⁴ Scholarly opinion however does acknowledge that ‘attention instead be placed on giving courts presiding over this type of litigation adequate powers to ensure class members are treated fairly and receive adequate compensation in successful class actions’.⁶⁵ Those powers justify the application of *Corporations Act* ch 5C (MIS) and pt 7 (Financial Services and Markets) to these types of MIS. These sections of the *Corporations Act* and access to the considerable MIS jurisprudence available as a result provide a more substantial body of law on which to base plaintiff litigation. Litigation financing reform does not restrict the access of claimants to the courts in redress of grievances. Indeed, it may reduce costs over those of an untested previously proposed alternative bespoke statutory regime,⁶⁶ being a new body of law. It may also allow more transparency to defendant directors.

The previous and now reformed exemptions⁶⁷ from the financial advice and managed investment scheme provisions of the *Corporations Act* for litigation financing were an example of Hayne’s ‘special rules, exceptions and carve-outs’,⁶⁸ there being considerable but unsuccessful

people, persons facing socio-economic barriers, indigenous claimants, older people, personal injury claimants, and natural disaster claimants. See also Jane Caruma and Vince Morabito, ‘Australian Unions—the Unknown Class Action Protagonists’ (2011) 30(4) *Civil Justice Quarterly* 382, 389. In this study period, 20% of the representative parties consisted entirely of aggrieved employees.

⁵⁸ *Federal Court of Australia Act 1976* (Cth) pt IVA.

⁵⁹ *Ibid.*

⁶⁰ *Corporations Amendment Regulation 2010* (No 6) cited in *Integrity Fairness and Efficiency* (n 25) 62.

⁶¹ *Corporations Amendment Regulation 2010* (No 6).

⁶² Morabito, Submission No 6 (n 41) 1.

⁶³ *Integrity Fairness and Efficiency* (n 25) 161 [6.37].

⁶⁴ Morabito, Submission No 6 (n 41) 1.

⁶⁵ *Ibid* 5.

⁶⁶ See generally *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147, [9], [3.30]–[3.35]. (‘*Brookfield*’). See below (n 236) *LCM Funding Pty Ltd v Stanwell Corporation Limited* [2022] FCAFC 103 [103] (‘*Stanwell*’). See also *Paterson Inquiry* (n 4) [16.94].

⁶⁷ From the 22 August 2020.

⁶⁸ *Hayne Final Report* (n 37) 16, 495 rec 7.3.

support for ‘a bespoke licensing regime that sat outside the [AFSL] regime but imposing comparable obligations’.⁶⁹ Some participants support AFSL and MIS reform to include class action financiers.⁷⁰ Others, perhaps conflicted, do not.⁷¹

The ALRC terms of reference⁷² included consideration of adequacy of regulation of conflicts of interest between scheme participants and funder, lawyer and participants, and between funder and lawyer. It also included whether to impose prudential standards on litigation funders requiring proof of financial resources for fund the litigation. At the time, litigation funding schemes were not MIS, but as this author’s empirical analysis has identified, MIS capital adequacy regulation given the size and extent of some MIS, requires reform.⁷³ Paterson also addressed capital adequacy, suggesting that litigation funding MIS, funder capital adequacy should also extend to security for costs orders and more generally to fund the likely costs of the litigation.⁷⁴ The RE would be responsible for enforcement as part of its compliance and best interest obligations to MIS members. Capital adequacy in all its facets (other than ASIC regulated RE NTA computation) is currently a market led analysis conducted by the funder and the plaintiff lawyers and not a matter for the court *ex ante*.⁷⁵ In the absence of a certification procedure, the courts’ duty to protect the members’ interest *ex post* does extend to approval of the settlement agreement.⁷⁶ However, *ex post* review is insufficient protection if capital adequacy is deficient.

The ALRC provided 24 Recommendations.⁷⁷ Important amongst these were Court express statutory power to make common fund orders and amendments to the *Corporations Act* and *ASIC Act* to confer exclusive jurisdiction on civil matters commenced as representative proceedings in the Federal Court.⁷⁸ A common fund order is a court order requiring all participants to contribute proportionate costs of the litigation from their settlement proceeds including where they have not signed the litigation funding agreement. Common fund orders commenced in 2016 and ameliorate the need for a bookbuild process.

⁶⁹ *Integrity Fairness and Efficiency* (n 25) [6.17]–[6.42].

⁷⁰ See, eg, Norton Rose Fulbright, Submission No 45 to *Paterson* (n 4) (June 2020) 2 [1.2]; King&Wood Malleons, Submission No 53 to *Paterson* (n 4) (22 May 2020) <www.kwm.com/en/au/knowledge/insights/litigation-funding>.

⁷¹ See, eg, Woodsford Litigation Funding, Submission No 16 to *Paterson* (n 4) (11 June 2020) 18; Omni Bridgeway, Submission No 73 to *Paterson* (n 4) (June 17 2020) 1; Premier Litigation Funding Management Submission No 20 to *Paterson* (n 4) (10 June 2020) 5 [5].

⁷² *Integrity Fairness and Efficiency* (n 25) 5.

⁷³ Millhouse, (n 5) [7.120]–[7.122].

⁷⁴ *Paterson Inquiry* (n 4) [10.56].

⁷⁵ *Ibid* [11.14].

⁷⁶ *Ibid* [11.25].

⁷⁷ *Integrity Fairness and Efficiency* (n 25) 9–12.

⁷⁸ This recommendation included proceedings brought for financial services consumer protection and unconscionable conduct by amendment to the *ASIC Act 2001* (Cth) div 2 s 12 GJ.

Rec 16 proposed to include ‘law firm financing’ and ‘portfolio funding’ within the definition of ‘litigation funding scheme’.⁷⁹ As is often the case, definitional boundaries became contentious and remain unresolved. ‘All that the word “scheme” requires is that there be some programme, or plan of action’.⁸⁰ It is not a defined term, but there are constituent statutory elements. Judicial analysis concluded a litigation funding scheme was indeed a MIS,⁸¹ satisfying the five essential elements in s 9 of the *Corporations Act*. This general law is now reflected in the *Corporations Act*.⁸² Further definition of a litigation funding scheme is proposed,⁸³ but does not include litigation financing as group costs or no-win, no-fee as recommended by the ALRC. Schemes operated by law practices if they were interpreted as being MIS in the general law or a revised statutory definition of all litigation financing as MIS would require those law practices to hold an AFSL unless specifically exempted.

Where litigation financing arrangements are exempt from the AFSL/MIS regime, similar regulations apply and include procedures for managing conflicts of interest.⁸⁴ There are exemptions from the requirement to hold an AFSL which are captured by this regulation.⁸⁵ The exemption does not extend to registered MIS,⁸⁶ but it could extend to non-MIS litigation financing. A group costs order may be a MIS.⁸⁷ A group costs order (presently Victoria only since July 2020) is a contingent liability for legal costs including disbursements. If not, then third party litigation funders finance a registered MIS requiring an AFSL and Product Disclosure Statement (PDS), but the law firm funding it does not.⁸⁸ If not a MIS, a group costs order is a financial product and will require compliance with the fundraising provisions of the *Corporations Act*⁸⁹ or is regulated as a credit product pursuant to the NCCPA, depending on the nature of the financing contract.

Rec 20 proposed a specialist practice accreditation requiring law firms and their solicitors to undertake Continuous Professional

⁷⁹ *Integrity Fairness and Efficiency* (n 25) 10, 183.

⁸⁰ *ASIC v Chase Capital Management Pty Ltd* [2001] WASC 27 [57] citing *Australian Softwood Forests* [1981] HCA 49 [11]. See also ‘Millhouse, ‘Corporate Governance’ (n 5) [3.133].

⁸¹ *Brookfield* (n 66.) FCAFC 147.

⁸² See above *Litigation Funding Regulations* (n 21).

⁸³ Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funders (Cth) (Litigation Funders Bill) s 9AAA. See also Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funding Exposure Draft Explanatory Materials at [1.10]. Financial products are defined as a ‘litigation funding scheme’ or ‘arrangement’ (emphasis added).

⁸⁴ *Litigation Funding Regulations* (n 21) sub-reg 7.6.01AB(2).

⁸⁵ *Corporations Act 2001* (Cth) s 766A(2)(b); *Corporations Regulations 2001* (Cth) reg 7.129.

⁸⁶ *Litigation Funding Regulations* (n 21) sub-reg (c)(ii)(B).

⁸⁷ See *ASIC Corporations (Conditional Costs Schemes Instrument) 2020/38* cited in *Paterson Inquiry* (n 4) [14.49].

⁸⁸ *Paterson Inquiry* (n 4) [14.48]–[14.49].

⁸⁹ *Corporations Act 2001* (Cth) pt 6D.1

Development (CPD) in the identification and management of actual and perceived conflicts of interest and duties in class action proceedings. Rec 22 developed this theme requiring the avoidance of conflicts of interest, and to disclose the detail should they then occur. Rec 21 proposed a prohibition on law firms and solicitors having a financial or other interest in a third-party litigation funder which supports the same proceedings. Relevant to the media attention given to litigation financing schemes, Rec 24 proposed a review of the legal and economic impacts of continuous disclosure and misleading and deceptive conduct provisions of both the *Corporations* and *ASIC Acts*.

IV Parliamentary Joint Committee ‘Paterson’ Inquiry 2020 — Foundation for Future Reform

The commercial benefits to litigation funders reported in the media found echoes in the Paterson Inquiry.⁹⁰

Courts and civil remedies were not established as novel investment vehicles to deliver handsome profits to innovative financiers or creative lawyers ... Australia’s highly unique and favourably regulated litigation funding market has become a global hotspot for international investors ... to generate investment returns unheard of in any other jurisdiction ...⁹¹

Noble sentiments indeed, and not without foundation. However, some of the reported sentiments ignored Morabito’s empirical analysis that the number of shareholder class actions has declined.

The Paterson Inquiry produced 31 Recommendations.⁹² Recommendation 82 proposed that the Federal Court be empowered to hold selection hearings to determine which of competing or multiple class actions should proceed, based on the ‘best interest’ and preference of class members. However, this would fall short of tests in a certification process found in other jurisdictions where the court must approve the commencement of a proceeding or not. Common funds orders have a chequered judicial history and Rec 7 proposed to ban them (as did the subsequent Litigation Financing Bill in 2021). Other recommendations proposed to extend the power of the court to close or re-open a class, funder indemnity of representative plaintiffs against adverse costs orders withholding approval otherwise, and a statutory security for costs from the funder. Federal Court approval would be required for a litigation funding agreement to be enforceable and varied, rejected, or could be amended by that Court with it having exclusive jurisdiction. Rec 30 proposed that exclusive jurisdiction over class actions be given to the Federal Court; if not, then State Supreme Courts to achieve consistency with it.

⁹⁰ *Paterson Inquiry* (n 4).

⁹¹ *Ibid* xiii.

⁹² *Ibid* xxiii–xxxi.

Conflicts of interest recommendations noted the best interest to members test in MIS law⁹³ and emulate the ALRC recommendation in prohibiting law firms having a pecuniary interest in the funder of the proceedings where they act for the plaintiffs. Rec 28 supports the application of the MIS regime but proposes tailoring that regime for the specific needs of litigation financing. Where law firms provide contingency funding (known as a ‘group costs order’)⁹⁴, the AFSL regime should be extended, if feasible, to them. Other recommendations proposed regulation over fees, costs, minimum returns to class participants, and the publication of Australian company tax paid by the litigation funder over the prior three-year period.

V Legal Profession Uniform Rules and Regulations

In Australia,

[a] law practice is permitted to provide legal services in relation to a managed investment scheme [general], despite an associate of the law practice having an interest in the scheme or the responsible entity of the scheme.⁹⁵

This permission extends to litigation funding schemes,⁹⁶ a consequence of regulating litigation funding schemes as MIS to ensure compliance with the *Uniform Law*.⁹⁷ The amended Uniform Rules did not find unqualified favour with the Law Council⁹⁸ who recommended no relaxation of the general prohibitions and ‘the importance of distinguishing between the provision of legal advice and services that might constitute financial product advice’.⁹⁹

Previously, the *Uniform Rules* did not permit a law practice to promote, operate, or provide a service where any associate has an interest in the scheme or its RE to a MIS,¹⁰⁰ but could participate in litigation financing which was not a MIS. The principal of the law practice objectively must know of or ought reasonably to know of the interests of any associate.

Statutory inclusion of litigation financing schemes as MIS resulted in a grace period providing relief from the relevant rule until 22 August 2021 where the law practice had an interest in the MIS or the

⁹³ *Corporations Act 2001* (Cth) ss 601FC(1)(c), 601FD(1)(b).

⁹⁴ See *Paterson Inquiry* (n 4) [14.40]–[14.47] citing *Supreme Court of Victoria Act 1986* (Vic) ss 33ZDA(2).

⁹⁵ *Legal Profession Uniform General Rules 2015* (NSW) [2015-246] (20 August 2021) s 91A (‘*Uniform Rules*’). See below nn 97–109 and accompanying text.

⁹⁶ *Ibid* s 91BA. See also, *Corporations Regulations 2001* (Cth) reg 7.1.04N(3).

⁹⁷ *Legal Profession Uniform Law* (NSW) s 258 (‘*Uniform Law*’).

⁹⁸ Michael Tidball, ‘Law Council of Australia to Legal Services Council Commissioner for Uniform Legal Services Regulation’, *01 July 2021 Law Council* (Letter, 1st July 2021) <[www.https://lawcouncil.asn.au/publicassets](https://lawcouncil.asn.au/publicassets)>.

⁹⁹ *Ibid* [2(b)(i), (ii)].

¹⁰⁰ *Uniform Rules* (n 95) ss 258(1)(a), (1A), (2) (unamended).

Responsible Entity (RE) of the MIS if it is a litigation financing scheme. This reform of the *Uniform Rules* permitting a law practice to provide legal services to a MIS where an ‘associate of the law practice’ has an interest in the MIS or its RE¹⁰¹ extends the permission to a broad range of associates. ‘Associate’ is widely defined being a principal, partner, director, officer, employee, agent, or consultant of the law practice and is considerably broader than the definition in the *Corporations Regulations* as applied to funder AFSL conditions designed to protect plaintiffs,¹⁰² being ‘the lawyer’s own interests ... family members or close associates’.¹⁰³ A ‘law practice’ is a broader definition than a ‘law firm’ and includes sole practitioners.¹⁰⁴ The *Uniform Rules* apply to related entities of the law practice.¹⁰⁵ The scope of associate makes the identification and management of conflicts of interest problematic for both the law practice and the RE, despite the more limited ‘close associate’ interpretation in the *Corporations Regulations*. Both regimes need to be managed and reported, including seeking and obtaining informed consent.

The 91B Rule is qualified by a best interest and a no-conflict of interest test.¹⁰⁶ However, the first can be subjective and the latter relies on disclosure and informed consent, being at best imperfect tools in a financial consumer market where conflicts of interest are permitted. Reliance on disclosure and informed consent is widely acknowledged to be problematic in other jurisdictions.¹⁰⁷

The *Uniform Rules* reform is seen through the eyes of and is generated by the legal services ‘industry’,¹⁰⁸ not the consumers of its services and now (at least in the UK context), its financial products.¹⁰⁹ Whilst generally consistent with the MIS regime, it further entrenches the architecture of prioritization over prohibition in Australian financial services and financial products law except in specific circumstances.

Since the Wallis Inquiry¹¹⁰, Australian financial products and services selling has permitted conflicts of interest provided that priority

¹⁰¹ *Legal Profession Uniform General Amendment (Managed Investment Schemes) Rules 2015* (NSW) sch 1 [1] 91B; *Consolidated Regulations 2015* (NSW) reg 91BA.

¹⁰² *Corporations Amendment (Litigation Funding Regulations) 2021* regs 7.6.04(1), (2).

¹⁰³ *Ibid.*

¹⁰⁴ *Legal Profession Uniform Law 2015* (NSW) s 6.

¹⁰⁵ As defined in the *Corporations Act 2001* (Cth) s 50 or the *Uniform Rules* if not a company.

¹⁰⁶ *Uniform Rules 2015* (n 95) [1] rule 91B (a)–(b) amended to provide a law practice to permit provision of legal services to a MIS or its RE in which it has an interest provided that in the event of a conflict, the practice and its associates prioritise the best interest of the client.

¹⁰⁷ See Millhouse, ‘Corporate Governance’ (n 5) [2.193], [6.173]–[6.196], [7.52]–[7.64].

¹⁰⁸ Legal Services Council review of rules 91A–91D of the *Legal Profession Uniform General Rules 2015* cited in Legal Services Council Newsletter 3 (2021) 4.

¹⁰⁹ See, eg, John Kay, *The Kay Review of UK Equity Markets and Long-Term Decision Making* (Final Report Department of Business, Innovation and Skills UK, July 2012) 47 (‘*Kay Review*’).

¹¹⁰ S Wallis, *Australian Financial System Inquiry Final Report*, Australian Government Publishing Service, March 1997 (‘*Wallis*’).

be given to those being advised or those consuming financial products. The architecture relies on disclosure, informed consent through financial literacy and advice. It entrenches a disturbing permissive culture — ‘[c]ulture can drive or discourage misconduct’.¹¹¹ It resulted in ‘failure of law on a massive scale’.¹¹² This conclusion arises from a quantitative and legal analysis of 199 senior relevant court judgments between 1981 and 2018. Implementation failures in these Wallis principles are directly attributable for 25.84% of the incidences of systemic failure and indirectly attributable to another 32.34 %, being a total of 58.18% of the systemic incidences.¹¹³ Heydon also identified similar unhealthy governance culture in the superannuation governance context which facilitated corrupting benefits of related party transactions ‘antithetical to the rule of law ...’¹¹⁴ These weaknesses in MIS law, now aided in litigation financing MIS by the amended *Legal Profession Uniform General Rules* based on disclosure and informed consent rather than fiduciary prohibitions, thus continues into the litigation financing industry. The dark clouds of ‘divided loyalties’ between plaintiff lawyers and their clients¹¹⁵ not only remain but are systemically entrenched, able to facilitate egregious breaches of fiduciary and ethical duties under the compliance protection of subjective best interest opinion, informed consent and disclosure (if indeed there is disclosure at all or of sufficient veracity to support a determination of informed consent). Legal complexity is only one cause of the problem — the standards of behaviour of some participants also play a considerable role.¹¹⁶ The outcome in some circumstances will ‘essentially [be] the practice of using the letter of the law to defeat its spirit, and to do so with impunity’, circumstances which occurred in the UK.¹¹⁷

These ‘dark clouds’ are very distant from the required ‘punctilio of honour’ found, albeit not unanimously, in other jurisdictions.¹¹⁸ They also lead potentially to breaches of a lawyers’ duties to the court and

¹¹¹ *Hayne Final Report* (n 37) ch 6 s 2, 375.

¹¹² David G Millhouse, ‘Empirical Analysis Supports the Hayne Long Run Reform Thesis’ 3(2–3) *Law and Financial Markets Review* (2019) 162, 179.

¹¹³ *Ibid.*

¹¹⁴ Commonwealth, Royal Commission into Trade Union Corruption and Governance. Final Report, December 2015, ch 4 [10] Commissioner Heydon. See also Millhouse ‘Corporate Governance’ (n 5) [2.198]–[2.203], [2.225].

¹¹⁵ *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666 [1356] (‘*Banksia No 18*’).

¹¹⁶ See, eg, *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582 where related party interests were not disclosed to plaintiffs and there was no ability to provide informed consent to the consequent unauthorised conflicts of interest..

¹¹⁷ See, eg, Simon Ashby, *The Turner Review on the Global Banking Crisis: A Response from the Financial Services Forum* (Nottingham University, 2009) 17.

¹¹⁸ See, eg, *Meinhard v Salmon* 164 NE 545 (NY1928) cited in R B Thompson, ‘The Story of *Meinhard v. Salmon* and Fiduciary Duty Punctilio’ (Working Paper Number 08044, Vanderbilt University Law School Public Law and Legal Theory, 2008).

their fiduciary and best interest duties to the client¹¹⁹ which are unresolvable ‘by appropriate disclosure’.¹²⁰ Paterson recommended further reform of the (amended) *Uniform Law* to a prohibitive posture:¹²¹

simply put, these conflicts [of interest] are unmanageable ... A prohibition is the best approach for ensuring uncompromised, objective and independent advice to, and advocacy of, the representative plaintiff.¹²²

This is consistent with the views of the Law Council.¹²³ The ALRC recommended law practice accreditation CPD in the management of conflicts of interest and duties, and prohibition of conflicts of interest by law practices in class action proceedings¹²⁴ because ‘conflicts can result in outcomes that are detrimental to some or all class members ... not all conflicts can be managed ... unmanaged conflicts can undermine the integrity of class actions and the civil justice system’.¹²⁵ Further, ‘some solicitors may commence class actions (whether funded or not) without a complete understanding of their legal and ethical obligations’.¹²⁶ That CPD should be required at all to address conflicts of interest management is an indictment of those law practices and lawyers involved. However, the updated *Uniform Rules* remain unamended with a different a definition of ‘associate’ to the *Corporations Regulations*.¹²⁷

In recognition of the deficient disclosure and informed consent architecture, as an added financial consumer protective statutory measure, litigation funders now have a disciplinary responsibility as an additional AFSL condition to ‘prevent legal representatives of the plaintiff in a funded action from having or obtaining a material financial interest in the litigation funder for that action’¹²⁸ for the duration of the action. It is silent on post-settlement arrangements with associates. Some litigation funders have a related or associated party as their RE. The AFSL holder will need to police the lawyer’s own interest, interests of family members or ‘close associates’ (undefined), and the broader interpretation of interests found in the *Uniform Rules*.¹²⁹ The general prohibition to be enforced by the AFSL holder thus reinforces the

¹¹⁹ See, eg, Submission 67 Law Council of Australia 16-18 cited in *Paterson Inquiry* (n 4) [14.61]–[14.62].

¹²⁰ *Ibid* 17. See also *Paterson Inquiry* (n 4) [15.101]–[15.102].

¹²¹ *Paterson Inquiry* (n 4) rec 26 [15.105].

¹²² *Ibid* [15.101]–[15.102].

¹²³ Tidball (n 98).

¹²⁴ *Integrity Fairness and Efficiency* (n 25) recs 20–22.

¹²⁵ *Ibid* [7.121].

¹²⁶ *Ibid* [7.136].

¹²⁷ *Corporations Amendment (Litigation Funding) Regulations 2021* (Cth).

¹²⁸ Explanatory Statement, *Corporations Amendment (Litigation Funding) Regulations 2021* (Cth).

¹²⁹ *Corporations Amendment (Litigation Funding) Regulations 2021* (Cth) sub-regs 7.6.04(1)–(2).

prohibition on the plaintiff lawyers having an interest in a related party RE. This is supported by an economic disincentive in the proposed Bill restricting RE fees to ‘reasonable costs ... incurred in operating the scheme’,¹³⁰ complimented by the fair and reasonable tests to manage the proceedings ‘in the best interests of the general members to minimize the legal costs for the proceedings’.¹³¹

Despite the permissions of the *Uniform Rules*, the plaintiff lawyers will need to decide whether to purvey legal services or financial products — they cannot personally do both in the context of a litigation financing MIS. Doing so in non-MIS litigation financing may enliven a second fiduciary relationship to the client, especially in circumstances where there is a direct nexus with the client rather than indirectly with the MIS representative plaintiff:

Fiduciary relationships will be exacted where the function the adviser represents himself as performing, and for which he is consulted, is that of counselling an advised party as to how his interests will or might best be served in a matter considered to be of importance to his personal or financial well-being, and in which the adviser would be expected to be both disinterested, save for his remuneration, and to be free of adverse responsibilities unless the contrary is disclosed at the outset.¹³²

VI Caveat Emptor or Caveat Venditor?

Imperfections in the comprehension of disclosure are common in MIS. ‘[A] misunderstanding of the use of the term “trust” in the minds of tenant-investors’¹³³ extended to assumptions of a ‘trust fund’, or ‘trust account’,¹³⁴ rather than an investment in a MIS with RE as corporate trustee.¹³⁵ ‘[T]he so-called disclosure requirement in the form of a PDS... did nothing to protect consumers.’¹³⁶

History repeats itself, despite Haynes’ recommendation¹³⁷ and in part because of Rec 2.3¹³⁸ which deferred the repeal of the ‘safe harbour’ provision for financial advisers with a review proposed no later than 31

¹³⁰ Treasury Laws Amendment (Measures for Consultation) Bill (Cth) 2021: Litigation Funding Exposure Draft Explanatory Materials [1.56]–[1.57] ‘Litigation Funders Bill’. See below (n 207) and accompanying text.

¹³¹ Litigation Funders Bill (n 83) s 3(a)(iii).

¹³² *Pilmer v Duke Group (in liq)* [2001] HCA 31 [131] (‘*Pilmer*’) citing Professor Finn, ‘The Fiduciary Principle’ in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 50.

¹³³ Parliament of Australia, The Senate Economics Reference Committee Inquiry into the Sterling Income Trust, February 2022 [2.22] (‘*Sterling*’).

¹³⁴ *Ibid.*

¹³⁵ *Ibid* [2.25] citing statement of Mr Joseph Longo, Chair, Australian Securities and Investments Commission, Proof Committee Hansard, 16 November 2021, 5.

¹³⁶ *Ibid* [4.101].

¹³⁷ *Hayne Final Report* (n 37) vol 1 16, 495–496.

¹³⁸ *Ibid* 178.

December 2022.¹³⁹ ‘Unless there is a clear justification for retaining that provision at that time, it should be repealed’.¹⁴⁰

With some pessimism, Hayne concludes ‘none of those measures, either alone or in combination, will be sufficient to ensure that conflicts of interest in the financial advice industry are managed adequately’.¹⁴¹ His solution requires that conflicts of interest and duty ... be eliminated rather than managed.¹⁴² This excision is to be supported by a governance culture, based in fiduciary principle such ‘cannot be prescribed or legislated’.¹⁴³ Nonetheless, he provided guiding principles including ‘obey[ing] the law and ‘when acting for another, act in the best interests of that other’.¹⁴⁴ ‘What financial consumers need is [a culture of] trust generated by long term ‘deeper’ relationships’.¹⁴⁵

Litigation financing MIS contracts may not overtly recognize fiduciary obligation even though their implementation requires fiduciary status as lawyer and promoter.

[S]ometimes a short-sighted assumption that all relevant duties are prescribed in contract ... has been responsible for serious misbehaviour in the financial markets and elsewhere, as shown by many litigated cases in the last quarter-century.¹⁴⁶

Commonly in Australia, where there are related party transactions, recusal from the decision making or meeting occurs. Recusal is also open to manipulation — ‘Recusal and [“]mere[”] disclosure are not sufficient’.¹⁴⁷

Recent mainstream media reporting has focussed on these issues:

Dixon has collapsed into voluntary administration under the weight of class actions by clients who sustained heavy losses ...[b]ut in reality, its vertically integrated wealth model was affordable only because its advice wasn’t independent at all.¹⁴⁸

¹³⁹ *Corporations Act 2001* (Cth) s 961B(2); *Hayne Final Report* (n 37) rec 2.3 26.

¹⁴⁰ *Hayne Final Report* (n 37) 178.

¹⁴¹ *Ibid* 178.

¹⁴² *Ibid* 45.

¹⁴³ *Ibid* 376.

¹⁴⁴ *Ibid* ch 1 s 1.5.1, 8–9.

¹⁴⁵ *Kay Review* (n 109) 46. In this context, Kay’s meaning is to emphasise relationships based on trust to eliminate or reduce asymmetries of knowledge and power, an important issue in litigation financing MIS.

¹⁴⁶ Law Commission UK, *Fiduciary Duties of Investment Advisers* (Consultation Paper No 215, 22 October 2013) 171.

¹⁴⁷ See, eg, *Jones v Invion Ltd* [2015] QCA 100. See Millhouse, ‘Corporate Governance’ (n 5) [3.35]–[3.38] quoting R Langford, *The Bona Fide Fiduciary Loyalty of Australian Company Directors*. PhD Thesis, Faculty of Law, Monash University, 2013, [3.7.4] citing *Fitzsimmons v R* (1997) 23 ACSR 355.

¹⁴⁸ Editorial, ‘Dixons’s Conflicted Advice: The AFR View’, *Australian Financial Review* (Sydney, January 25 2022).

Dixon was an Australian funds manager operating funds in the United States using funds under advice from its wealth planning entities in Australia. Its US property fund provided mortgages to directors, contractors and an executive of its joint venture partner that purchased homes from the Dixon real estate portfolio.

‘Conflict of interest ... remains the outstanding danger for consumers in Australia ... the current protective framework is riddled with potholes.’¹⁴⁹ These potholes are not limited to incomprehension of disclosures. They extend inter alia to MIS with flawed business models,¹⁵⁰ and promoters of MIS not having ‘the necessary skills to undertake such a business venture successfully ...’.¹⁵¹ MIS PDS are not required to have a detailed Management Discussion and Analysis (MD&A) disclosure section which in the United States analyses the underlying investment.

Australian corporate law is replete with references to ‘best interest’. The Paterson Inquiry uses this aphorism frequently, and to ‘interest’ in respect of the obligations of the Federal Court to scheme participants. Whether the superlative ‘best’ has legal meaning at all¹⁵² even in its ‘best financial interest’¹⁵³ formulation is unlikely to be understood by many class action participants. It raises expectations which are different from their legal basis. The distinction between fiduciary obligation to act in the interest of another and the best interest obligation to have regard to the interests of another usually requires court adjudication. This arises in part from statutory contextual best interest obligations which may subsume but not necessarily extinguish fiduciary obligation to the financial consumer.¹⁵⁴ That relationship can be contractually

¹⁴⁹ James Kirby, ‘Dixon puts Conflicts of Interest Back in Focus’ *The Australian* (Sydney, January 19, 2022).

¹⁵⁰ *Sterling* (n 133) [4.98].

¹⁵¹ Millhouse, ‘Corporate Governance’ (n 5) [2.63]–[2.64].

¹⁵² David Pollard, ‘The Short-Form “Best Interest Duty” — Mad, Bad and Dangerous to Know: Part 1 – Background, *Cowan v Scargill* and MNRPF’ (2018) 32(2) *Trust Law International* 106..

¹⁵³ *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Cth) sch 3 amends *SIS Act 1993* (Cth) ss 52A, 52B to replace ‘best interest’ with ‘best financial interest’ being obligations of the trustee and the directors of the trustee.

¹⁵⁴ See, eg, *Corporations Act 2001* (Cth) s 961A,B which is prescriptive and does not of itself acknowledge a fiduciary obligation to the financial consumer. Essentially it is ‘box-ticking’ compliance system supported by a ‘safe-harbour’ provision for financial advisers. The FCAFC has interpreted this section as an obligation of ‘unqualified faithfulness to the interests of the client’. See *ASIC v Westpac Securities Administration Ltd* [2019] FCAFC 187 [10]. Section 921U also regulates the conduct of ‘relevant providers’ and emulates fiduciary principles though a Code of Ethics containing five values and twelve standards imposed personally on the provider. It does so without using ‘fiduciary’ in either its verb or noun formulations. An adviser or relevant provider must comply with both statutory regimes contemporaneously although they are completely different. They may also have statutory DDO best interest obligations to the financial consumer.

extinguished for wholesale investors (eg a representative plaintiff)¹⁵⁵ or is ignored in some MIS PDS and associated documents sold to retail investors.¹⁵⁶

Management of conflicts of interest of the plaintiffs, their lawyers and the litigation funder remains one of prioritisation following disclosure and informed consent (under the *Uniform Rules* for lawyers) rather than prohibition. This is unfortunate and relies on their identification, honesty in disclosure, and where necessary the seeking of and obtaining informed consent from the plaintiffs. Informed consent requires full and frank disclosures. These protocols failed in *Banksia* as they have in traditional MIS. Fiduciary prohibition is the better architecture.

Some United States opinion suggests lawyer contingency fees ‘fly in the face of a lawyer’s fiduciary duty to their client’ and that ‘litigation which is lawyer funded, lawyer managed, and lawyer settled is unacceptable’.¹⁵⁷ Similar criticism has been applied to the control exercised by the litigation funder in Australia.¹⁵⁸ Other opinion views contingency fee arrangements as central to plaintiff access to justice. The US does not have the ‘loser-pays’ system which applies in Australia. Contractual rights of control, including rights of instruction of the plaintiff lawyer do conflict with the lawyer-client relationship and can lead to egregious self-interested behaviours by the litigation funder. They can also interfere with the statutory duties of the RE of the MIS which is lawfully the operator of the scheme holding its property in trust for the plaintiffs.

Nonetheless, contingency fees are part of the US landscape (and in some Canadian provinces, and England and Wales). The Productivity Commission and the ALRC recommend extension of contingency fees to other Australian jurisdictions (with restrictions) to provide enhanced access to justice for plaintiffs. However, there is no unanimity of opinion. Utilitarians argue that traditional time-based billing ‘incentivise[s] inefficiency while percentage-based billing encourages law practices to resolve matters efficiently.’¹⁵⁹

¹⁵⁵ Andrew Tuch, ‘Investment Banks as Fiduciaries: Implications for Conflicts of Interest’ (2005) 29 *Melbourne University Law Review* 478, 500–502. See also *ASIC v Citigroup* below (n 185).

¹⁵⁶ See, eg, *Giabal Pty Ltd v Gunns Plantations Ltd (in liquidation)* [2020] NSWSC 1070.

¹⁵⁷ *U.S. Chamber Institute for Legal Reform* Submission 21 cited in *Paterson Inquiry* (n 4) [14.65] 19.

¹⁵⁸ See, eg, *Menzies Research Centre*, Submission 66, Joint Committee on Corporations and Financial Services, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (14 June 2020) 29 cited in *Paterson Inquiry* (n 4) [15.14].

¹⁵⁹ *Campbell’s Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 cited in *Paterson Inquiry* (n 4) [14.113], [14.131], [15.17]–[15.18].

VII Systemic Failures in Regulatory Policy Architecture

Empirical research by this author remains the only substantive analysis of the correlation between conflicts of interest and egregious behaviours in the Australian financial products and services sectors.¹⁶⁰ This analysis of 199 senior court judgments included a large cohort of MIS.

Table 1.
Correlation Analysis

Legal matters raised in the judgments	Variable	Recurrence of sample	Correlation
<i>Top decile</i>			
Related parties/conflicts of interest	1	22.16%	
Misleading & deceptive/unconscionable conduct	2	20.70%	93.42%
<i>Top quartile</i>			
Dishonesty	1	15.98%	
Related parties/conflicts of interest	2	15.23%	95.31%
<i>Systemic causes - first variable correlation</i>			
Dishonesty	1	15.98%	
Related parties/conflicts of interest	2	15.23%	95.31%
Directors/trustee duties	3	15.23%	95.31%
Disclosure	4	14.86%	92.97%
<i>Systemic causes - second variable correlation</i>			
Related parties/conflicts of interest	2	15.23%	
Directors/trustee duties	3	15.23%	100.00%

This empirical analysis quantified the cost of wrong policy to individuals and the broader economy especially where there are related or associated parties driving conflicts of duty and conflicts of interest.¹⁶¹

Continued empirical research now includes more than an additional 200 similar adjudicated cases (since 2019).¹⁶² The objective of this research is to prove causation between related party transactions, their conflicts of interest and egregious behaviours. Hayne wrote '[C]onflicts of interest and conflicts between duty and interest should be removed.

¹⁶⁰ David G Millhouse, 'Empirical Analysis Supports the Hayne Long Run Reform Thesis' *Law and Financial Markets Review* (2019) 13(2-3), 162-187 <<https://doi.org/10.1080/17521440.2019.1602923>> ('*Empirical Analysis*'). See especially David Guy Millhouse, '*Systemic and Cyclical Failure in Australian Financial Services and Financial Products Sectors: Have Weaknesses in Law Contributed to these Failures?*' (PhD thesis, Bond University, 2019) ch 3.

¹⁶¹ Millhouse, *Empirical Analysis* (n 160) 173 [3.6].

¹⁶² Millhouse, unpublished.

There must be recognition that ... should be eliminated rather than “managed”.¹⁶³ Consistently, ‘[R]elated party transactions are problematic under any circumstances’.¹⁶⁴ They ‘undermin[e]... fiduciary responsibility...’¹⁶⁵

VIII Confluence of Laws — A Gordian Knot

A litigation funder is not necessarily a fiduciary, but a promoter of a MIS including a promoter of a litigation funding scheme is.¹⁶⁶ ‘Promoter is not a defined legal term — the same person can have multiple roles, some fiduciary, others not’.¹⁶⁷ It is business terminology in common but ambiguous usage. Judges have encountered considerable difficulty in defining, and expressed great reluctance to define, just what is a promoter’.¹⁶⁸ ‘The end result is that although undoubtedly once identified as a promoter the defendant is ipso facto stamped as a fiduciary...’¹⁶⁹ This principle applies to REs (who promote and distribute MIS PDS online and in hard copy) and corporate trustees who are not REs — the trustee had acted ‘as the originators, instigators and sponsors of projects for the acquisition of aircraft through the medium of syndicates [and] owed a fiduciary obligation to the partners of the syndicates, akin to those of promoters’.¹⁷⁰ There is considerable other authority where fiduciary duties have been imposed by the courts on ‘promoters’.¹⁷¹ These duties are owed to investors and others at whom the promotion is aimed. This would extend to those who ‘bookbuild’ in pursuit of recruiting members to a litigation financing MIS. A bookbuild is a procedure ‘to identify, communicate with, and enrol class members in the action and by signing the litigation funding agreement’.¹⁷² It requires a registered PDS.

MIS participants may also include the funder, its related and associated parties (including directly or indirectly its RE), and associates of the law firm acting for the class. The advent of the MIS regime in litigation financing may result in vertically integrated related party RE’s which compromise Hayne’s reform thesis. An RE, as corporate trustee, can only fulfill its statutory and general law obligations if it is unfettered. Directors of the RE of a MIS have a

¹⁶³ *Hayne Final Report* (n 37) ch 1 sec 4 [4.2], ch 4 sec 2 [2.2].

¹⁶⁴ Duncan C Jessup, John H Farrar, and Susan Watson, ‘Related Party Transactions in New Zealand: An Empirical Study of a Flawed System’ (2012) 30(2) *Companies and Securities Law Journal* 110, 113.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Babcock & Brown Global DIF111 Global Investment Fund LP v Babcock & Brown International Pty Ltd* (No 2) [2017] VSC 556 [35] (‘*Babcock & Brown*’).

¹⁶⁷ Millhouse, (n 5) [5.12].

¹⁶⁸ *Catt v Marac Australia Ltd* (1986) 9 NSWLR 639, 651[G] (‘*Catt*’)

¹⁶⁹ *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* [1987] FCA 332 [161].

¹⁷⁰ *Catt* (n 168) 639[C], 653[B]–[G].

¹⁷¹ See, eg, *Babcock & Brown* (n 166) [34].

¹⁷² *Paterson Inquiry* (n 4) [7.51].

fiduciary duty to the RE (as a company) and the RE has a statutory best interest duty to the MIS member,¹⁷³ in this case the class action participants. This statutory best interest duty does not statutorily extinguish general law equitable remedies and duties of the RE as corporate trustee holding property in trust for MIS members. Where MIS are contractual trusts, that does not prevent the application of fiduciary principles, and ‘a court may treat the relationship as fiduciary under established principles of equity’.¹⁷⁴ The RE best interest duty does not presently extend to a personal nexus between RE director and MIS members as it does in the superannuation trustee-director context where those directors are parties to the *Superannuation Industry (Supervision) Act* s 52A(2) covenants personally.¹⁷⁵ The RE may also have a ‘promoter’ fiduciary duty to the general members. The RE is the issuer and distributor of a financial product by way of a PDS enlivening its role as promoter by virtue of website content thus adding that additional fiduciary duty. The RE may also have a duty to require the funder and its lawyers to seek informed consent from at least the representative plaintiff should they have disclosable conflicts of interest.¹⁷⁶ ASIC could, unless it provides an exemption, require the RE to apply the *Corporations Act* s 994 DDO rules.

These convolutions raise the question of roles. Which entity is the promoter? Is it the Funder, the Investment Manager of the Funder, the case Project Manager, the RE, an associate of the plaintiff’s lawyer, or the Plaintiff Representative? The funder is ‘intimately involved in the [case] management of the plaintiff law firm, not just in terms of costs, but the broader litigation strategy’.¹⁷⁷ In other MIS, it is common for the investment manager to perform the role of promoter seeking funds from investors. Whichever entity(ies) ‘bookbuild’ as promoter, then they are fiduciaries at general law, duties owing to the recruited members of the MIS. These questions require judicial resolution in the absence of statutory reform. Until then, there will be a continuation of ‘box-ticking’ compliance processes to meet prioritisation obligations. Logically, the RE in exercising its responsibilities to the MIS members should contractually control all other participants.

Similar terminological inexactitudes arise in the use of ‘operator’ of the MIS. ‘Operator’ is not defined in the *Uniform Law*, *Uniform Rules*, or the *Corporations Act*. Arguably, the RE is the operator of both general MIS and litigation financing MIS, although industry practices in general MIS and litigation funding MIS can have confused roles.

¹⁷³ *Corporations Act 2001* (Cth) n 93.

¹⁷⁴ Pamela F Hanrahan, *Funds Management in Australia: Officers’ Duties and Liabilities* (LexisNexis Butterworths, 2007) 52 cited in Millhouse, ‘Empirical Analysis’ (n 160) 165.

¹⁷⁵ *Superannuation Industry (Supervision) Act 1993* (Cth) s 52(a)(6).

¹⁷⁶ See generally Alan Jessup, *Managed Investment Schemes* (Federation Press, 2012) [4.5.2].

¹⁷⁷ Australian Law Reform Commission, answer to written question on notice 28 July 2020 cited in *Paterson Inquiry* (n 4) [11.38].

Where a law practice identifies opportunity, promotes it to potential class action participants, and administers their involvement with the financing of the MIS, their daily activities of providing legal services extend to promotion of a financial product and operations of the MIS, a function more properly exercised by the RE. In some instances, these financial product promotions extend as relevant provider to the provision of financial advice to putative or actual class members.

There is a dichotomy in Australia between those who hold that fiduciary duties are entirely proscriptive (supported by the High Court) and those (including other judicial officers) who hold that fiduciary duties can also be prescriptive.¹⁷⁸ A promoter makes representations to others. In class action litigation these ‘others’ are often vulnerable persons who seek redress. There is almost always an asymmetry of power arising from the availability of financial resources and of knowledge arising from the complex legal skills required to pursue litigation. Fiduciary principles can apply in all class actions despite differing categorisation of general members separately from the representative plaintiffs as wholesale clients. The latter may agree to contract out of a fiduciary relationship but that does not necessarily bind the general members in, for instance, a bookbuild process. Representations require honesty and candour¹⁷⁹ — ‘it is established that such a positive duty applies to promoters in varying contexts ...’,¹⁸⁰ whether the duty be fiduciary or otherwise. That is — the exercise of the promoters’ obligations can give rise to prescriptive fiduciary duties. The facts of each specific case will determine the exact relationships.

There is no unanimity of opinion:

Positive prescriptive duties may arise as a consequence of there being no decision of which I am aware binding on this court to hold that the fiduciary duties of directors to their companies are so limited [to proscriptive duties].¹⁸¹

In *Pilmer*, Kirby J ‘... question[ed] the viability of this supposed dichotomy [between proscriptive and prescriptive duties] (because omissions quite frequently shade into commissions) ...’¹⁸² Best interest duties, by their nature, often require positive actions, the significance for both best interest and fiduciary duties there being no legal impediment to the exercise of those duties in a positive fashion.

The importance of the existence or otherwise of a fiduciary relationship is often understated or ignored, and misunderstood by financial consumers. Fiduciary standards mitigate malfeasance by

¹⁷⁸ For a detailed discussion, see, eg, Millhouse, ‘Corporate Governance’ (n 5) ch 5 [5.1]–[5.20].
¹⁷⁹ *Banksia (No 18)* (n 115) [1319], [1388].

¹⁸⁰ *Babcock & Brown* (n 166) [40].

¹⁸¹ *Westpac Banking Corp v Bell Group (No 3)* [2012] WASCA 157 [1961]. See also, ‘*Babcock & Brown*’ (n 166) [40].

¹⁸² *Pilmer* (n 132) [128].

reducing the power imbalance resulting from asymmetries of knowledge and comprehension. They align interests. Those categorised as fiduciary have great importance to financial products consumers, including class action litigation MIS participants. It also is of great importance to the formulation of legal tactics by litigants.

A fiduciary relationship not only enlivens restorative remedies in equity but can provide a cleansing commercial environment. In *Banksia*,¹⁸³ the egregious behaviours exhibited by some legal practitioners would not accord with fiduciary principles, even if limited to proscriptive tradition. Outcomes for stakeholders can be very different if the fiduciary relationship is established¹⁸⁴ or not.¹⁸⁵

The relationship between lawyer and class action members represented by the lead plaintiff has been recognised as fiduciary¹⁸⁶ — ‘[T]he applicant’s lawyers at least have a duty to act in the class members’ interests’.¹⁸⁷ This is not necessarily the same as the ‘best interest’ requirement in the *Uniform Rules and Regulations* which permit prioritisation of interests. Fiduciary duty requires ‘absolute and disinterested loyalty’.¹⁸⁸ *Banksia* is a recent example of the distinction:

... there was potential for, and actual conflict [of interest]... the Lawyer Parties preferred their personal interests as they sought to profit through receiving unauthorised benefits from the settlement sum, particularly as they did so by seeking a common fund order.¹⁸⁹

Notably, lack of disclosure of related party interests and benefits prevented any possibility of informed consent by the plaintiffs.¹⁹⁰ These interests were discovered by the contradictor.¹⁹¹

The exercise of the best interest duty by a fiduciary may require positive actions. Best interest duties in their various manifestations have their heritage in equity. Context will indicate whether the exercise of the best interest duty by fiduciaries is fiduciary in character. The essential quality should be the undivided loyalty standard, now compromised by multiple statutory interventions illustrated in Fig 2,¹⁹² and the *Uniform Rules* in respect of MIS.¹⁹³ The seeking of informed consent by a fiduciary is a positive action and may of itself be fiduciary. Not to properly seek informed consent in pursuit of the undivided

¹⁸³ *Banksia (No 18)* (n 115) 1366.

¹⁸⁴ See, eg, *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* [2012] FCA 1028; *ABN Amro Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

¹⁸⁵ See, eg, *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963 [7].

¹⁸⁶ *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439, 486 cited in *Banksia (No 18)* (n 115) [1359].

¹⁸⁷ *Ibid.*

¹⁸⁸ *Banksia (No 18)* (n 115) [1366].

¹⁸⁹ *Ibid.*

¹⁹⁰ See, *Banksia (No 4)* (n 116).

¹⁹¹ *Paterson Inquiry* (n 4) app 2, 389.

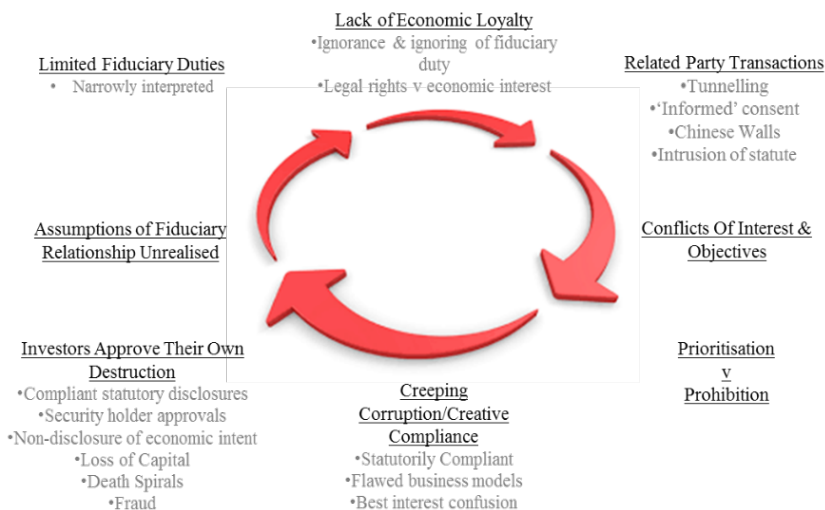
¹⁹² For a detailed discussion, see Millhouse, ‘Corporate Governance’ (n 5) chs 3–6.

¹⁹³ *Uniform Rules* (n 95).

loyalty standard is a breach of duty by a fiduciary. If not a breach of fiduciary duty, it is a breach of the best interest duty to members of the MIS.

Figure 2.

*How Fiduciary Expectations are Compromised*¹⁹⁴



It is the responsibility of the RE to untangle the Gordian Knot. To unravel it requires prohibition, not prioritisation, and elimination of dual interest. These fiduciary issues should be central to a court-approved, but presently missing certification process. Under present law, it is only the Federal Court (and State Supreme Courts) which have unambiguous statutory duties to act in the 'interest' of the plaintiff class member participant.¹⁹⁵ The court must approve the settlement agreement.¹⁹⁶ This agreement 'determines the rights of all class members.'¹⁹⁷

The essence of the relationships should be fiduciary, objectively in the interest of the class participant plaintiff, not a mash of ambiguous competing and conflicting best interest duties in multiple contexts. That would establish a common standard requiring Federal Court approval in a certification process, tested by a contradictor appointed by the court. Litigation funding agreements were proposed by Paterson and by the

¹⁹⁴ David G Millhouse, 'Systemic and Cyclical Failure in Australian Financial Service and Financial Products Sectors: Have Weaknesses in Law Contributed to These Failures?' (PhD Thesis, Bond University, 2019) ch 6 ss 2.2, 341.

¹⁹⁵ *Federal Court of Australia Act 1976* (Cth) pt IVA ss 33J, 33K, 33M, 33N [where costs excessive], 33Q ('FCAA').

¹⁹⁶ See *Paterson Inquiry* (n 4) [12.55].

¹⁹⁷ FCAA (n 195) s 33ZB.

Litigation Funding Bill before Parliament to be unenforceable in the absence of certain preconditions — this voiding of the litigation funding agreement should extend to the resolution of these fiduciary issues.

This analysis is not only of scholastic interest. Many institutional funders are international firms based in jurisdictions which, whilst they have a common or similar legal heritage, have different interpretations of fiduciary law. Similarly, Australia based participants may not comprehend the expectations or assumptions of the law by those with whom they deal from those jurisdictions.¹⁹⁸

IX Insights from Comparative Jurisdictions

Of political interest is the continuation of reduced (Covid-19 induced) continuous disclosure civil law liabilities of companies and directors.¹⁹⁹ These are different in other jurisdictions.²⁰⁰ Australia has reduced company liability private action risk compared with Canada, Hong Kong, South Africa, but not the UK or USA and reduced company liability public action risk compared with Canada, Hong Kong, South Africa, UK and USA. In all of these jurisdictions, directors and officers have personal liability for company breaches, but in Australia and Canada, there are safe-harbour defences for breaches of company civil continuous disclosure obligations.

Arguments against disclosure of a litigation funding agreement supporting an action include whether a plaintiff has funding, the quantum of it, and the power of the funder to withdraw. These could be resolved by a court certification process based on fiduciary principles espoused in a standard which provides for contextual specificity.

The US Federal *Litigation Funding Transparency Act*²⁰¹ is a transparency regime requiring the disclosure of litigation financing agreements. Hitherto, each state operated its regime independently, some not sustaining the common law provisions of champerty and maintenance.²⁰² Wisconsin,²⁰³ West Virginia²⁰⁴ (in both states for all civil litigation but excluding class action contingency fees) and the

¹⁹⁸ See, eg, 'Millhouse, Corporate Governance' (n 5) ch 6.

¹⁹⁹ *Corporations (Coronavirus Economic Response) Determination No. 2 2020*.

²⁰⁰ *Paterson Inquiry* (n 4) tab 17.2.

²⁰¹ *Litigation Funding Transparency Act of 2019*, 28 USC ch 114 § 471 §§1716,1407 (February 13, 2019).

²⁰² See, eg, Kristen Carroll, 'A State by State Guide to Litigation Financing Disclosure' (LewisBrisbois, 2022) <<https://lewisbrisois.com/newsroom/legal-alerts/a-state-by-state-guide-to-litigation-financing-disclosure>>.

²⁰³ *Wisconsin Act 235* Law 360 Wis Stat § 804.01(2)(bg) (2018). See also, Jamie Hwang, *Wisconsin Law Requires All Litigation Funding Arrangements to Be Disclosed* (April 10, 2018) <http://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed>.

²⁰⁴ *West Virginia Consumer Credit and Protection Act* (W Va) Code Ann § 46A-6N-6 (2019).

federal Northern District of California²⁰⁵ require disclosure of the litigation funding agreement to the Court and the adversary but only for civil class actions and without a formal discovery process. US federal and state disclosure proposals are intended to provide transparency, address conflict of interest risks (including lawyers) and reduce the as-yet-unexplored potential for abuse²⁰⁶ in a securitised litigation financing market which developed later than in Australia.

In Australia, the existence of a litigation funding agreement requires disclosure but its contents do not except in summary form in the context of a PDS for a MIS. Certification could provide full disclosure to the court in camera, but not the opposing party or the public. It would then be for the court at its own discretion to determine whether broader disclosure is warranted.

X Proposed Reform — Litigation Funders Bill 2021

The Litigation Funders Bill²⁰⁷ before the previous parliament (now lapsed) sought to amend ch 5C and s 9 of the *Corporations Act* but did not resolve the uncertainty surrounding whether contingency fees (Victoria only), common fund orders (should the latter continue) and other financings are MIS or not. The present bizarre position where an institutional funder requires an AFSL to operate a registered MIS but the law firm acting on a contingency basis (sometimes on the same case) does not (and may not) was unaddressed and reliant upon previous general law interpretations of what constitutes a MIS.²⁰⁸ The law applies differently to different participants in the same case.

A new definition of ‘class action litigation scheme’ being a category of MIS was defined in proposed new s 9AAA. The farrago of corporate best interest duties continues with a new best interest test to ‘minimise the legal costs of the proceedings’.²⁰⁹

There was no reference to Hayne and no reference to the disparity introduced by the reformed *Uniform Rules and Regulations*. Resolution of MIS architecture is central to litigation financing MIS reform but was not addressed in the Litigation Funders Bill. Litigation financing MIS, contingency fees (as group costs orders) and no-win, no-fee financing are all capital intensive with long duration deferred return profiles rather than the quarterly in advance fee structures in traditional MIS. It follows that an AFSL should be required in all cases and that AFSL conditions should better address capital adequacy. Reformed capital

²⁰⁵ *Cal Nthn District Civil Local Rule 3-15 (2021)*, Standing Order for all Judges §19 (2017).

²⁰⁶ Katelyn Ashton and Luther Munford, ‘Discoverability of Third-Party Litigation Financing’ (ButlerSnow, June 18 2020).

²⁰⁷ Litigation Funders Bill. See also Exposure Draft Explanatory Materials, Treasury Laws Amendment (Measures for Consultation) Bill 2021: Litigation Funding (Cth).

²⁰⁸ See, eg, *ASIC v Chase Capital Management Pty Ltd* [2001] WASC 27 [57]. See also *Re Gunns Finance Limited; Re Gunns Plantations Limited (No 2)* [2013] VSC 365 [138].

²⁰⁹ See above (n 207) Litigation Funders Bill 2001 (Cth) s 601LG(3)(a)(iii).

adequacy conditions may mean a reduction in the number of law firms able to operate these MIS, but as with RE NTA, capital adequacy is proportionate to the specific MIS and does not automatically result in reducing access to justice for plaintiffs. There is some support for reform²¹⁰ but the Litigation Funders Bill did not address capital adequacy or systemic deficiencies in MIS architecture. Rather, this Bill suggested the creation of a bespoke regime²¹¹ which may not benefit from the existing solid body of MIS jurisprudence. From this financial product consumer perspective, and particularly for those plaintiffs wishing to pursue smaller and/or consumer product claims, it is possible — likely even — that access to litigation finance and hence access to justice would become more limited.²¹²

Ostensibly introduced to protect financial product consumers, this proposed legislation was likely to have unintended consequences. These may include constraining capital supply to consumers as plaintiffs in smaller actions and reluctance by independent RE's to act under proposed costs constraints. This arises from the proposed limit on the proportion of funds payable to the litigation funder (30% of the plaintiff's settlement proceeds), in effect a price cap.²¹³ Whilst the introduction of a contradictor is welcome, a certification process was ignored, as was the Federal Court having exclusive jurisdiction.

Proposed piecemeal reform does not imply that egregious behaviours should be acceptable or accepted — disciplinary action must and has been taken,²¹⁴ but subsequent ex post judicial intervention will be regularly required to remedy statutory failure.

XI Litigation Financing as Venture Capital

Market interventions by statutory reform are not only matters of law. 'The law can facilitate economic development and not simply coerce, regulate and control'.²¹⁵ It can also have the opposite result. There is 'a positive relationship between financial sector functions and economic

²¹⁰ See, eg, *Paterson Inquiry* (n 4) [14.186]–[14.187].

²¹¹ *Ibid* [14.188].

²¹² See, eg, *Integrity Fairness and Efficiency* (n 25) app E 'ALRC Dataset: Class Action Proceedings Finalised in the Federal Court of Australia (1997–October 2018) [by year]; app F [by case].

²¹³ '*Litigation Funders Bill*' (n 207) s 601LG(5).

²¹⁴ See, eg, *Banksia (No 18)* (n 115).

²¹⁵ Justice Michael Kirby, 'The Company Director: Past, Present, and Future' (Speech, Australian Institute of Company Directors, Tasmanian Division, Hobart 1998).

growth'.²¹⁶ '[T]he [S]tate should create the framework — the rules of the game for the economy'.²¹⁷ These sentiments were echoed by Hayne:

[T]here is every chance that adding a new layer of law and regulation would only serve to distract attention from the very simple ideas that must inform the conduct of financial services entities ... Their simplicity points firmly towards a need to simplify the existing law ... in the blizzard of [statutory] provisions it is too easy to lose sight of those simple ideas ...²¹⁸

Litigation financing is an important financial product in a healthy economic system. It cleanses, it provides resources otherwise unavailable in a high-cost professional environment. For some, it can be a tool for strategic purposes. It has many sources — not only the 'litigation funders' which have been the subject of media and insurer attention. It is a financial product regulated by the *Corporations Act*, *ASIC Act* and *NCCP Act* and properly rests in the venture capital asset class. Venture capital is a widely used business term typically for illiquid, higher risk investments where the investor participates in the equity of the project. It has wide application.

Categorisation of securitised litigation financing as a venture capital asset class provides insights into the respective needs of the capitalist and other stakeholders. Generally, these needs are contractually provided for and include control over certain decision making. Venture capital investment does not require the litigation funder to assume fiduciary liability provided that investment is their sole function. Presently that is not always the case, but sole function (unless it is law firm provided) should be a part of the reform process. Such contracts are not constrained by the deep interface with the legal profession and the court in litigation financing. In litigation financing contracts, the contract can be tested by the contradictor. Ultimately, it is only the court which approves the settlement terms acting in the interests of the members of the MIS. These contractual issues could be much improved by a certification procedure, part of which would be to approve of or modify the financing contract prior to court approval to commence proceedings.²¹⁹

²¹⁶ Jeffrey Carmichael and Michael Pomerleau, 'The Development and Regulation of Non-Bank Financial Institutions' (Report, World Bank, 2002) 12, citing Ross Levine, Norman Loaya and Thorsten Beck, 'Financial Intermediation and Growth: Causality and Causes' (World Bank Development Research Group, 1999).

²¹⁷ Matthew Qvortrup, *Angela Merkel: Europe's Most Influential Leader* (Duckworth Overlook, 2017) 338.

²¹⁸ Commonwealth, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, 2018) (Commissioner Hayne) ('*Hayne Interim Report*') vol 1 290, quoted in David G Millhouse, 'W[h]ither Australia? Will Parliament Act?' (2020) 14(2) *Law and Financial Markets Review* 84 <<https://doi.org/10.1080/17521440.2020.1759218>>.

²¹⁹ Paterson recommends this but not in the context of a certification procedure relying on ex ante court intervention to deny contract enforceability. See *Paterson Inquiry* (n 4) [15.73].

Regulation by a court of investment returns to investors in the manner proposed in the Litigation Funders Bill was ill-judged, did not reflect opportunity cost of capital, and could diminish litigation financing as part of a healthy economic system which facilitates access to justice. The Bill's drafting confuses investment return with egregious behaviours. Venture capital is required to earn a risk-adjusted rate of return measured by international benchmarks. Otherwise, the necessary capital does not flow. Many of the institutional litigation funders operating in Australia are international, their managers judged accordingly. This regulatory intervention into pricing of capital should reflect the required rate of return on capital, allowing for regulatory and legal risks — not an arbitrary split of proceeds from successful litigation, proposed to be not more than 30% of the plaintiff claim proceeds.²²⁰ For a top quartile funds manager in the venture capital asset class, they aspire to generate consistent 25% internal rates of return (IRR) on capital invested. This is consistent with the present proposals for a funder commercial return,²²¹ and a market-based fee policy preferred by the Productivity Commission.²²² Market based fees have some judicial support.²²³

The court may not be able to provide necessary oversight. 'The judges do not have the experience and training in corporate finance ... The idea that a lawyer is the best person ... to explain, using principles of corporate finance, why a fee structure is reasonable is baffling.'²²⁴ A financing model for third party litigation financing based on readily available expert opinion would settle this issue.²²⁵ It would be disclosed in the PDS alongside all fee and costs disclosures. Whilst comprehension of complex disclosure documents remains problematic, until fiduciary principles are comprehensively adopted in the regulatory architecture, the PDS approach remains. Litigation financing scheme fees that are not MIS presently adopt a market-based approach.²²⁶ Speculative billing where the plaintiff's lawyer funds the litigation is a form of venture capital presently priced accordingly based on time-charging and profit uplift. The litigation proceeds are cost recovery (as agreed by the court with advice from a Contradictor) and thence to the plaintiffs. The market participants will decide whether to fund the smaller actions for plaintiffs within these investment constraints.

²²⁰ Litigation Funders Bill (n 207) ss 601LG(3)(b), (5).

²²¹ See above (n 207) [1.25].

²²² *Access to Justice* (n 27). See also *Paterson Inquiry* (n 4) [14.24]. Market based time-billed uplift fees are permitted at not more than 25% on the time billed amount.

²²³ See, eg, Jill Rowbotham, 'Class Action Cost Decisions Best Left to Courts, Says Judge', *The Australian* (Sydney, 21 March 2022) Business Section quoting Justice Murphy speaking at a Shine Lawyers class action seminar Friday 18 March 2022.

²²⁴ *Menzies Research Centre*, Submission 66 (n 158) cited in *Paterson Inquiry* (n 4) [11.9].

²²⁵ See generally *Paterson Inquiry* (n 4) ch 13 [13.1]–[13.61].

²²⁶ See, eg, Mr Sean McGing, Submission 101 cited in *Paterson Inquiry* (n 4) [13.46]–[13.47].

XII Reform Options

Paterson recommended adoption of a bespoke litigation financing MIS regime.²²⁷ This would add an additional layer of complexity and deny plaintiffs access to MIS jurisprudence. More importantly, such a tactical intervention would miss the opportunity for needed reform of the MIS architecture. There is an opportunity for strategic reform which would improve the operation of litigation financing MIS and revitalise the important role of general MIS in the economy. The size and importance of general MIS in the economy, and the devastating impacts of their failure are documented, as are the underlying systemic legal problems which facilitated these failures.²²⁸

Neither a continuation of present MIS law governing litigation financing schemes nor a bespoke regime address the issue of culture. Presently,

[it is] easier ... for compliance to be seen as asking “Can I do this?” and answering that question by ticking boxes instead of asking “Should I do this? What is the right thing to do?” And there is every reason to think that the conduct examined in this report has occurred when the only question asked is: Can I?²²⁹

Heydon and Hayne both identified unhealthy governance cultures which facilitate egregious behaviours. Empirical analysis identifies the deficiencies in the law which have led to these unhealthy cultures. Their excision requires the application of fiduciary principles to all participants in the investment chain, including in litigation financing MIS.

The Bill (now lapsed) also missed the opportunity to simplify and produce cohesion in the investor (client in the litigation finance general member context) typologies in various sections of the *Corporations Act*. It failed to address flawed MIS business models promoted to investors by the operators of some of these MIS and their management competencies.

The ‘responsible manager’ (RM) engaged by the RE to oversee the MIS will have the onerous tasks, in pursuit of their RE best interest and disclosure duties, not only of disciplining scheme stakeholders, but also of dissecting roles and managing MIS regulation and litigation funding practice and procedure.²³⁰ Since these differ from prior practice and incur foregone profit to some, an education process will be required to define roles and responsibilities to comply with modern law. These include the identification and management of conflicts of interests and duties. Whilst the *Corporations Act and Regulations*, and the *Uniform*

²²⁷ *Paterson Inquiry* (n 4) [16.94].

²²⁸ Millhouse, *Empirical Analysis*, (n 160) [3.6], [3.13].

²²⁹ *Hayne Interim Report*, (n 218) vol 1, 290.

²³⁰ See ASIC Regulatory Guide RG 105.

Rules permit the same, the definition of ‘associate’ in each case is different. But both require informed consent, at least in general law. Each MIS Constitution and PDS will require detailed analysis and revision.

RM responsibilities undoubtedly will extend to explaining to ‘retail’ clients (as general members) why litigation funding MIS law regards their representative plaintiff(s) as a ‘wholesale’ client and the implications therein,²³¹ being a different experience for those who have previously invested in general MIS. Those litigation financings that may not be MIS (and within MIS where there is a bookbuild), still require compliance with the DDO of the *Corporations Act*.

Doubtless, aggrieved persons, however categorised, will continue to seek redress, whether warranted or otherwise and the RM will investigate the circumstances on appointment.²³² Thereafter, proceedings for existing or putative class actions will require the RE to instruct its lawyers with mandatory or discretionary examinations of directors and other officers a likely result.²³³

Accounting policy in respect of MIS trust property, being, in litigation financing MIS, a contingent asset with unknown valuation (since it is court approved), the implications for RE Net Tangible Assets (NTA) and custody, are all significant matters of law. The legal nature of that property, is at commencement an enforceable, assignable right (to the trust) as a contribution of ‘money’s worth’, of the plaintiff.²³⁴ The nature of chose in action has expanded to include rights arising under contract and the commercial benefits derived therefrom.²³⁵ Chose in action can be pooled.²³⁶ The benefit arising from a right pursuant to successful prosecution of a class action is a claim on that future benefit, not dissimilar to a derivative and could be priced (valued) in accordance with established principles of corporate finance. These issues are all part of untangling the Gordian Knot. In the interim, ASIC has provided limited relief to aid the transition to the MIS environment.²³⁷

Given the potential uncertainty as to the nature and characterisation of scheme property of as litigation funding scheme, and how it might best be

²³¹ See below *ASIC Instrument 2020/787* (n 237), *ASIC Instrument 2020/787 ES* (n 238).

²³² See, eg, *Walton v ACN 004 410 833 Limited (formerly Arrium Limited (in liq))* [2022] HCA 3.

²³³ *Corporations Act 2001* (Cth) ss 596A, B.

²³⁴ See, eg, *Zhu v The Treasurer of the State of New South Wales* [2004] HCA 56 [121]–[122] citing *Consul Development Pty Ltd v DP Estates Pty Ltd* [1975] HCA 8. See also Jessup n 176 [2.2.2(b)]. See especially *Corporations Act 2001* (Cth) s 9.

²³⁵ *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157 [2157].

²³⁶ *LCM Funding Pty Ltd v Stanwell Corporations Limited* [2022] FCAFC 103 (*‘Stanwell’*).

²³⁷ *ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787* (21 August 2020) (*‘Instrument 2020/787’*).

valued, ASIC has formed the view that an exemption from the obligation to value scheme property at regular intervals is *appropriate at this time*.²³⁸

That is an acknowledgment of an unresolved legal policy issue and a hint that the exemption may not be permanent. Notably, the exemption only applies to registered MIS and not to other forms of litigation financing.

The Gordian Knot has now become more complex. *Stanwell*²³⁹ adds to the complexity but does not resolve it. *Stanwell* continues a long history of defining what a MIS (or managed fund) is.²⁴⁰ The dichotomy arises from the distinction between the substantive purpose of Ch 5C of the *Corporations Act*²⁴¹ and the discrete definitions of MIS contained in s 9. Misuse of the law for strategic commercial objectives can arise from both interpretations.²⁴² *Stanwell* raises significant questions of law in the interpretation of s 9 of the *Corporations Act*, being different to those applied in *Brookfield*. In 1992 at the commencement of Part IVA of the *Federal Court Act* which introduced class action procedures, the litigation financing industry did not exist in its present scope and importance.

Stanwell requires close scrutiny. It does not refer to all MIS, only *Brookfield*. Nor does it refer to other forms of litigation financing which may be MIS. *Stanwell* is ‘relevantly indistinguishable from *Brookfield*’.²⁴³ *Stanwell* therefore results in *Brookfield* also not being a MIS on the basis of it being identical in construction. It follows that LFS which are not identical remain MIS. Further, the Corporations Regulations as amended in 2020 remain in effect. The practical result is that each LFS (including those already extant and previously categorized as MIS) require testing to establish whether or not they are exactly identical in construction to *Stanwell* and *Brookfield*, an onerous task.

XIII Conclusion

There is much in *Stanwell* that supports the Gordian Knot proposition in this paper and the arguments advanced above. These include the roles of the various parties and in particular, which entity is the RE. *Brookfield* was not required to have an RE because of its grandfathering exemption from registration. That is not the same as other parties performing RE-like obligations, which they did.²⁴⁴ Neither is it an

²³⁸ ASIC Corporations (Litigation Funding Schemes) Instrument 2020/787 (21 August 2020) Explanatory Statement 5 (emphasis added) (*‘Instrument 2020/787 ES’*).

²³⁹ *Stanwell* (n 236) [18].

²⁴⁰ See generally *‘Brookfield’* (n 66) [2]–[103].

²⁴¹ *Ibid* [116].

²⁴² *Ibid*. Finkelstein J noted that ‘what lies behind this application is Multiplex’s desire to stop the action in its tracks’: at 116. *Stanwell* exposed similar motivations.

²⁴³ *Stanwell* n 236 [28] sub-para [16], [166].

²⁴⁴ *Brookfield* (n 66) [104].

argument that lack of a properly appointed RE means *Brookfield* was not a MIS — ‘There can be little doubt that between them [funder and promoter], they are operating the scheme which is unregistered and lacks a responsible entity’.²⁴⁵ Absent the grandfathering, the scheme should have been registered with an appointed RE. These issues are discussed in *Stanwell* but not resolved.²⁴⁶ An RE can be (and should be, as it is in many general MIS) an independent third party.

Stanwell acknowledges ‘it is desirable that [*Brookfield*] be reconsidered by a Full Court, unless of course pre-emptive legislative changes seeking to enshrine it move the dial ...’²⁴⁷ The Contradictor (who did not agree with the overturning of *Brookfield* by *Stanwell* and provides plentiful evidence accordingly) supports the need for pre-emptive legislation:

... the absence of any regulation by the Court prior to the commencement of the Class Action, or any certainty that there will ever be any regulation by the Court, may well be a very real reason why Parliament would want funded class actions to be regulated under the provisions of the Act.²⁴⁸

This is another argument in favour of ex ante court certification.

Legislative intervention needs to reflect the specific needs of the litigation financing and managed funds industries as they are practised in 2022. It includes deficiencies of s 9 definitions, addressing the shortcomings of the *Litigation Funders Bill*, but more broadly needs to recognise the economic importance of MIS to the community generally and the legal deficiencies which have facilitated egregious behaviours. The real issue is that the law, as illustrated in the discussion above, has not kept up to date with the growth of the litigation financing industry or the statutory weaknesses in the architecture of MIS law.

The nature of the problem faced by a RM is succinctly stated in the Paterson minority report — ‘Not a single submitter to this inquiry ... could explain how the managed investment scheme rules would operate in practice in the context of funded class actions’.²⁴⁹ ‘Not even ASIC could explain it. And evidently, ASIC still can’t explain it’.²⁵⁰

This paper is designed to assist all stakeholders untangle the Gordian Knot.

²⁴⁵ Ibid.

²⁴⁶ *Stanwell* (n 236) [163].

²⁴⁷ Ibid [28] sub-para [23].

²⁴⁸ *Stanwell* (n 236) [91].

²⁴⁹ *Paterson Inquiry* (n 4) Minority Report [1.39] 366.

²⁵⁰ Ibid [1.40]–[1.41] citing Australian Securities and Investments Commission, answer to questions on notice, 10 November 2020.