



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 185

Litigation schemes and proof of debt schemes: Managing conflicts of interest

August 2012

About this paper

This consultation paper sets out ASIC's proposed approach on how funders and lawyers can manage potential and actual conflicts of interest in litigation schemes and proof of debt schemes.

The purpose of this paper is to seek the views of stakeholders, including funders, lawyers, professional bodies, consumer representatives and other interested parties, on the proposals we have developed.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 17 August 2012 and is based on the Corporations Act as at the date of issue.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- the likely compliance costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information. We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on managing conflicts of interest in litigation schemes and proof of debt schemes. In particular, any information about compliance costs, impacts on competition and other impacts, costs and benefits will be taken into account if we prepare a Regulation Impact Statement: see Section F, 'Regulatory and financial impact'.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 21 September 2012 to:

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What will happen next?

Stage 1	17 August 2012	ASIC consultation paper released
Stage 2	21 September 2012	Comments due on consultation paper
Stage 3	December 2012	Regulatory guide released

A Background to the proposals

Key points

From 13 January 2013, funders and lawyers providing financial services for litigation schemes and proof of debt schemes will be exempt from the requirements that would otherwise apply under Ch 7 of the *Corporations Act 2001* (Corporations Act), including the licensing, conduct and disclosure requirements, but they must have adequate arrangements to manage conflicts of interest.

The nature of the arrangements between the parties involved in a litigation scheme or a proof of debt scheme means that there may be some situations in which the interests of the members and the interests of the funder and/or lawyers may conflict.

This paper sets out our proposals on what constitutes adequate arrangements for managing any conflict of interest that may arise in a litigation scheme or a proof of debt scheme.

Litigation schemes and proof of debt schemes

What is a litigation scheme?

- 1 A litigation scheme is a scheme for making a claim which, if necessary, is to be pursued by participating in, conducting and funding legal proceedings. The purpose of the scheme is to obtain remedies to which the member or members may be legally entitled. These remedies can be obtained by various means, including by lawyers making a demand for payment or undertaking legal proceedings.
- 2 A common form of litigation scheme is a representative proceeding or group proceeding issued in the Federal Court or a state or territory supreme court. While the terms ‘representative proceeding’ and ‘group proceeding’ are used in these courts, these proceedings are commonly referred to as ‘class actions’. A litigation scheme can be structured as fully funded by an external funder, partly funded by lawyers or unfunded (i.e. funded by the members).

What is a proof of debt scheme?

- 3 A proof of debt scheme often has a similar structure to a litigation scheme, but the key difference is that the company against which remedies are sought has become insolvent. As a result, legal proceedings cannot be issued or continued against it without the permission of the liquidator.

- 4 A proof of debt scheme is a scheme for participating in, conducting and funding the proving of claims against an insolvent company. In a proof of debt scheme, third parties engaged by the scheme members will gather evidence to support the claim against the insolvent company, prepare an individual proof of debt for each member and submit the proof of debt and supporting evidence to the liquidator. The purpose of the scheme is to obtain full or partial payment of a debt owed to the participant by the insolvent company.
- 5 Like a litigation scheme, a proof of debt scheme can be structured as fully funded by an external funder, partially funded by lawyers or unfunded.

Growth and regulation of litigation schemes and proof of debt schemes

- 6 Class action litigation has become an important feature of the corporate and legal landscape in Australia. A key factor in the increase in class action filings has been the emergence of commercial litigation funding. Litigation funding overcomes one of the major disincentives to filing a class action—namely, the risk of incurring significant costs.
- 7 Litigation funding has grown significantly in Australia, particularly since the High Court decision in *Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* (2006) 229 CLR 386 (*Fostif*). In *Fostif*, the court considered the legality of litigation funding for the first time and held that it was not necessarily an abuse of process or against public policy for a funder to seek out claims that may be aggregated in class action proceedings and exercise a significant level of control over the conduct of the litigation.

Compliance with Corporations Act requirements

- 8 In *Brookfield Multiplex Limited v International Litigation Funding Partners* [2009] FCAC 147 (*Brookfield Multiplex*), the Full Court of the Federal Court held that a funded class action was a ‘managed investment scheme’ within the meaning of s9 of the Corporations Act, which was required to be, but had not been, registered with ASIC. Accordingly, an interest in the funded class action is a financial product for the purposes of Ch 7 of the Corporations Act.
- 9 In *International Litigation Partners Pte Ltd v Chameleon Mining NL* [2011] NSWCA 50 (*Chameleon Mining*), the New South Wales Court of Appeal found that the litigation funder was required to hold an Australian financial services (AFS) licence because the funding agreement between Chameleon Mining and the funder was a financial product. It was the court’s view that the agreement was a facility through which Chameleon Mining managed

financial risk under s763A of the Corporations Act. Special leave was granted to appeal that decision to the High Court. The High Court's judgement is currently reserved, following a hearing on 20 June 2012.

- 10 The effect of the decisions in *Brookfield Multiplex* and *Chameleon Mining* is that currently a litigation scheme or a proof of debt scheme will generally need to comply with the relevant requirements of the Corporations Act, unless exempted by ASIC.

Exemptions from Corporations Act requirements

- 11 From 13 January 2013, litigation schemes and proof of debt schemes, as defined in the Corporations Amendment Regulation 2012 (No. 6) (the Corporations Amendment Regulation), will be exempt from:
- (a) the definition of 'managed investment scheme' in s9 of the Corporations Act; and
 - (b) the licensing, conduct, anti-hawking and disclosure provisions in Ch 7 of the Corporations Act.
- 12 Under the Corporations Amendment Regulation, if a person is providing a financial service covered by these exemptions, they must have adequate arrangements for managing any conflict of interest that may arise in relation to the scheme. Failure to have adequate arrangements for managing these conflicts is an offence.
- 13 This paper sets out our proposals on what we consider constitutes adequate arrangements for managing conflicts of interest in a litigation scheme or a proof of debt scheme.

Potential conflicts of interest

- 14 The nature of the arrangements between the parties involved in a litigation scheme or a proof of debt scheme has the potential to lead to a divergence between the interests of the members and the interests of the funder and lawyers because:
- (a) the funder has an interest in minimising the legal and administrative costs associated with the scheme and maximising their return;
 - (b) lawyers have an interest in receiving fees and costs associated with the provision of legal services; and
 - (c) the members have an interest in minimising the legal and administrative costs associated with the scheme, minimising the remuneration paid to the funder and maximising the amounts recovered from the defendant or insolvent company.

- 15 This divergence of interests may result in conflicts between the interests of the funder, lawyers and members. This is often referred to as a 'conflict of interests'. The conflicts can be actual or potential, and present or future.

Potential conflicts in a litigation scheme

- 16 We consider that the areas where divergent interests between the funder, lawyers and members may arise in an externally funded litigation scheme include:

- (a) where the lawyers act for both the funder and the members;

Note: In such a case there may at least be a perception of a conflict for the lawyers. For example, the funder retains the lawyers, and retainers offered by the funder can provide significant fees for the lawyers. Members do not, usually, engage their own lawyers.

- (b) where there is a pre-existing relationship between the funder, lawyers and/or members; and

Note: For example, the lawyers may also own, or be officers of, the funder.

- (c) where the funder has, or has the ability, to control the conduct of the proceedings;

Note 1: For example, the funder may determine whether or not the lawyers are provided with the funds to initiate interlocutory proceedings or an appeal in relation to particular points of class action law or procedure.

Note 2: For example, a proceeding against a multinational corporation is proposed that will be funded by a funder, and there are several possible causes of action, all of which are viable. Some causes of action are stronger than others. In an effort only to reduce legal costs, the funder recommends to the lawyers that certain causes of action should not be pleaded.

- 17 We consider that a divergence of interests between the funder, lawyers and members in a litigation scheme could affect:

- (a) the recruitment of members;

Note: For example, advertisements are placed calling for potential members to participate in the litigation scheme. The advertisements give undue prominence to the scheme's prospects of success in order to maximise the number of members recruited.

- (b) the terms of the funding agreement;

Note: For example, the funding agreement may include terms that the funder is to be paid 30% of the amount recovered if proceedings are issued within one year or, if proceedings are not issued within one year, the funder is to be paid 45% plus a management fee of 5%.

- (c) a scheme where there are difficulties with the case of the representative party, but not with the cases of the other members of the class; and

Note: For example, the defendant may make an offer not to claim costs to a representative party with a weak case if the proceedings of the class are discontinued.

- (d) any decision to settle or discontinue the proceedings.

Note: For example, a settlement offer is received from the defendant before proceedings are issued. The settlement offer is attractive to the funder due to the size of the global resolution sum. However, the lawyers regard the damages payable to the majority of the class as arguably insufficient.

Potential conflicts in a proof of debt scheme

- 18 A proof of debt scheme does not generally involve legal proceedings being issued, so the areas where conflicts of interest may arise in a litigation scheme will not necessarily apply in a proof of debt scheme. In those instances where legal proceedings are issued to dispute the decision by a liquidator to admit or refuse a claim, those areas where interests may diverge in a litigation scheme will also apply.
- 19 We consider that conflicts of interest may arise in a proof of debt scheme in the following areas:
- (a) the recruitment of members;
 - (b) the terms of the funding agreement;
 - (c) schemes where the lawyers act for both the funder and the members; and
 - (d) schemes where there is a pre-existing relationship between the funder, lawyers and/or members.

Your feedback

A1Q1 Do you agree that, in the areas we have identified for litigation schemes and proof of debt schemes, the interests of the funder, lawyers and members may diverge? If not, why not?

A1Q2 Are there any other areas where divergent interests between the funder, lawyers and members may arise, about which we should give specific guidance?

Our objectives

- 20 Funders and lawyers should only conduct a litigation scheme or a proof of debt scheme if they have policies and procedures for addressing potential, actual or perceived conflicts of interest.

Note: When we refer to ‘funders’ and/or ‘lawyers’, we mean those relying on the exemptions in the Corporations Amendment Regulation: see paragraph 11.

- 21 The proposals in this paper are designed to enhance the protection of members by setting out our expectations of what is required to satisfy the

obligation to have adequate arrangements for managing any conflicts of interest that may arise in a litigation scheme or a proof of debt scheme.

- 22 In developing our proposals, we are concerned with ensuring that funders and lawyers have processes and procedures in place to protect the interests of members and that they follow these processes and procedures.

Our proposals

- 23 To meet our objectives, we propose that a person relying on the exemptions in the Corporations Amendment Regulation should:
- (a) be responsible for determining their own arrangements to manage interests that may conflict with their duties; and
 - (b) be able to demonstrate that they have adequate arrangements to manage conflicts of interest, including documenting, implementing, monitoring and reviewing their arrangements (see Section B).
- 24 We propose that a person relying on the exemptions should be able to demonstrate that they have formally reviewed areas where interests may diverge and have, as a minimum, written processes and procedures that address the following:
- (a) effective disclosure of conflicts of interest to members and prospective members (see Section C);
 - (b) control of situations where interests may conflict (see Section D);
 - (c) adequate protection of members' interests (see proposal D3);
 - (d) recruitment of prospective members (see proposal D4);
 - (e) review of the terms of the funding agreement, in light of the law on unfair contracts and unconscionability (see proposal D5);
 - (f) the situation where the lawyer acts for both the funder and the members (see proposal D6);
 - (g) the situation where there is a pre-existing relationship between the funder, lawyers and/or members (see proposal D7); and
 - (h) approval of the terms of settlement of a litigation scheme by an independent panel or counsel (see Section E).

B Our approach to managing conflicts of interest

Key points

The nature of the arrangements between the funder, lawyers and members means that it will be difficult for the funder and lawyers to avoid conflicts of interest.

Our proposed approach to the management of conflicts of interest is to:

- require each funder and each lawyer to be responsible for determining their own arrangements to manage conflicts of interest and be able to demonstrate that they have adequate arrangements for managing conflicts (see proposal B1);
- only apply our guidance to funders and lawyers involved in a litigation scheme or proof of debt scheme to the extent that they rely on the exemptions in the Corporations Amendment Regulation for such activities or conduct their activities under an AFS licence (see proposal B2); and
- revoke any exemptions we have previously given litigation schemes or proof of debt schemes from the requirements in Chs 5C and 7 of the Corporations Act (see proposal B3).

Our general approach

Proposal

B1 We propose that each funder and each lawyer should:

- (a) be responsible for determining their own arrangements to manage interests that may conflict with their duties; and
- (b) be able to demonstrate that they have adequate arrangements to manage conflicts of interest, including documenting, implementing, monitoring and reviewing their arrangements.

Your feedback

B1Q1 Do you agree with this proposal? If not, why not?

B1Q2 Do you think that this proposal gives adequate assurance that we will achieve our objectives identified in paragraphs 20–22? Please give reasons for your views.

B1Q3 Should some or all of our proposals differentiate between litigation schemes and proof of debt schemes? If so, please explain why.

B1Q4 Is any transition period required, over and above the six-month transition period prescribed in the Corporations Amendment Regulation, to ensure that adequate arrangements to manage interests that may conflict are in place? If so, is six months a sufficient period?

B1Q5 Please give details of any additional costs associated with the implementation of our proposals. If possible, please quantify these costs.

B1Q6 What benefits do you consider will result from these proposals? If possible, please quantify these benefits.

Rationale

25 While funders and lawyers must take responsibility for determining their own approach to managing interests that may conflict, we will provide some guidance on our expectations to assist them to determine what we consider constitutes adequate management of these interests.

26 The nature of the arrangements between the funder, lawyers and members means that it will be difficult for the funder and lawyers to avoid conflicting interests. Instead, we expect that each funder and each lawyer will have adequate arrangements to:

- (a) ensure they make appropriate disclosure of the divergence of interests from their duties (see Section C);
- (b) control situations where interests may conflict with their duties (see Section D); and
- (c) where proceedings have not been issued, ensure the settlement agreement or the settlement offer are approved by an independent panel or by counsel (see Section E).

Who the proposals apply to

Proposals

B2 We propose that our guidance to manage divergent interests will only apply to funders and lawyers involved in a litigation scheme or proof of debt scheme to the extent that they:

- (a) rely on the exemptions under the Corporations Amendment Regulation for such activities; or
- (b) conduct their activities under an AFS licence.

Your feedback

B2Q1 Do you agree with this proposal? If not, why not?

B2Q2 Do you think that there are any circumstances where this proposal should not apply?

B2Q3 Do you think that the fiduciary duties and ethical and professional obligations imposed on lawyers already offer sufficient protection for members? If so, please give detailed reasons.

B2Q4 Do you think that our proposals conflict with any fiduciary duties or ethical or professional obligations already imposed on lawyers? If so, please identify which ones and provide detailed reasons.

B2Q5 Do you think that it is necessary that a direct contractual relationship should exist between the members and the lawyers in a litigation scheme or a proof of debt scheme?

Rationale

- 27 We recognise that the majority of activities undertaken by lawyers for litigation schemes or proof of debt schemes are either not financial services or are likely to be exempt from compliance with the relevant requirements of Ch 7 of the Corporations Act without the need to rely on the exemptions in the Corporations Amendment Regulation for litigation schemes and proof of debt schemes. If, for all of the activities undertaken by lawyers for a litigation scheme or proof of debt scheme, they do not need to rely on the exemptions, they will not be required to have adequate arrangements in place to manage conflicts of interest under the Corporations Act or Corporations Regulations 2001.
- 28 Lawyers are already subject to obligations to their clients relating to conflicts of interest. For example, lawyers are subject to fiduciary duties to their client, ethical duties to the court, statutory duties under state or territory legal profession Acts, and professional codes of conduct and practice rules. These obligations give rise to penalties for professional misconduct.

Revocation of pre-existing exemptions

- B3 We propose that any exemptions we have previously given litigation schemes or proof of debt schemes from the requirements in Chs 5C and 7 of the Corporations Act will be revoked.

Your feedback

B3Q1 Do you agree with this proposal? If not, why not?

B3Q2 Please give details of any additional costs associated with the implementation of this proposal.

B3Q3 Is any transition period required before the revocation?

Rationale

- 29 We have previously granted exemptions from Chs 5C and 7 of the Corporations Act to some funders. We will need to review whether it is appropriate for these exemptions to remain in place given the government's decision to create exemptions in the Corporations Amendment Regulation.

C Disclosing conflicts of interest

Key points

We propose that the funder and lawyers should ensure that they have processes and procedures to ensure they make appropriate disclosure to members.

The funder should provide prospective members with information about the different significant interests of the funder, lawyers and members, and how they may conflict, as well as details of any dispute resolution options that are available to members: see proposal C1.

If the funder and/or lawyers become aware of a significant divergence in their interests that may conflict they should disclose this information to each affected member at the first reasonable opportunity: see proposal C2.

The disclosure by the funder and/or lawyers should be timely, prominent and specific, and contain enough detail for members to understand the potential impact of the diverging interests on the scheme: see proposal C3.

Disclosure to prospective members

Proposal

- c1 We propose that the funder should provide prospective members with:
- (a) information that is likely to assist them to understand the different significant interests of the funder, lawyers and members, and how they may conflict; and
 - (b) details of any dispute resolution options that are available to a member who has a dispute with the funder.

Your feedback

C1Q1 Do you agree with this proposal? If not, why not?

C1Q2 Are there any practical problems with the application of this proposal? Please give details.

C1Q3 Should we provide specific guidance about disclosure of conflicts of interest or is it appropriate for the funder to determine what is appropriate disclosure based on the facts and circumstances?

C1Q4 Please give details of any additional costs associated with the implementation of this proposal? If possible, please quantify these costs.

C1Q5 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 30 We believe that the funder and lawyers should make appropriate disclosure to members as part of their arrangements to manage interests that may conflict. While disclosure alone will sometimes not be enough, it is a key mechanism that the funder and lawyers should use to assist them in managing potential and actual divergence of interests.
- 31 Disclosure reduces the risk of breach of duty by promoting accountability. In addition, disclosure may be necessary to avoid prospective members being misled in deciding whether they participate in the litigation scheme or proof of debt scheme. For our expectations on arrangements for avoiding misleading and deceptive conduct, see proposal D4.
- 32 There are currently no requirements regarding the information that should be made available to prospective members. Adequate disclosure that highlights potential conflicts of interest at the outset of the funding arrangement enhances prospective members' ability to make more informed decisions about entering into a funding agreement and reduces the risk of them being misled.
- Note: For example, disclosure of the level of control that the funder would be capable of exercising over the conduct of the scheme, and the interests that control may affect, would help avoid the possibility of prospective members being misled about the risk that the funder will not adequately protect their interests.
- 33 We think it is important that members know from the outset how and where they can seek assistance to resolve a dispute with the funder. Dispute resolution is potentially an important mechanism to resolve conflicts of interest because it is one means by which a member's interest and the funder's interest can be fairly balanced. Therefore, details about the availability of any dispute resolution mechanism are important for a member in assessing the likely impact of potential conflicts.

Ongoing disclosure

Proposal

- c2 We propose that there should be mechanisms in place so that if the funder or lawyers become aware of a significant divergence in their interests, and which has not already been disclosed, they should tell each affected member at the first reasonable opportunity.

Your feedback

- C2Q1 Do you agree with this proposal? If not, why not?
- C2Q2 Are there any practical problems associated with the application of this proposal? Please give details.

C2Q3 Please give details of any additional costs associated with the implementation of this proposal? If possible, please quantify these costs.

C2Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 34 We expect that disclosure of conflicts of interest will be ongoing throughout the course of the litigation scheme or proof of debt scheme. The funder and lawyers should notify members of any significant conflicts of interest that arise during the conduct of the scheme at the first reasonable opportunity, using the most efficient and effective method of communication (e.g. on a website or by email).
- 35 We recognise that in some situations disclosure may not be appropriate (e.g. the source of the conflict of interest may be confidential). In such situations, the funder and/or lawyers should consider whether the conflict can be managed through other mechanisms, or whether it is appropriate to continue to provide the service to the affected member.

Timely, prominent, specific and meaningful disclosure

Proposal

- c3 We propose that the disclosure of the diverging interests of the funder, lawyers and members, and how they may conflict, should:
- (a) be timely, prominent and specific; and
 - (b) contain enough detail for members to understand the potential impact of the diverging interests on the litigation scheme or proof of debt scheme.

Your feedback

C3Q1 Do you agree with this proposal? If not, why not?

C3Q2 Are there any other minimum features of effective disclosure we should expect of funders and lawyers in managing conflicts of interest? Please give details.

C3Q3 What additional costs, if any, would arise from meeting our proposed expectations? If possible, please quantify these costs.

C3Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 36 We consider that the funder and lawyers should provide disclosure on a timely basis and provide enough detail in a clear, concise and effective manner to allow the member to make an informed decision about how the conflict of interest may affect the service being provided to them.
- 37 In our view, ‘boilerplate’ disclosure is unlikely to be appropriate. In order to be specific, and so be meaningful for members, we consider that disclosure should refer to the particular facts and circumstances and should be specific enough for members to understand the potential impact of the divergent interests. Disclosures may be given in writing or verbally. If given verbally, appropriate records of the disclosure should be retained.

D Controlling situations where interests may conflict

Key points

We consider that the funder and lawyers have an obligation to control situations where conflicts may arise. We propose that the funder and lawyers should be able to demonstrate that they have written processes and procedures to:

- identify divergent interests, assess and evaluate those interests, and decide upon and implement an appropriate response to those divergent interests (see proposal D1);
- ensure these procedures are tailored to the particular scheme, documented, effectively implemented, reviewed regularly and overseen by a designated person (see proposal D2);
- ensure the interests of members are adequately protected (see proposal D3); and
- ensure that conflicts do not result in misleading or deceptive conduct (see proposal D4).

As part of the obligation to control situations where conflicts may arise, we also propose that:

- the funder and lawyers should review the terms of the funding agreement in light of the law on unfair contracts and unconscionability (see proposal D5);
- if there is no direct contractual relationship between the lawyers and members, the funder should ensure that they engage the lawyers on terms that make clear that where there is a divergence of interests between the funder and members, the lawyers must ensure that the members' interests are adequately protected (see proposal D6); and
- the funder, lawyers and members should be independent, or, if they are not independent, the relationship should be disclosed to members (see proposal D7).

Procedures to identify, assess and manage conflicts

Proposals

- D1 We propose that the funder and lawyers should be able to demonstrate that they have processes and procedures to:
- (a) identify divergent interests and where conflicts may arise;
 - (b) assess those interests and potential conflicts; and
 - (c) decide upon and implement an appropriate response to those divergent interests and potential conflicts.

Your feedback

- D1Q1 Are there any measures, processes or procedures that we should expect most or all funders and/or lawyers to have in place? Please give details.
- D1Q2 Are there any practical problems with the application of this proposal to particular litigation schemes or proof of debt schemes? Please give details.
- D1Q3 Please give details of any additional costs associated with this proposal. If possible, please quantify these costs.
- D1Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

- D2** We propose that the funder and lawyers should be able to demonstrate that the processes and procedures they adopt are:
- (a) tailored to the nature, scale and complexity of the litigation scheme or proof of debt scheme, including the number of members that are party to the scheme;
 - (b) documented;
 - (c) effectively implemented;
 - (d) regularly monitored and reviewed, and updated as needed; and
 - (e) overseen by a designated senior person (or persons) within the funder or law firm who takes responsibility for their implementation and monitoring.

Your feedback

- D2Q1 Are there other key features of effective and efficient arrangements that we should expect most or all funders and/or lawyers to have in place? Please give details.
- D2Q2 Are there any practical problems with the application of this proposal to particular litigation schemes or proof of debt schemes? Please give details.
- D2Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.
- D2Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

38 We consider that successfully controlling situations where interests may conflict requires:

- (a) the divergent interests relating to the scheme to be identified;
- (b) an assessment of those interests and where any conflict may arise; and
- (c) the implementation of appropriate measures to address and minimise the impact of the conflicts.

- 39 For the funder and lawyers to have adequate arrangements to control situations where their interests may conflict, we consider that they should:
- (a) have written processes and procedures to identify divergent interests and where conflicts may arise, and implement appropriate measures to address them;
 - (b) continue to monitor, assess and evaluate those interests and conflicts, as well as to monitor, assess and evaluate whether the measures in place remain adequate to address and minimise the impact of them; and
 - (c) ensure that the interests of members are adequately protected.
- 40 Merely having a plan for arrangements to manage divergent interests and conflicts that may arise is not adequate. To be adequate, we consider the funder and lawyers must:
- (a) be able to demonstrate that the arrangements have been implemented, maintained and followed;
 - (b) have monitoring procedures in place so that divergent interests and potential conflicts can be identified and acted upon; and
 - (c) document their arrangements and review them regularly to ensure that they continue to be adequate.
- 41 Primary responsibility for the implementation and monitoring of the interests and potential conflict should rest with the senior management or partners. The senior person designated to be directly responsible should satisfy themselves that the arrangements are adequate and approve a response to any conflicts that are identified. Wherever possible, the person who is deciding upon and implementing an appropriate response to a conflict of interest should not be significantly affected by the conflict.
- 42 We believe that the funder and lawyers should be able to determine what arrangements are adequate for them to manage conflicts that may arise. We consider that it is important that the funder and lawyers design these arrangements with their particular circumstances in mind.

Procedures to protect members' interests

Proposal

- D3 We propose that the funder and lawyers should ensure that they have in place appropriate policies and procedures so that when they are faced with a conflict between their interest and the interests of members, the members' interests are adequately protected.

Your feedback

D3Q1 Do you agree with this proposal? If not, why not?

D3Q2 Are there any practical problems with the application of this proposal? Please give details.

D3Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.

D3Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 43 We believe that the funder and lawyers should be able to demonstrate that they have arrangements to ensure that, regardless of the presence of conflicts, their services are provided in a way that meets their obligations. We recognise that the funder and lawyers involved in a litigation scheme or proof of debt scheme have legitimate commercial interests. However, these commercial interests need to be pursued in a manner that does not involve inadequate protection of members' interests.
- 44 The funder and lawyers may be in a position of trust with members and should not conduct the scheme without taking into account the risks that conflicts may pose to the members' interests.

Recruitment of members

Proposal

- D4 We propose that the funder and/or lawyers recruiting members for a litigation scheme or proof of debt scheme should have arrangements to ensure that conflicts do not result in misleading or deceptive conduct, including having a senior person with designated responsibility to oversee recruitment practices.

Your feedback

D4Q1 Do you agree with this proposal? If not, why not?

D4Q2 Does this proposal adequately address the consumer protection issues arising from conflicts of interest?

D4Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.

D4Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 45 Recruiting a sufficient number of potential members with good claims to participate in a litigation scheme or proof of debt scheme is of commercial importance to the funder.

- 46 The funder and/or lawyers must not engage in recruitment strategies that are misleading or deceptive, or likely to mislead or deceive. In view of the conflict that may arise, the funder needs to have in place arrangements to ensure that advertising or recruitment practices do not mislead potential members about significant features or risks.

Note: For example, a funder should have arrangements for checking marketing communications to ensure they do not suggest that potential members will receive a certain amount without disclosing the amounts that will be subtracted from this sum for the fees and costs of the funder.

- 47 In recruiting members, the funder should be mindful of all of our expectations on controlling situations where conflicts may arise. For example, a senior manager or partner the funder has designated as being responsible for overseeing the processes and procedures to control conflicts of interest should review all advertising and recruitment scripts to ensure that prospective members are not misled.

Reviewing the terms of the funding agreement

Proposal

- D5 We do not propose to require particular terms in the agreement relating to the litigation scheme or proof of debt scheme. However, we propose that, as part of the obligation to control situations where conflicts may arise, the funder and/or lawyers should review the terms of agreements to which they are a party in light of the existing body of law on unfair contracts and unconscionability, where relevant.

Your feedback

- D5Q1 Do you agree with this proposal? If not, why not?
- D5Q2 Do you think that a funding agreement should include terms that impose a legally enforceable obligation on the funder to implement the proposals in this paper?
- D5Q3 Does the existing body of law on unfair contracts, such as the unfair contract provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act) or the *Competition and Consumer Act 2010*, provide adequate protection for members?
- D5Q4 Are there any terms in a funding agreement that are necessary to manage conflicts? For example, an appropriate form of dispute resolution is one means by which members' interests and the funder's interests can be fairly balanced.
- D5Q5 Are there any additional costs that would arise from meeting our expectations in this proposal? If possible, please quantify these costs.
- D5Q6 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 48 Members may not always have legal knowledge, and may not be well placed to negotiate a funding agreement or have the ability to assess the terms they agree to. This can create an asymmetry of bargaining power between the funder/lawyers and members.
- 49 While we recognise that there can be an asymmetry of power between the funder/lawyers and members when they enter into the funding agreement, we do not propose at this stage that the funding agreement should contain certain terms to satisfy the requirement to have adequate arrangements to manage conflicts. Imposing such terms may inhibit the ability of the funder/lawyers and member to proceed on a commercial basis.
- 50 We believe that there are some protections for members from being bound by unfair terms of funding agreements, including:
- (a) the law on unfair contracts, such as the unfair contract provisions in Subdiv BA of Div 2 of Pt 2 of the ASIC Act that commenced on 1 July 2010, and the law on unconscionability;
 - (b) the consequent loss of any return on investment for the funder if the agreement, or part of it, is found to be invalid by the courts; and
 - (c) the increasing participation of more sophisticated members who are well informed and familiar with contractual terms and legal proceedings, and who are unlikely to agree to the terms of an unfair contract.
- 51 Despite these protections, we consider that the funder should be mindful of our expectations in proposal D5 in drafting the funding agreement and ensure that it is checked with due regard to the law. The funding agreement should be approved by the designated person with responsibility for the implementation and monitoring of arrangements to manage conflicts of interest.

Lawyers' obligations to both the funder and members

Proposal

- D6 We propose that if there is no direct contractual relationship between the lawyers and members, the funder should ensure that they engage the lawyers on terms that make clear that if there is a divergence of interests between the funder and the member, the lawyers must ensure that the members' interests are adequately protected.

Your feedback

D6Q1 Do you agree with this proposal? If not, why not?

D6Q2 Are there any practical problems with the application of this proposal? If so, please give details.

D6Q3 Does this proposal adequately address the consumer protection issues arising from interests that may conflict?

D6Q4 Are there any additional costs associated with our proposal? If possible, please quantify these costs.

D6Q5 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

52 In a lawyer–client relationship, the lawyer has fiduciary obligations to the client. Lawyers also have fiduciary obligations to people who are not in a direct contractual relationship with them. However, we consider that the potential for any adverse impact on members as a result of a divergence of interests is reduced when the members are the clients.

53 We recognise that it is necessary for there to be communication between the lawyers and the funder during the course of the litigation scheme or proof of debt scheme. It is appropriate for the funder to give instructions to the lawyers and for the lawyers to consider these instructions in light of their obligations to the members. However, we do not think that having the lawyers acting solely for the members will impede this occurring.

Independence of the funder, lawyers and members

Proposal

D7 We propose that there should be either:

- (a) independence between the funder, lawyers and members; or
- (b) if there is no such independence, the relationship should be disclosed to members.

Your feedback

D7Q1 Do you agree with this proposal? If not, why not?

D7Q2 Are there any practical problems with the application of this proposal? If so, please give details.

D7Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.

D7Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

- 54 The independence of lawyers from the funder means that their interests are less likely to conflict than when there is a relationship between the lawyers and funder.
- 55 We are aware that some relationships between funders and lawyers have begun to develop in Australia. In these circumstances, we consider it is important that these relationships are disclosed to members. Disclosure assists members to understand where their interests may diverge with those of the funder and lawyers.
- 56 We consider that the funder and/or lawyers should prominently disclose to members:
- (a) if they are associates, or if spouses, children, directors, partners or senior employees are associates;
 - (b) any relationships between other directors, partners or senior employees;
 - (c) any relationships (outside the provision of the services for the litigation scheme or proof of debt scheme) with any other parties to the scheme (including any involvement with any other litigation funding scheme or proof of debt scheme) that are current, proposed or that have been in place for a reasonable period; and
 - (d) any direct or indirect fee or benefit to be paid or given by one party to the scheme to another for providing services to, or participating in, that scheme.
- Note 1: For example, if a member was receiving a fee that other members were not receiving for participating in the scheme, we consider this should be disclosed.
- Note 2: For example, if a lawyer is a partner of a law firm that is acting for members in a litigation scheme and a director of the funder providing the funding for the same litigation scheme, we consider that this should be disclosed.
- 57 Disclosure should be timely, prominent and meaningful for members and potential members. ‘Boilerplate’ disclosures (e.g. ‘we receive fees for professional services’) should be avoided in favour of more specific disclosure.

E Oversight of settlement agreements and offers

Key points

Some litigation schemes settle without a proceeding being issued and the courts will only look at the settlement agreement if it is challenged on some other grounds. Our proposals for independent oversight of settlement agreements and offers apply to these schemes because the members are not afforded the same protection as when proceedings are issued.

We propose that either:

- the terms of any settlement agreement are independently approved; or
- any settlement offer, or the acceptance of such an offer, is independently approved (see proposal E1).

We are also proposing certain criteria for the approval of any settlement agreement: see proposal E2.

Independent review

Proposal

E1 We propose to adopt one of the following options when proceedings have not been issued:

Option 1

The terms of any settlement agreement of a litigation scheme should be approved by either:

- (a) a panel comprising at least one independent person; or
- (b) counsel (or senior counsel if involved).

Option 2

Any settlement offer in a litigation scheme to be made by the members, or the acceptance of any settlement offer received by the members, should be approved by either:

- (a) a panel comprising at least one independent person; or
- (b) counsel (or senior counsel if involved).

Your feedback

- E1Q1 Which of Option 1(a), Option 1(b), Option 2(a) or Option 2(b) is preferable? Please explain why.
- E1Q2 Is it common for a litigation scheme to be settled before proceedings are issued? Please give details.
- E1Q3 What is the financial impact of each option on you or your law firm or your funder? Please quantify these costs.

- E1Q4 What additional costs might arise for the members from adopting any of the options in this proposal? Please quantify these costs.
- E1Q5 Who should bear the costs of whichever option is adopted? Please give reasons.
- E1Q6 What benefits do you consider will result from each option in this proposal? If possible, please quantify these benefits.

Rationale

- 58 If representative or group proceedings have been issued, any settlement or discontinuance cannot occur without the approval of the court. We consider that this independent oversight of the court provides protection for group members as a whole against the potentially conflicting commercial interests of the funder and/or lawyers and for group members against each other. However, we consider that the funder and lawyers should be mindful of our expectations in proposal D3 when evaluating or formulating settlement proposals.
- 59 Some litigation schemes settle without a proceeding being issued and the courts will only look at the settlement agreement if it is challenged on some other grounds. Our proposal for reviewing settlement agreements and offers applies to these schemes because the members are not afforded the same protection as when proceedings are issued.
- 60 We recognise that the funder and lawyers involved in a litigation scheme have a good understanding of the legal and commercial factors behind the claim and therefore have important insight into whether settling is in the best interests of the members. We believe that this knowledge is an important resource that should be used to assist members in settlement negotiations. However, we are concerned about the potential for the funder and lawyers to prefer their own commercial interests over those of the members, or for the settlement to be in the interests of the lead plaintiff and defendant and not necessarily the other group members.
- 61 We consider that independent oversight provides a mechanism that assists in controlling the conflict between the interests of the funder, lawyers and members. However, this advantage may be offset by the time and cost that may be needed for the independent panel member to understand the legal and commercial factors relevant to the specific claim and make an informed decision.
- 62 In appointing an independent panel member, we expect that the funder and lawyers will have regard to the qualifications, experience and expertise of the person to ensure that they have a proper understanding of a scheme's commercial and legal issues and the potential for conflicts of interest.

- 63 An independent panel member is an impartial decision maker who is not involved with, or associated with a person involved with, the proceeding, and who is outside the control and authority of a person involved with the proceeding. For example, it would not be appropriate to appoint an independent panel member whose independence might be doubted because of an economic reliance on repeat work from a funder or a lawyer involved in the proceeding.

Criteria for approval

Proposal

- E2** We propose that in reviewing a settlement agreement or offer, the panel members or counsel must be satisfied that the settlement agreement or offer is fair and reasonable, taking into account the claims made on behalf of the members who will be bound by the settlement and potential conflicts between the funder and/or lawyers and the members as well as between the group members. In satisfying themselves that the proposed settlement is fair and reasonable, the panel members or counsel should take into account, among other things, the following factors:
- (a) the amount offered to each member;
 - (b) the prospects of success in the proceeding (i.e. the weaknesses, substantial or procedural, in the case advanced by the members);
 - (c) the likelihood of members obtaining judgement for an amount significantly in excess of the settlement sum;
 - (d) whether the settlement sum falls within a realistic range of likely outcomes;
 - (e) the terms of any advice received from counsel or an independent expert on the issues that arise in the case;
 - (f) the attitude of the group members to the settlement;
 - (g) the likely duration and cost to members of proceedings if continued to judgement;
 - (h) whether the funder might refuse to fund further proceedings if the settlement is not approved; and
 - (i) whether the settlement involved any unfairness to any member or categories of members for the benefit of others.

Your feedback

E2Q1 Do you agree with this approach? If not, why not?

E2Q2 Are there any other relevant criteria? If so, what are they?

- E2Q3 Are there circumstances in which it would be appropriate for the panel members or counsel to take into account the interests of plaintiffs or members who are not parties to, or bound by, the proposed settlement (e.g. the potential conflict of interest arising when a party seeks to settle by limiting or narrowing the definition of the class to exclude some of the members from the settlement).
- E2Q4 Should our proposal deal with issues relating to disclosure of privileged or confidential communications in the event that approval is not given by the panel or counsel? Is it reasonable to assume that agreement can be reached between the parties that they will not seek to access privileged communications or assert that there has been a waiver of legal professional privilege?
- E2Q5 Are there any additional costs associated with this proposal? Please give details.
- E2Q6 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.

Rationale

64 There is no market in legal claims and therefore the panel members or counsel have no measure for determining whether a settlement agreement is reasonable. We believe that the panel members or counsel should ‘stand in the shoes’ of the various scheme members and determine whether a reasonable member would accept the settlement as reasonable.

65 A considerable body of case law has developed on the appropriate factors for a court to consider in determining whether to approve a settlement of a representative proceeding. Our proposal adopts the tests applied by the Federal Court in approving the settlement of a representative proceeding under the *Federal Court of Australia Act 1976*.

Note: For example, see *Adamson v Professional Investment Services Pty Ltd* [2009] FCA 1235 and *Darwalla Milling Co. Pty Ltd v F Hoffman-La Roche Ltd (No. 2)* (2006) 236 ALR 322 (*Darwalla*).

66 We believe that the panel members or counsel should also take into account the potential for conflicts of interest between members and therefore our proposal also adopts the test applied by Jessup J in *Darwalla* at paragraph 41.

67 The test applied by His Honour in *Darwalla* was to determine whether the settlement involved any actual or potential unfairness to any member or categories of members having regard to all relevant matters, including whether the overall settlement sum involved unfair compromises by some members or categories of members for the benefit of others, and whether the distribution scheme fairly reflected the apparent or assumed relative losses suffered by particular members or categories of members.

F Regulatory and financial impact

- 68 In developing the proposals in this paper, we have carefully considered their regulatory and financial impact. On the information currently available to us we think they will strike an appropriate balance between:
- (a) ensuring that conflicts are managed to minimise the risk of members' interests being disadvantaged by unlawful operation of litigation schemes and proof of debt schemes; and
 - (b) facilitating the operation of litigation schemes and proof of debt schemes in an economic manner meeting the needs of members.
- 69 Before settling on a final policy, we will comply with the Australian Government's regulatory impact analysis (RIA) requirements by:
- (a) considering all feasible options, including examining the likely impacts of the range of alternative options which could meet our policy objectives;
 - (b) if regulatory options are under consideration, notifying the Office of Best Practice Regulation (OBPR); and
 - (c) if our proposed option has more than minor or machinery impact on business or the not-for-profit sector, preparing a Regulation Impact Statement (RIS).
- 70 All RISs are submitted to the OBPR for approval before we make any final decision. Without an approved RIS, ASIC is unable to give relief or make any other form of regulation, including issuing a regulatory guide that contains regulation.
- 71 To ensure that we are in a position to properly complete any required RIS, we ask you to provide us with as much information as you can about our proposals or any alternative approaches, including:
- (a) the likely compliance costs;
 - (b) the likely effect on competition; and
 - (c) other impacts, costs and benefits.
- See 'The consultation process', p. 4.

Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an Australian financial services licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7)
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Amendment Regulation	Corporations Amendment Regulation 2012 (No. 6)
funder	An entity that agrees to partially or fully fund potential litigants or creditors of an insolvent company and agrees, among other things, to pay the costs of the lead plaintiff
funding agreement	An agreement between a funder and member that sets out the terms and conditions upon which the funder agrees to partially or fully fund the member's participation in the litigation scheme or proof of debt scheme
litigation scheme	A scheme for making a claim which, if necessary, is to be pursued by participating in, conducting and funding legal proceedings
member	A member of a litigation scheme or proof of debt scheme
proof of debt scheme	A scheme for participating in, conducting and funding the proving of claims against an insolvent company
unfunded scheme	A litigation scheme or proof of debt scheme that is not funded by a funder where the members either agree to meet the costs and disbursements of the proceeding or have special funding arrangements with the lawyers

List of proposals and questions

Proposal	Your feedback
<p>See the discussion in paragraphs 16–19 on areas where there are potential conflicts of interest between the funder, lawyers and members in a litigation scheme or a proof of debt scheme.</p>	<p>A1Q1 Do you agree that, in the areas we have identified for litigation schemes and proof of debt schemes, the interests of the funder, lawyers and members may diverge? If not, why not?</p> <p>A1Q2 Are there any other areas where divergent interests between the funder, lawyers and members may arise, about which we should give specific guidance?</p>
<p>B1 We propose that each funder and each lawyer should:</p> <p>(a) be responsible for determining their own arrangements to manage interests that may conflict with their duties; and</p> <p>(b) be able to demonstrate that they have adequate arrangements to manage conflicts of interest, including documenting, implementing, monitoring and reviewing their arrangements.</p>	<p>B1Q1 Do you agree with this proposal? If not, why not?</p> <p>B1Q2 Do you think that this proposal gives adequate assurance that we will achieve our objectives identified in paragraphs 20–22? Please give reasons for your views.</p> <p>B1Q3 Should some or all of our proposals differentiate between litigation schemes and proof of debt schemes? If so, please explain why.</p> <p>B1Q4 Is any transition period required, over and above the six-month transition period prescribed in the Corporations Amendment Regulation, to ensure that adequate arrangements to manage interests that may conflict are in place? If so, is six months a sufficient period?</p> <p>B1Q5 Please give details of any additional costs associated with the implementation of our proposals. If possible, please quantify these costs.</p> <p>B1Q6 What benefits do you consider will result from these proposals? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>B2 We propose that our guidance to manage divergent interests will only apply to funders and lawyers involved in a litigation scheme or proof of debt scheme to the extent that they:</p> <p>(a) rely on the exemptions under the Corporations Amendment Regulation for such activities; or</p> <p>(b) conduct their activities under an AFS licence.</p>	<p>B2Q1 Do you agree with this proposal? If not, why not?</p> <p>B2Q2 Do you think that there are any circumstances where this proposal should not apply?</p> <p>B2Q3 Do you think that the fiduciary duties and ethical and professional obligations imposed on lawyers already offer sufficient protection for members? If so, please give detailed reasons.</p> <p>B2Q4 Do you think that our proposals conflict with any fiduciary duties or ethical or professional obligations already imposed on lawyers? If so, please identify which ones and provide detailed reasons.</p> <p>B2Q5 Do you think that it is necessary that a direct contractual relationship should exist between the members and the lawyers in a litigation scheme or a proof of debt scheme?</p>
<p>B3 We propose that any exemptions we have previously given litigation schemes or proof of debt schemes from the requirements in Chs 5C and 7 of the Corporations Act will be revoked.</p>	<p>B3Q1 Do you agree with this proposal? If not, why not?</p> <p>B3Q2 Please give details of any additional costs associated with the implementation of this proposal.</p> <p>B3Q3 Is any transition period required before the revocation?</p>
<p>C1 We propose that the funder should provide prospective members with:</p> <p>(a) information that is likely to assist them to understand the different significant interests of the funder, lawyers and members, and how they may conflict; and</p> <p>(b) details of any dispute resolution options that are available to a member who has a dispute with the funder.</p>	<p>C1Q1 Do you agree with this proposal? If not, why not?</p> <p>C1Q2 Are there any practical problems with the application of this proposal? Please give details.</p> <p>C1Q3 Should we provide specific guidance about disclosure of conflicts of interest or is it appropriate for the funder to determine what is appropriate disclosure based on the facts and circumstances?</p> <p>C1Q4 Please give details of any additional costs associated with the implementation of this proposal? If possible, please quantify these costs.</p> <p>C1Q5 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>C2 We propose that there should be mechanisms in place so that if the funder or lawyers become aware of a significant divergence in their interests, and which has not already been disclosed, they should tell each affected member at the first reasonable opportunity.</p>	<p>C2Q1 Do you agree with this proposal? If not, why not?</p> <p>C2Q2 Are there any practical problems associated with the application of this proposal? Please give details.</p> <p>C2Q3 Please give details of any additional costs associated with the implementation of this proposal? If possible, please quantify these costs.</p> <p>C2Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>
<p>C3 We propose that the disclosure of the diverging interests of the funder, lawyers and members, and how they may conflict, should:</p> <p>(a) be timely, prominent and specific; and</p> <p>(b) contain enough detail for members to understand the potential impact of the diverging interests on the litigation scheme or proof of debt scheme.</p>	<p>C3Q1 Do you agree with this proposal? If not, why not?</p> <p>C3Q2 Are there any other minimum features of effective disclosure we should expect of funders and lawyers in managing conflicts of interest? Please give details.</p> <p>C3Q3 What additional costs, if any, would arise from meeting our proposed expectations? If possible, please quantify these costs.</p> <p>C3Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>
<p>D1 We propose that the funder and lawyers should be able to demonstrate that they have processes and procedures to:</p> <p>(a) identify divergent interests and where conflicts may arise;</p> <p>(b) assess those interests and potential conflicts; and</p> <p>(c) decide upon and implement an appropriate response to those divergent interests and potential conflicts.</p>	<p>D1Q1 Are there any measures, processes or procedures that we should expect most or all funders and/or lawyers to have in place? Please give details.</p> <p>D1Q2 Are there any practical problems with the application of this proposal to particular litigation schemes or proof of debt schemes? Please give details.</p> <p>D1Q3 Please give details of any additional costs associated with this proposal. If possible, please quantify these costs.</p> <p>D1Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>D2 We propose that the funder and lawyers should be able to demonstrate that the processes and procedures they adopt are:</p> <ul style="list-style-type: none"> (a) tailored to the nature, scale and complexity of the litigation scheme or proof of debt scheme, including the number of members that are party to the scheme; (b) documented; (c) effectively implemented; (d) regularly monitored and reviewed, and updated as needed; and (e) overseen by a designated senior person (or persons) within the funder or law firm who takes responsibility for their implementation and monitoring. 	<p>D2Q1 Are there other key features of effective and efficient arrangements that we should expect most or all funders and/or lawyers to have in place? Please give details.</p> <p>D2Q2 Are there any practical problems with the application of this proposal to particular litigation schemes or proof of debt schemes? Please give details.</p> <p>D2Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.</p> <p>D2Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>
<p>D3 We propose that the funder and lawyers should ensure that they have in place appropriate policies and procedures so that when they are faced with a conflict between their interest and the interests of members, the members' interests are adequately protected.</p>	<p>D3Q1 Do you agree with this proposal? If not, why not?</p> <p>D3Q2 Are there any practical problems with the application of this proposal? Please give details.</p> <p>D3Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.</p> <p>D3Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>
<p>D4 We propose that the funder and/or lawyers recruiting members for a litigation scheme or proof of debt scheme should have arrangements to ensure that conflicts do not result in misleading or deceptive conduct, including having a senior person with designated responsibility to oversee recruitment practices.</p>	<p>D4Q1 Do you agree with this proposal? If not, why not?</p> <p>D4Q2 Does this proposal adequately address the consumer protection issues arising from conflicts of interest?</p> <p>D4Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.</p> <p>D4Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>D5 We do not propose to require particular terms in the agreement relating to the litigation scheme or proof of debt scheme. However, we propose that, as part of the obligation to control situations where conflicts may arise, the funder and/or lawyers should review the terms of agreements to which they are a party in light of the existing body of law on unfair contracts and unconscionability, where relevant.</p>	<p>D5Q1 Do you agree with this proposal? If not, why not?</p> <p>D5Q2 Do you think that a funding agreement should include terms that impose a legally enforceable obligation on the funder to implement the proposals in this paper?</p> <p>D5Q3 Does the existing body of law on unfair contracts, such as the unfair contract provisions in the Australian Securities and Investments Commission Act 2001 (ASIC Act) or the Competition and Consumer Act 2010, provide adequate protection for members?</p> <p>D5Q4 Are there any terms in a funding agreement that are necessary to manage conflicts? For example, an appropriate form of dispute resolution is one means by which members' interests and the funder's interests can be fairly balanced.</p> <p>D5Q5 Are there any additional costs that would arise from meeting our expectations in this proposal? If possible, please quantify these costs.</p> <p>D5Q6 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>
<p>D6 We propose that if there is no direct contractual relationship between the lawyers and members, the funder should ensure that they engage the lawyers on terms that make clear that if there is a divergence of interests between the funder and the member, the lawyers must ensure that the members' interests are adequately protected.</p>	<p>D6Q1 Do you agree with this proposal? If not, why not?</p> <p>D6Q2 Are there any practical problems with the application of this proposal? If so, please give details.</p> <p>D6Q3 Does this proposal adequately address the consumer protection issues arising from interests that may conflict?</p> <p>D6Q4 Are there any additional costs associated with our proposal? If possible, please quantify these costs.</p> <p>D6Q5 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>D7 We propose that there should be either:</p> <p>(a) independence between the funder, lawyers and members; or</p> <p>(b) if there is no such independence, the relationship should be disclosed to members.</p>	<p>D7Q1 Do you agree with this proposal? If not, why not?</p> <p>D7Q2 Are there any practical problems with the application of this proposal? If so, please give details.</p> <p>D7Q3 Are there any additional costs associated with this proposal? If possible, please quantify these costs.</p> <p>D7Q4 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>
<p>E1 We propose to adopt one of the following options when proceedings have not been issued:</p> <p>Option 1</p> <p>The terms of any settlement agreement of a litigation scheme should be approved by either:</p> <p>(a) a panel comprising at least one independent person; or</p> <p>(b) counsel (or senior counsel if involved).</p> <p>Option 2</p> <p>Any settlement offer in a litigation scheme to be made by the members, or the acceptance of any settlement offer received by the members, should be approved by either:</p> <p>(a) a panel comprising at least one independent person; or</p> <p>(b) counsel (or senior counsel if involved).</p>	<p>E1Q1 Which of Option 1(a), Option 1(b), Option 2(a) or Option 2(b) is preferable? Please explain why.</p> <p>E1Q2 Is it common for a litigation scheme to be settled before proceedings are issued? Please give details.</p> <p>E1Q3 What is the financial impact of each option on you or your law firm or your funder? Please quantify these costs.</p> <p>E1Q4 What additional costs might arise for the members from adopting any of the options in this proposal? Please quantify these costs.</p> <p>E1Q5 Who should bear the costs of whichever option is adopted? Please give reasons.</p> <p>E1Q6 What benefits do you consider will result from each option in this proposal? If possible, please quantify these benefits.</p>

Proposal	Your feedback
<p>E2 We propose that in reviewing a settlement agreement or offer, the panel members or counsel must be satisfied that the settlement agreement or offer is fair and reasonable, taking into account the claims made on behalf of the members who will be bound by the settlement and potential conflicts between the funder and/or lawyers and the members as well as between the group members. In satisfying themselves that the proposed settlement is fair and reasonable, the panel members or counsel should take into account, among other things, the following factors:</p> <ul style="list-style-type: none"> (a) the amount offered to each member; (b) the prospects of success in the proceeding (i.e. the weaknesses, substantial or procedural, in the case advanced by the members); (c) the likelihood of members obtaining judgement for an amount significantly in excess of the settlement sum; (d) whether the settlement sum falls within a realistic range of likely outcomes; (e) the terms of any advice received from counsel or an independent expert on the issues that arise in the case; (f) the attitude of the group members to the settlement; (g) the likely duration and cost to members of proceedings if continued to judgement; (h) whether the funder might refuse to fund further proceedings if the settlement is not approved; and (i) whether the settlement involved any unfairness to any member or categories of members for the benefit of others. 	<p>E2Q1 Do you agree with this approach? If not, why not?</p> <p>E2Q2 Are there any other relevant criteria? If so, what are they?</p> <p>E2Q3 Are there circumstances in which it would be appropriate for the panel members or counsel to take into account the interests of plaintiffs or members who are not parties to, or bound by, the proposed settlement (e.g. the potential conflict of interest arising when a party seeks to settle by limiting or narrowing the definition of the class to exclude some of the members from the settlement).</p> <p>E2Q4 Should our proposal deal with issues relating to disclosure of privileged or confidential communications in the event that approval is not given by the panel or counsel? Is it reasonable to assume that agreement can be reached between the parties that they will not seek to access privileged communications or assert that there has been a waiver of legal professional privilege?</p> <p>E2Q5 Are there any additional costs associated with this proposal? Please give details.</p> <p>E2Q6 What benefits do you consider will result from this proposal? If possible, please quantify these benefits.</p>