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**CLASS ACTIONS, LITIGATION FUNDING AND  
ACCESS TO JUSTICE**

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# **Class Actions, Litigation Funding and Access to Justice**

**Public Lecture Addressing Victorian Law Reform Commission Consultation Paper, Access to Justice — Litigation Funding and Group Proceedings (July 2017)**

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## **Introduction**

The Victorian Law Reform Commission (VLRC), *Access to Justice — Litigation Funding and Group Proceedings Consultation Paper* (July 2017) is a comprehensive review of the numerous issues that have been debated in relation to the operation of class actions in Australia, including the group proceedings regime contained in Part 4A of the *Supreme Court Act 1986* (Vic).

The Victorian Attorney-General and the VLRC are to be congratulated for undertaking this review as the class actions regime, with the aid of litigation funding, has become a central plank for access to justice. However, class actions are often expensive with the result that much of the access to justice achieved, usually monetary compensation, does not go to the group members who have been harmed. Instead the resources that could have been used to compensate the victims of bushfires, faulty hip implants, anti-competitive conduct or securities law violations (alleged but not proved in most cases) are lost to transaction costs. The Civil Justice System must do better and a review of class actions, legal fees and litigation funding is an important first step.

The aim of this paper is to respond to a selection of the issues raised by the VLRC consultation paper, in particular:

- certification of class actions, including address multiple/concurrent class actions;
- settlement criteria;
- court oversight of costs and fees;
- assistance for courts in providing oversight;
- confidentiality of settlement amounts, legal fees and funder fees; and
- forum shopping.

The hope is that by setting out responses ahead of the deadline for submissions this will encourage others to critique the responses or express agreement.

## **Certification of class actions**

### ALRC position

The ALRC examined the certification or authorisation procedures adopted in the United States and Quebec, Canada.<sup>1</sup> These procedures required the applicant to establish that the formal requirements for a class action have been fulfilled. The ALRC Report stated:

... Class actions, like all litigation, are open to abuse. Because of the potential numbers involved and the fact that many group members may be absent, specific safeguards have been built into the Commission's recommended procedure to protect the interests of both group members and respondents. In light of the recommended safeguards, the Commission sees no value in imposing an additional costly procedure, with a strong risk of appeal involving further delay and expense, which will not achieve the aims of protecting parties or ensuring efficiency. No certification procedure is recommended.<sup>2</sup>

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<sup>1</sup> Federal Rules of Civil Procedure (US) r 23 and An Act respecting the class action 1978 c 8 (Quebec), art 1002.

<sup>2</sup> Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No. 46 (1988), [147].

However the focus now is not just on avoiding an abuse of process but efficiency. The costs and delay that the ALRC was concerned about have eventuated without a certification process due to numerous interlocutory procedures aimed at challenging, or clarifying, the case being brought.<sup>3</sup> Cost and delay has also increased with the advent of concurrent class actions and litigation funding, developments not foreseen by the ALRC.

The Supreme Court of Victoria's class actions practice note in requiring key matters be dealt with at the first case management hearing<sup>4</sup> and the need more generally for the contours of the class action to be resolved as early as possible to facilitate notice to group members and the management of future case preparation steps is informally moving towards a quasi-certification format. Early identification of problems with the class action, including pleadings and group definition, can avoid cost and delay associated with interlocutory challenges and responding amendments. To this may be added the need for addressing litigation funding and orders to facilitate a common fund<sup>5</sup> that are required at the beginning of proceedings. Consequently, it may be more efficient to place the onus on the entities with the best knowledge of the proposed class action to come forward and demonstrate that it complies with the requirements for cohesion and adequacy of representation, as well as seeking orders for other key steps aimed at determining the 'shape' of the class action.

#### A Suggested Approach to Certification

The plaintiff must satisfy the Court that the requirements in ss 33C and 33H of the *Supreme Court Act 1986* (Vic) are met as at the date of certification. For s 33C that means demonstrating:

- a) 7 or more persons have claims against the same person; and
- b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
- c) the claims of all those persons give rise to a substantial common issue of law or fact;

For s 33H this means being able to:

- a) describe or otherwise identify the group members to whom the proceeding relates; and
- b) specify the nature of the claims made on behalf of the group members and the relief claimed; and
- c) specify the questions of law or fact common to the claims of the group members.

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<sup>3</sup> See *Bright v Femcare Limited* (2003) 195 ALR 574; [2002] FCAFC 243, [160]; *P Dawson Nominees Pty Ltd v Multiplex Ltd* [2007] FCA 1061, [18] (Experience of class actions suggests that the absence of a certification process is itself the cause of numerous interlocutory applications with resultant expense and delay.); Rachael Mulheron, 'Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550, 568. See also *Hodges v Waters (No 7)* [2015] FCA 264, [16]-[18]; *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited (No 2)* [2017] FCAFC 116 for recent examples of interlocutory disputes in class actions causing cost and delay.

<sup>4</sup> Supreme Court of Victoria, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [5.7]-[5.8]. See also Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 25 October 2016, [7.1]-[7.11].

<sup>5</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.

The requirements should not change so that the precedent that has developed in relation to the meaning of these provisions is not lost. The requirements are arguably not ideal,<sup>6</sup> but if there is a move to certification then it is better to keep the certainty of the existing provisions, at least for now.

The plaintiff must also satisfy the Court, that as the representative party, she/he/it is able to bring the proceedings based on their:

1. ability to provide adequate representation
2. retaining sufficiently skilled and efficient legal representation
3. obtaining cost-effective financing sufficient to conduct the proceedings.

The aim is that the key requirements for a group proceeding to be successfully undertaken are now the subject of upfront judicial verification.

#### *Adequacy of representation*

Adequate representation would need to be defined. Adequate representation embodies the ideals of loyalty and common – not conflicting – interests. The Supreme Court of the United States has explained the meaning of adequacy of representation as follows:<sup>7</sup>

The adequacy inquiry under r 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent ... "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members".

Adequacy of representation also guards against “The self-proclaimed carrier of a litigious banner [who] may prove to be an indolent or incompetent champion of the common cause in the courtroom” as described by Brennan J in *Carnie v Esanda Finance Corporation Ltd*.<sup>8</sup>

A suggested definition is that it means the ability to represent and protect group members' interests with diligence and loyalty.

Alternatively, rather than referring to loyalty, reference could be made to an alignment of interests so that no conflict of interest arises.

#### *Choice of Lawyers*

This element requires the representative party to select legal representation. The criteria for selection is not particularly high – “sufficiently skilled and efficient”. Another expression might be sufficiently competent. The idea is that they don’t have to be the most pre-eminent and experienced lawyer, although they might be, but rather that they can perform the role.

The idea is not to create barriers to entry for legal representation and to recognize that in Victoria there is an independent bar that allows access to the necessary skill set, regardless of the particular lawyer or law firm that appears on the record.

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<sup>6</sup> See eg John Emmerig and Michael Legg, “Twenty Five Years of Australian Class Actions—Time for Reform” (2017) 36 *Civil Justice Quarterly* 164.

<sup>7</sup> *Amchem Products, Inc v Windsor* 521 US 591, 625-626 (1997).

<sup>8</sup> *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 408.

The requirement for efficiency is to bring into play the need for legal fees to be efficiently incurred from the very commencement of the class action, even though they will be assessed in relation to any settlement or judgment.

### *Financing*

The choice of cost-effective financing is a deliberate attempt to permit a range of approaches to financing the class action. Financing involves both (a) payment of legal fees and disbursements and (b) payment of any adverse costs order, including providing security for costs.

The former can be dealt with by the representative party paying those costs, possibly with contributions from group members, through a conditional or no-win no-fee arrangement, or through litigation funding.

The costs of bringing the group proceeding can usually be recovered from an opponent if the proceeding is successful. If the class action is unsuccessful then the representative party (but not group members) is liable for the opponent's costs.<sup>9</sup> This category of costs can be addressed through litigation funding, which provides an indemnity to the representative party, and/or by obtaining after-the-event (ATE) insurance.

Each of these approaches has advantages and disadvantages, which may vary depending on the actual terms, including the costs of obtaining them, that a court would need to weigh.

In relation to litigation funding the approach may include seeking an order permitting a common fund at the commencement of proceedings, with the fee to be determined by the court if the proceedings are successfully concluded.

It may also be possible that other novel forms of funding arise. For example a regulator or legal aid may seek to fund a group proceeding.

### Multiple group proceedings

Multiple or concurrent group proceedings are undesirable as they increase costs. Put simply, class actions are designed to allow for the sharing of costs and economies of scale. Allowing more than one class action to be brought means that efficiencies are lost and costs are duplicated.<sup>10</sup>

Where multiple group proceedings are commenced, then at the certification hearing, the court is to select the most able representative party based on the three criteria listed above.

The other proceedings are unable to proceed. The aim is that there is only one class action which is brought on behalf of all group members.

This is to overcome the current situation identified in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*, namely, "Under Part IVA there is no certification process; representative proceedings can be issued as of right and continue, provided that the conditions in ss 33C and 33H

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<sup>9</sup> *Supreme Court Act 1986* (Vic) s 33ZD. The Federal equivalent is *Federal Court of Australia Act 1976* (Cth) s 43(1A).

<sup>10</sup> See *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [44] for examples of duplicated costs

are satisfied and subject to there later being no s 33N order.” The aim of the amendment would be to create a situation where “there is no entitlement for any proceeding to go forward as a class action until certification”.<sup>11</sup>

However, devising an approach for selecting a class action to proceed does not end the issue. Victorian class actions may then face the “Worldcom problem”.<sup>12</sup> A law firm/funder that is not part of the class action selected to proceed may encourage their clients to opt out, with the result that there is a large-scale exit of group members. Those group members may sue individually or together. However, to prevent the selection of a single class action being undermined it may be necessary to stay any non-group proceeding until the group proceeding has resolved. The ability of group members to opt out is maintained but they go to the back of the queue. Where multiple jurisdictions are involved the cross-vesting regime would also play an important role. A solution to the “Worldcom problem” needs to choose between reducing the costs associated with multiple proceedings and allowing group members to have the right to choose how their claim will be prosecuted, or not.

### **Settlement Criteria**

The Australian Law Reform Commission in its *Managing Justice* report in 1999 observed that s 33V requires judges to approve settlements of class actions but does not specify the criteria judges should use to grant such approval.<sup>13</sup> The Commission stated that it supported the drafting of specified criteria for judges to take into account in approving a settlement.<sup>14</sup>

The criteria for approving settlements has been discussed on a number of occasions and has crystallised into two main questions: whether (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the class members who will be bound by the settlement; and (b) the proposed settlement has been undertaken in the interests of class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).<sup>15</sup>

These requirements have been described as the two “critical questions”.<sup>16</sup> This reflects the fact that the court has an important and onerous role in needing to protect the interests of group members who are not before the court but will be bound by its decision.

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<sup>11</sup> *McKay Super Solutions Pty Ltd (Trustee) v Bellamy’s Australia Ltd* [2017] FCA 947, [54].

<sup>12</sup> John Coffee, *Entrepreneurial Litigation* (Harvard University Press, 2015) 75. When William Lerach’s firm of Lerach, Coughlin, Stoia, Geller, Rudman & Robbins was not selected as class counsel in the WorldCom class action Mr Lerach convinced some sixty-five investors to opt out of the WorldCom action.

<sup>13</sup> Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system, Report 89* (2000) 541 [7.107]. Section 33V(1) states: ‘A representative proceeding may not be settled or discontinued without the approval of the Court’.

<sup>14</sup> Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system, Report 89* (2000) 541 [7.108].

<sup>15</sup> Supreme Court of Victoria, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.1]. See also Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 25 October 2016, [14.3].

<sup>16</sup> *Matthews v Ausnet Electricity Services Pty Ltd* [2014] VSC 663, [34]; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [45].

*In Williams v FAI Home Security Pty Ltd (No 4) [2000] FCA 1925 Golberg J, citing Re General Motors Corp Pick-Up Truck Fuel Tank Products Liability Litigation 55 F 3d 768, 785 (3d Cir 1995), set out a number of criteria that may be considered by the court in assessing the fairness and reasonableness of a settlement:*

Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

However, the above criteria are not exhaustive, but rather function as a useful guide. Particular cases may require different matters to be considered or emphasised.

The Victorian class actions practice note adopts the *Williams v FAI* list of factors, but also adds “the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding”.<sup>17</sup>

The US text *Newberg on Class Actions* § 13:48 (5th ed) explains that in the US most jurisdictions have developed multi-factorial tests for considering settlement approval with the following being recurring factors:<sup>18</sup>

1. the amount of the settlement in light of the potential recovery discounted by the likelihood of plaintiffs prevailing at trial;
2. the extent to which the parties have engaged in sufficient discovery to evaluate the merits of the case;
3. the complexity and potential costs of trial;
4. the number and content of objections;
5. the recommendations of experienced counsel that settlement is appropriate; and, in some instances
6. the capacity for the defendant to withstand a larger judgment.

The two “critical questions” and criteria for assessing the fairness of a settlement should be inserted in s 33V.

Legislation is needed to not just guide judges but to ensure that the factors are given due consideration. If the legislation requires that certain criteria be considered, and one or some are not considered, then the judge’s discretion will have miscarried.<sup>19</sup>

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<sup>17</sup> Supreme Court of Victoria, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.3].

<sup>18</sup> See also *Manual for Complex Litigation* (Federal Judicial Centre, 4<sup>th</sup> ed 2004) §21.62.

<sup>19</sup> *House v The King* (1936) 55 CLR 499, 504-505.



The specification of relevant factors will also perform an educative role for the public generally, and group members in particular, so that they can better comprehend what matters are considered in determining whether to approve a settlement.

### **Court Oversight of Costs / Fees**

The issues arising in relation to protection of group members and litigants is different, in that group members may or may not have entered into a retainer and funding agreement, so that they may never have had the opportunity to negotiate the terms. Equally, for most group members even when they enter a retainer and a funding agreement there is little ability to negotiate the terms unless they are a large institutional investor with a significant stake in the proceedings.

The class actions regime in Victoria should be amended to provide the Court with specific power to review all fees and costs charged in relation to a class action, in particular legal costs, litigation funding fees and settlement distribution costs. This should not be controversial as the Full Court of the Federal Court has stated that a court has a supervisory or protective role in relation to legal costs and litigation funding fees proposed to be charged to class members.<sup>20</sup> Further, the legislation should specify the objective of that power in general terms.

The legislative provision could apply to all fees and costs. It could simply state that all fees and costs must be fair, reasonable and proportionate. Further, that the court has power to review and alter any fee or cost to ensure that it is fair, reasonable and proportionate. However, a reference to proportionality is unlikely to be effective in relation to legal costs if the current judicial understanding of the concept is applied (see below).

Alternatively legal costs, litigation funding fees and settlement distribution costs could be dealt with separately. This approach would allow for a more individualized approach in relation to each category. However, legal fees and funding agreements can be structured in a number of ways and approaches may continue to develop and change.

Litigation funding usually involves an agreement to pay the costs of the litigation, including the legal fees, and indemnifies the representative party against the risk of paying the other party's costs if the case fails. In return, if the claim is successful, the funder will be reimbursed the cost of legal fees and disbursements, and receive a fee, typically a percentage of any funds recovered.<sup>21</sup> Some litigation funders have varied this model of payment by instead setting their fee as a multiple of the funds paid out in legal fees and disbursements, or as being the higher of the multiple and a set percentage.<sup>22</sup>

Lawyers running cases without litigation funding typically employ conditional billing, also called speculative fee agreements or no win no fee agreements, which involve the lawyer's fee only becoming payable to the lawyer if a successful outcome is achieved. Conditional billing may also be combined with an uplift fee agreement where the lawyer takes his or her usual fee plus an agreed

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<sup>20</sup> *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98, [90].

<sup>21</sup> Simone Degeling and Michael Legg, 'Funders and Fiduciaries: Litigation Funders in Australian Class Actions' (2017) 36 *Civil Justice Quarterly* 244, 245.

<sup>22</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [128]. Other more 'exotic' formulations are also available: *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144, [16].

amount or percentage of this usual fee, the uplift, if the action succeeds.<sup>23</sup> Uplift fees must not exceed 25% (excluding disbursements) of the legal fees otherwise payable.<sup>24</sup> However, when a lawyer is acting in a case with litigation funding they will typically charge an hourly fee which the funder will pay. There may be a risk-sharing arrangement with the funder so that some of the fee is held back pending a successful outcome or a success fee is added if the case resolves in the applicants favour. Equally, there have been examples of lawyers, without a litigation funder, who have charged each group member a fixed fee by reference to particular stages in the litigation.<sup>25</sup> The growth in alternative fee arrangements may see other forms of billing develop.<sup>26</sup>

These variations make drafting a legislative provision that is other than generally expressed a challenge.

### Legal Fees

Australian courts have power to regulate costs agreements between a solicitor and a client.<sup>27</sup> In the class action context, the power in section 33ZF has been interpreted as allowing for the supervision of costs agreements with lawyers.<sup>28</sup>

In the Mickleham bushfire class action Emerton J explained the court's role:<sup>29</sup>

It is the Court's role to satisfy itself that the legal costs to be deducted from the Settlement Sum are reasonable in all the circumstances. This is to protect the plaintiff and group members from unfair advantage being taken of them by the plaintiff's solicitor, particularly in circumstances where the information available to group members may be limited and they may have a correspondingly limited capacity to act as contradictors.

There are a number of detailed exegeses of how the court should fulfil its role which are best illustrated by *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [24]-[54] and *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [348]-[386].

Gordon J in *Modtech Engineering Pty Limited v GPT Management Holdings Limited* explained the role of the court as involving two aspects: the test to be adopted by the court and then the material necessary to undertake the assessment. The task of the court is not a taxation. Rather, the questions for the court in assessing the fees and disbursements claimed by the lawyers are:<sup>30</sup>

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<sup>23</sup> Conditional fee agreements are dealt with by the *Legal Profession Uniform Law 2015* (Vic) s 181. Uplift fees are permitted by *Legal Profession Uniform Law 2015* (Vic) s 182.

<sup>24</sup> *Legal Profession Uniform Law 2015* (Vic) s 182(2).

<sup>25</sup> *Clarke v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation)* [2014] VSC 516, [135]; *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439; [2016] FCA 323, [328]

<sup>26</sup> See eg Michael Legg, "The Financing of Commercial Litigation into the Future: Alternative Fess Arrangements and Unbundling of Legal Services", *The Future of Civil Procedure: Innovation and Inertia*, Australian Centre for Justice Innovation, Monash University, Melbourne, 17 February 2016.

<sup>27</sup> *Woolf v Snipe* (1933) 48 CLR 677, 678.

<sup>28</sup> *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, [35]-[37].

<sup>29</sup> *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [79].

<sup>30</sup> *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [32]. See also *Stanford v DePuy International Ltd (No 7)* [2017] FCA 748, [12]; *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [120]; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [179] (In determining whether to approve the deduction of costs from the settlement sum, courts must be satisfied that the costs claimed are

1. are the fees and disbursements of an unreasonable amount having regard to, inter alia, the nature of the work performed, the time taken to perform the work, the seniority of the persons undertaking that work and the appropriateness of the charge out rates for those individuals; and
2. if the work is unreasonable in the circumstances, can the group members be considered to have approved (explicitly or impliedly) the costs claimed.

The types of information that should be put before the judge were stated to include:<sup>31</sup>

1. whether the work in a particular area, or in relation to a particular issue, was undertaken efficiently and appropriately;
2. whether the work was undertaken by a person of appropriate level of seniority;
3. whether the charge out rate was appropriate having regard to the level of seniority of that practitioner and the nature of the work undertaken;
4. whether the task (and associated charge) was appropriate, having regard to the nature of the work and the time taken to complete the task; and
5. the ratio of work and interrelation of work undertaken by the solicitors and the counsel retained.

The approach was followed in *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 at [352], which also set out the methodologies of two independent costs consultants that resulted in the court approving legal costs and disbursements of \$60 million.

The above methodology is comprehensive and considers a range of factors relevant to fairness and reasonableness. However despite its comprehensiveness and admirable objectives it may be ineffective. These concerns may be illustrated by the description of the approach in *Blairgowrie Trading Ltd v Allco Finance Group Ltd*:<sup>32</sup>

subject to the question of proportionality, if unchallenged expert opinion is put before the Court which sets out a commercial and reasonable methodology consistent with the terms of any retainer and which demonstrates that it has been accurately and thoroughly applied to sufficient and probative source records of the solicitors, then it is no part of my function to:

- (a) reject that evidence as to whole or part without very good reason; or
- (b) apply one's own subjective view of what the legal work is "really worth", divorced from the reality of the commercial context within which the work was carried out and the expenses incurred.

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'reasonable in the circumstances'. This does not necessarily require a taxation of the costs claimed (although it may), but rather the tendering of 'sufficient' evidence so as to enable the court to make an assessment as to whether the costs were reasonably incurred.)

<sup>31</sup> *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [37].

<sup>32</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [180]

This extract points out some of the problems in the current approach to the review of legal fees. First, no group member has the wherewithal to be able to challenge an independent costs expert. The court will only receive expert reports commissioned by the applicant (really the lawyers) seeking approval of the legal fees. Second even if fees are greater than permitted by the Supreme Court scale, group members may be seen to have agreed to these fees through entering into a retainer with the lawyer. However, in a class action, lawyers set their own fees and group members have little ability to negotiate. The reality of the commercial context is that group members accept what is on offer or they take no action until there is class closure or a settlement and are subject to the pre-existing legal fee arrangements. Funders might have an incentive to monitor a lawyer's fees as they are paying those fees during the litigation, but this may be undercut by the fact that if a settlement is reached the funder will be reimbursed for those legal fees.

The Productivity Commission report from 5 September 2014 found that solicitors generally charge on a time basis and law firm partners typically charge more than \$600 per hour, while associates charge around \$400 per hour.<sup>33</sup>

The fees that are charged in class actions may be illustrated by the recent examples in schedule 1. Partner fees are now in the \$800 range for class actions and associates in the range of \$440 to \$600 depending on seniority. There is also the use of trainee lawyers and paralegals, ie persons who are not admitted as legal practitioners, in the \$300 - \$350 range. This is the commercial reality.

Provided the work is needed and carried out by a person at the appropriate level of seniority using rates in the retainer it will not be capable of being challenged. This may be acceptable for non class action litigation where the client enters a retainer, receives the mandated disclosures and can give instructions, but it is problematic in a class action where there is a need to protect group members.

A review for fairness and reasonableness will not reduce legal fees. As a result proportionality is invoked.

#### Proportionality and Legal Costs

In the Mickelham bushfire class action Emerton J described the legal costs in the proceeding as high relative to the Settlement Sum.<sup>34</sup> However her Honour went on to explain as follows:<sup>35</sup>

Section 24 of the *Civil Procedure Act 2010* (Vic) requires reasonable endeavours to be used to ensure that legal and other costs incurred in connection with a civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.

In *Yara Australia Pty Ltd v Oswal*, [ (2013) 41 VR 302] the Court of Appeal held, in effect, that that the concept of proportionality in s 24 is forward looking. For each piece of work, a practitioner must consider whether the cost of the work is in proportion to the factors in s 24(a) and (b), namely the complexity and importance of the issues in dispute and the amount in dispute.[at 313 [36]] Hence, when assessing the expected benefit, the Court's

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<sup>33</sup> Productivity Commission, Access to Justice Arrangements (September 2014) 115-116.

<sup>34</sup> *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [89].

<sup>35</sup> *Id*, [109]-[111].

analysis must focus on the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved.*[Foley v Gay [2016] FCA 273, [24]]*

As a result, the fact that legal costs may be high in absolute terms or as a percentage of the Settlement Sum is not a proper basis for concluding that legal costs are disproportionate.*[Ibid]* It is necessary to consider whether, at the time the work was being performed, that work was not justified having regard to the complexity or importance of the issues in dispute or the amount in dispute.

Proportionality of legal costs has also become an important consideration in the Federal Court.<sup>36</sup> In *Foley v Gay Beach J* observed:<sup>37</sup>

I do accept, however, that what is claimed for legal costs should not be disproportionate to the nature of the context, the litigation involved and the expected benefit. The Court should not approve an amount that is disproportionate. But such an assessment cannot be made on the simplistic basis that the costs claimed are high in absolute dollar terms or high as a percentage of the total recovery. In the latter case, spending \$0.50 to recover an expected \$1.00 may be proportionate if it is necessary to spend the \$0.50. In the former case, the absolute dollar amount as a free-standing figure is an irrelevant metric. The question is to compare it with the benefit sought to be gained from the litigation. Moreover, one should be careful not to use hindsight bias. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved. Proportionality looks to the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed; at the later time, circumstances may have changed to alter the calculus, but that would not deny that the work performed and its cost was proportionate at the time it was performed. Perhaps the costs claimed can be compared with the known return, but such a comparison ought not to be confused with a true proportionality analysis. Nevertheless, any disparity with the known return may invite the question whether the costs were disproportionate, but would not itself answer that question.

Beach J further explains his approach by reference to the fact that the lawyers are paid on an hourly basis, not through a contingency fee, and are not “co-venturers” with the applicant. As a result “the actual outcome is a risk borne by the applicant and group members (and the litigation funder), but not the independent lawyer who is not sharing in the returns of the enterprise”.<sup>38</sup>

This approach creates a number of problems for the effective use of proportionality as a means to monitor costs.

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<sup>36</sup> *Foley v Gay [2016] FCA 273; Newstart 123 Pty Ltd v Billabong International Ltd [2016] FCA 1194; Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330.*

<sup>37</sup> *Foley v Gay [2016] FCA 273 at [24].*

<sup>38</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3) [2017] FCA 330, [183].*

Proportionality turns on a clear understanding of the denominator in the equation, that is, what the costs are being compared to.

The above approach disparages a comparison with the actual outcome achieved. Rather the correct denominator is said to be to “the expected realistic return at the time the work being charged for was performed”.

However, the actual outcome is clearly identifiable and known. It is the recovery that the proceedings have achieved for the group members. It is the access to justice in quantifiable terms that the lawyers have facilitated.

In contrast, the expected return is much more difficult to determine. The expected return from the proceedings is rarely disclosed in a settlement approval hearing, despite recovery compared to loss being a key indicator of the success of a class action seeking compensation.

Lawyers and funders will often seek to attract group member interest by stating that the claim is worth a large amount. However, this is a figure provided to the media as part of marketing or the “book-build”. Is this “the expected realistic return”? Probably not as the value of the claim is often determined by a range of assumptions that will rarely eventuate, including that all potential group members participate and they recover on the most favourable basis.

The above discussion probably simplifies the task. Focussing on the “the expected realistic return at the time the work being charged for was performed” necessitates determining that return as each piece of work is performed, not just when the proceedings commenced. The expected return will change as further information becomes known, such as through the filing of defences, subpoenas, discovery, opt out notices, expert reports etc. No judgment that considers proportionality appears to undertake this task, rather they just object to a focus on the actual result achieved.

Proportionality determined by a denominator of “the expected realistic return” at the time the cost is incurred is similar or the same as considering fairness and reasonableness. Indeed, it would be very difficult for an expert witness asked to opine on costs to know what “the expected realistic return” was at the time work was undertaken. Recourse to the well-worn fair and reasonable test follows.

The idea that the lawyer is not a co-venturer must also be questioned. A lawyer acting without litigation funding will typically act on a conditional fee bases giving them a keen interest in the outcome. Indeed with an uplift fee they have a clear interest in the increasing the work they undertake. Where the lawyer is paid by a litigation funder, so that they are not exposed to the risk of no recovery if the claim is unsuccessful, this still involves the lawyer investing their time and resources in the class action in the hope that they can carry out the necessary work so as to earn a fee. In *HFPS Pty Limited (Trustee) v Tamaya Resources Limited (in Liq)* Wigney J observed:<sup>39</sup>

The amounts paid to the lawyers and litigation funder in this case, when compared with the amounts to be distributed to group members, may cause some to wonder whether

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<sup>39</sup> *HFPS Pty Limited (Trustee) v Tamaya Resources Limited (in Liq) (No 3)* [2017] FCA 650, [126]. See also *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, [4]–[6]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811, [25]–[26]; *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311, [39].

securities class actions like this matter are anything more than essentially entrepreneurial exercises that are generated by class action lawyers and litigation funders so as to earn fees and, in the case of litigation funders, a return on investment.

Moreover, even when the lawyers are being paid on a time basis by a funder they may receive a success fee, or agree to part of their fee being held back until a successful outcome is achieved.

In short, the current approach to proportionality significantly reduces its effectiveness as a means to control costs and ensure that the group members who have been harmed actually receive compensation.

### Litigation Funding

The Full Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* set out a list of factors relevant to assessing the fee a litigation funder could charge, that may be summarised as follows:<sup>40</sup>

- (a) the funding commission rate agreed by sophisticated group members and the number of such group members who agreed.
- (b) the information disclosed to group members as to the amount and calculation of the funding commission;
- (c) a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market;
- (d) the litigation risks of providing funding in the proceeding, including:
  - i. the quantum of adverse costs exposure that the funder assumed, which may be illustrated by the security for costs provided; and
  - ii. the legal costs expended and to be expended;
- (g) the amount of any settlement or judgment and that the funding commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;
- (h) any substantial objections made by group members in relation to any litigation funding charges; and
- (i) group members' likely recovery "in hand" under any pre-existing funding arrangements.

The litigation risks may be further explained as:<sup>41</sup>

- liability risk - the risk that the applicant will fail to establish that the respondent breached the law as alleged;

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<sup>40</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191, [80]. See Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 ALJ 655, 666-669 discussing the relevant factors.

<sup>41</sup> Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 ALJ 655, 666-669.

- causation risk - the risk that the applicant will fail to prove that compensable damage resulted from the respondent's breach of the law;
- quantification risk - the risk that the applicant will fail to establish the loss or damage claimed, or the quantum recoverable is significantly less than expected;
- recovery or enforcement risk - the risk that the respondent has insufficient assets to be able to satisfy the recovery achieved ;
- class action or procedural risk – the risk that a class action procedural requirement such as ss 33C, 33D or 33H cannot be satisfied, or the class action is prevented from continuing as a class action by the court due to the matters set out in s 33N, or other procedural hurdles prevent or stop the proceedings.

As proposed above, Parliament should legislate a general power to set and review litigation funders' fees with the aim of ensuring that they are fair, reasonable and proportionate. The main criteria for determining the fee should be (a) the fee is commensurate with the risks undertaken by the funder and (b) that the fee is proportionate to the outcome achieved. However, unlike the settlement criteria referred to above that have developed over 25 years and for which there are international comparisons, the factors relevant to a funder's fee are only now being developed by the courts. As a result any criteria should be generally expressed.

#### *The Problem of Anchoring*

Anchoring is a cognitive psychology term that refers to a particular heuristic or rule of thumb used by humans to consciously or subconsciously simplify complex decisions. Anchoring and adjustment bias may be defined as:<sup>42</sup>

When making numeric estimates, people commonly rely on the initial value available to them. This initial value provides a starting point that “anchors” the subsequent estimation process. People generally adjust away from the anchor, but typically fail to adjust sufficiently, thereby giving the anchor greater influence on the final estimate than it should have.

In determining the fee that a litigation funder should receive there is a danger that a judge may place too greater weight on either the fee that the funder has used in the particular case, or the fees that have been charged in other class actions. Instead of engaging in the complex exercise of seeking to determine what is the return that compensates for the risk actually undertaken in the particular case, it may be tempting to use the source of fees referred to above as a guide.

There is no easy solution to a cognitive limitation that flows from being human, other than an awareness of the issue by the decision maker so as to allow them to ensure that they do not adopt the short-cut.

#### *Why legislate?*

It may be argued that courts are already reviewing litigation funding fees, having found the power to do so in existing legislative provisions such as ss 33V, 33ZF. However, the scope of that power has been expressed in different ways: the power to refuse to give a settlement approval where the

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<sup>42</sup> Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011) 255.



funding commission was considered 'disproportionate to the risk and expense to which the funder was exposed in the proceedings',<sup>43</sup> or to make any settlement approval subject to a condition limiting the funding commission,<sup>44</sup> or to directly reduce the funding commission to be deducted under the settlement.<sup>45</sup> In each of the cases where the power was found to exist, it was not exercised, or exercised consistent with the fee requested by the funder.<sup>46</sup> As a result the existence of the power has never been challenged on appeal and is not without controversy.<sup>47</sup> Legislation would remove uncertainty and give the court a clear power to review and set litigation funding fees.

### A Back-Stop Provision

A back-stop provision is where the legislature sets the maximum recovery for a particular fee/cost or for the total fees/costs that group members may be charged. The aim is to ensure that fees/costs cannot exceed that amount with the result that the recovery for the group members is protected.

This approach has started to be embraced in practice with funders specifying that their fee and the legal fees charged will not together be more than 50% of any settlement or judgment.<sup>48</sup> As a result a group member receives at least 50% of any recovery.

A back-stop provision or cap may be an effective last-ditch protection for group members. However, the risk of setting caps is that they become the default fee.<sup>49</sup> If class actions can only be prosecuted with half the recovery going in transaction costs then the class action procedure has failed in its objective of providing access to justice.

### **Assistance for Courts**

To assist the Court in determining that the costs amount payable to the lawyers should be approved it has become common practice to supply an affidavit from an independent costs expert who is able to opine as to the reasonableness of the costs and disbursements incurred by the lawyers for the applicant.<sup>50</sup> The Courts place significant reliance on the evidence of the independent costs expert

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<sup>43</sup> *City of Swan v McGraw-Hill Companies, Inc* [2016] FCA 343, [30].

<sup>44</sup> *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277, [42].

<sup>45</sup> *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [134], [157]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [101].

<sup>46</sup> Power not exercised: *Pharm-a-Care Laboratories Pty Ltd v Commonwealth (No 6)* [2011] FCA 277, [43]; *City of Swan v McGraw-Hill Companies, Inc* [2016] FCA 343, [30]; *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [196]. Power exercised consistent with fee acceptable to funder: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [46].

<sup>47</sup> See Ray Finkelstein, 'Class Actions: The Good, The Bad and The Ugly' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992-2017* (Ross Parsons Centre, 2017) 432 n 54 (observing that the correctness of the finding of a power to directly vary a funder's fee was likely to be challenged); Justice MBJ Lee, "Varying Funding Agreements and Freedom of Contract: Some Observations", *IMF Bentham Class Actions Research Initiative with UNSW Law Conference: Resolving Class Actions Effectively and Fairly*, 1 June 2017.

<sup>48</sup> *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [51], [154]; *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, [79].

<sup>49</sup> Michael Legg, "Contingency fees — Antidote or poison for Australian civil justice?" (2015) 39(3) *Australian Bar Review* 244, 266.

<sup>50</sup> *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311, [59].

but it is the judge who must find that the legal fees and disbursements are reasonable.<sup>51</sup> The judge will also consider the general circumstances of the litigation.<sup>52</sup>

The above approach to legal fees has the advantage that they require court approval and thus justification must be provided. The downside is not that a review of legal fees is conducted by a costs expert, but that the costs expert is retained by the lawyers seeking the fee award. The expert may become dependent on the lawyers for repeat work, which is unlikely to continue if legal fees are substantially reduced. Adversarial bias in relation to experts, including selection bias whereby an expert is chosen because their views will support the party's case, has been of long-standing concern amongst the courts.<sup>53</sup>

As funders seek a return for themselves and group members are ill-equipped to act as contradictors then court approval, with the assistance of expert evidence appears necessary. However, an expert appointed by the funder to opine on the funder's fee is problematic for the same reasons explained above ie the danger of selection bias (an expert who will agree is chosen) and adversarial bias (the expert will want to support the person appointing them).<sup>54</sup>

The process for legal fees could be improved without any increase in cost if the Court appointed the expert and the expert owed their allegiances solely to the Court.<sup>55</sup> The Supreme Court of Victoria has moved towards this model in relation to settlement distributions by appointing special referees to review costs.<sup>56</sup> For litigation funders there have not been expert witnesses to date and so requiring them would be an additional cost. But as litigation funding is usually the largest transaction cost in class actions<sup>57</sup> some form of independent review would be justified.

Another source of assistance for the court is to appoint a guardian or contradictor to create the adversarial contest that is often missing in a class action settlement and to give the absent or unrepresented group members a capable voice on the settlement.<sup>58</sup>

An example of a contradictor being used was in *Willmott Forest* where the court directed that counsel should be appointed as a contradictor to represent the interests of non-client class members. The lawyers for the applicant provided the Contradictor with all necessary information, including confidential information, and the cost of the appointment was shared between the parties.<sup>59</sup> The Contradictor originally put on detailed submissions opposing settlement approval.<sup>60</sup>

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<sup>51</sup> *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [30]; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [35].

<sup>52</sup> *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [31]; *Taylor v Telstra Corporation Ltd* [2007] FCA 2008, [73].

<sup>53</sup> See, eg, *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 58, [57]; NSW Law Reform Commission, *Expert Witnesses – Report 109* (June 2005) [5.5]–[5.13].

<sup>54</sup> Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 601-602.

<sup>55</sup> *Id.*, 608-610.

<sup>56</sup> *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731; *Downie v Spiral Foods Pty Ltd (Ruling No 3)* [2017] VSC 7, [4].

<sup>57</sup> *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148, [72].

<sup>58</sup> Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 611.

<sup>59</sup> *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439; [2016] FCA 323, [4].

<sup>60</sup> *Id.*, [53], [112], [216].

When the settlement was recast and there were still concerns about legal fees the Contradictor was appointed to represent class members' interests in relation to the reasonableness of the costs charged.<sup>61</sup>

### **Confidentiality of Settlement Amounts, Legal Fees and Funder Fees**

Orders being granted to render the amount of a settlement, the legal fees or the litigation funder's fee confidential should be kept to a minimum because class actions have a public interest element.

The class action settlement cannot be treated like other litigation where the persons affected are present and wish to have the resolution of their dispute kept confidential. Class actions have a representative capacity and resolve numerous persons' claims, primarily the claims of group members who are not before the court. Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals.<sup>62</sup> Class actions are not simply disputes between private parties about private rights.<sup>63</sup> A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings.

What should be disclosed?

- The aggregate settlement sum
- Legal fees
- Funder's fee
- Settlement distribution scheme costs
- Ideally what the claim was thought to be worth and why.

Since my 2014 *Melbourne University Law Review* article<sup>64</sup> there have been a number of developments in the case law.

In *De Brett Seafood Pty Limited v Qantas Airways Limited (No 7)* [2015] FCA 979 the balancing of open justice and confidentiality was addressed through some paragraphs of the judgment being

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<sup>61</sup> *Kelly v Willmott Forests Ltd (In Liq) (No 5)* [2017] FCA 689, [4].

<sup>62</sup> The objective of class action litigation when introduced into the Federal Court was to provide access to justice, to resolve disputes more efficiently, to avoid respondents facing multiple suits and the risk of inconsistent findings, and to reduce costs for the parties and the courts: See Second Reading Speech, Federal Court of Australia Amendment Bill 1991 (Cth), House of Representatives, 14 November 1991 (Michael Duffy, Attorney-General of Australia) 3176. However, a further objective, deterring contravention of the law was also recognised. See Second Reading Federal Court of Australia Amendment Bill 1991, Minister for Justice and Consumer Affairs, Australia, *Parliamentary Debates*, Senate, 13 November 1991 p 3023. See also Access to Justice Taskforce, Federal Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) 114 ('class actions can have a strong regulatory impact with the potential scale of the pecuniary damages providing a strong incentive to abide by existing laws').

<sup>63</sup> *Madgwick v Kelly* (2013) 212 FCR 1, 21 [91] (referring to the 'significant statutory and public policy in proceedings under Pt IVA' and that Pt IVA is 'an important statutory mechanism for the vindication of the rights of parties'); Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282-4.

<sup>64</sup> Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590.

redacted when it was released on the basis that they referred to confidential information. For example some or all of the text in relation to the following was redacted:

- The risks of maintaining a representative proceeding
- The range of reasonableness of the settlement in light of the best recovery
- The range of reasonableness of the settlement in light of all the attendant risks of litigation

The judge also granted confidentiality orders in relation to a number of affidavits at the time of the hearing and approval of settlement. However, the formal judgment was not handed down until much later. At that time his Honour stated:

given my approval of the settlement, and the time that has elapsed since those documents were prepared, it would be appropriate to either discharge or vary those orders so that (as far as the proper administration of justice allows) the full extent of the information the Court has relied upon is open to the public.

This approach has much to recommend it. Protect confidentiality only to the point where it is required. The effluxion of time will mean that confidentiality no longer needs to be maintained.

In *Hodges v Waters (No 7)* [2015] FCA 264, the parties placed the court in a difficult position by making the proposed settlement subject to confidentiality being maintained. Perram J stated:

[63] The settlement agreement and the distribution scheme are agreed between the parties to the litigation to be confidential. The operation of the settlement deed is such that its confidentiality is a condition precedent to the settlement taking place.

[64] There is no question about the power of the court to approve a confidential settlement either of representative proceedings under s 33V of the Federal Court of Australia Act 1976 (Cth) (see, for example, *Fowler v Airservices Australia* [2009] FCA 1189) or of trust proceedings under s 63. The more difficult question is whether that power should be exercised in this case. The options were but two:

(a) to refuse to approve the settlement under s 33V or to give the judicial advice under s 63 in which case the proceedings would continue until they were tried or another non-confidential settlement was reached; or

(b) to approve the settlement notwithstanding its confidential nature.

[65] Neither course is attractive. As to (a), making the case run merely because the settlement is confidential ensures transparency of process but creates a great deal of financial risk in the process. As to (b), while each unitholder has been told their approximate individual settlement sum, none has been told:

- (i) the global amount paid by KPMG; or
- (ii) the details of the distribution arrangements; or
- (iii) the size of some of the funder's fees which are to be deducted from the settlement.

[66] It is thus, perhaps, difficult for them to understand precisely how the compensation to be allotted to them has been calculated and more difficult still to put together any argument as to why any such settlement should be refused.

[67] In this case, three circumstances seem to me germane in considering whether to accept the confidentiality of the settlement:

(i) as discussed below, I consider the claims against the respondent as being at the weak end of the spectrum and the unitholders' position in the litigation precarious. For the reasons I develop later, the present proposed settlement stands a significant chance of being the class members' best outcome. Scotching it because of concerns about the confidential nature of its terms is not something lightly to be done;

(ii) one of the ends served by the need to get the approval of the court of any settlement under s 33V is external and independent scrutiny. Notwithstanding that the precise global terms of the settlement are to remain confidential, the fact remains that the court has had access to all of the terms of the settlement in assessing whether to grant leave under s 33V and has given them anxious consideration. Effectively, the court exercises a protective jurisdiction in the interests of all class members and does so with full knowledge of every detail of the settlement. This then is not a situation in which there is no scrutiny of the reasonableness of the settlement;

(iii) class members who were sufficiently enthusiastic to see the details of the settlement were provided with them on the execution of appropriate confidentiality agreements. Only one class member, however, took advantage of this.

[68] Taking each of those matters into account, this is a case where I conclude that it is appropriate that I not refuse to approve the settlement just because its terms are to remain confidential.

This decision highlights the problems with confidentiality, particularly for group members who don't know how much the remaining solvent defendant, KPMG,<sup>65</sup> contributed to the settlement, how the settlement was to be distributed or the funder's fee. The sole protection is the review of the settlement terms by the judge. The review by a judge and the provision of reasons is a significant protection, but the scrutiny that open justice seeks to provide is nonetheless diminished when essential information is unavailable.

In *Camilleri v Trust Company (Nominees) Limited* [2015] FCA 1468, Moshinsky J explained:

[59] The applicants seek an order that certain materials filed in support of the application be kept confidential. It is appropriate that the opinions of the applicants' solicitor and counsel remain confidential. In the event that the approval were challenged and overturned on appeal, and the trial then proceeded, it would give TCL an unfair advantage if it had access to the opinions of the applicants' lawyers. I raised with senior counsel for the applicants

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<sup>65</sup> The class action arose out of losses suffered by the MFS Premium Income Fund. Octaviar Limited (formerly MFS Limited) was the former responsible entity of the Fund. However, Octaviar was in liquidation. The remaining defendants were the former directors and officers of Octaviar and KPMG, the auditor of the fund.

whether confidentiality needed to be maintained over the percentage which the settlement sum represents of the applicants' lawyers' estimated 'best case' outcome. I also raised whether the percentage applied in calculating loss in respect of "Rollover Notes" needed to be kept confidential. I am satisfied that it is appropriate for both of these percentages to remain confidential because, if the approval were to be overturned and the trial were to proceed, these figures could directly or indirectly assist TCL. Very briefly, this is because divulging the percentage applied to calculate loss in respect of "Rollover Notes" may implicitly convey information helpful to TCL if the matter were to proceed. And divulging the percentage which the settlement represents of the estimated 'best case' outcome would, through a process of 'reverse engineering', enable TCL to calculate the applicants' lawyers' estimate of loss in respect of "Rollover Notes", which could be helpful to TCL if the matter were to proceed.

The reasoning of Moshinsky J raises the concern about the disclosure of material in a settlement approval judgment being used by a defendant if the settlement was overturned. The concerns could be addressed by only suppressing the information until the deadline to appeal has passed.

In *Foley v Gay* [2016] FCA 273, Beach J stated:

[29] The terms of the settlement deed have been negotiated on a confidential basis. The group represented in these proceedings is a closed class and there may be other aggrieved persons who might consider claims against the respondents. Delicately expressed, disclosure of the terms of settlement could interfere with the proper processes for any such persons to legitimately consider and pursue their rights against the respondents.

[30] Further, the loss assessment formula is the product of legal advice provided to the applicant concerning the relative strengths and weaknesses of the claims in these proceedings. Publication of the formula could facilitate the reverse-engineering of that advice and thus the disclosure of the substance of privileged communications.

[31] Further, the copies of fee and retainer agreements and correspondence with group members are privileged, as is counsels' opinion. Further, the applicant's financial arrangements with third parties are confidential as between them.

[32] In my view, the non-publication orders are appropriate.

The concerns raised by Beach J suggest that waiting for the deadline for an appeal to pass would be insufficient, and it would be necessary to wait for the statute of limitations to run on all claims against the defendant in case there was a claimant who was not bound by the class action. Beach J refers to the closed class nature of the proceeding (not all putative group members are included in the class action) before him but the argument would also apply if there had been group members who opted out. The timeframe in which redacted judgments or confidentiality orders would need to be revisited could be lengthy. However, it should be noted that his Honour appeared to be chiefly concerned with the quantum of the settlement, as the amount of legal fees charged was disclosed.<sup>66</sup>

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<sup>66</sup> *Foley v Gay* [2016] FCA 273, [20]-[23].

There is also a technical question as to whether the opinions of solicitors and counsel prepared for seeking settlement approval are protected by privilege, and if they were, is the privilege waived in being provided to the court. This issue is likely to turn on what the purpose or dominant purpose of the opinions are. Are they prepared to provide legal advice to the client? or to provide professional legal services in relation to proceedings? or as part of the duty to the court in assisting it to determine if the settlement should be approved?<sup>67</sup> Fee and retainer agreements are usually not privileged unless they contain legal advice.<sup>68</sup> However, even if the opinions and agreements were not privileged the court could order that they be treated as confidential.

In Victoria the above considerations must be examined through the lens of the courts' inherent jurisdiction to control their procedures and processes, including prohibiting access to a court file, and the *Open Courts Act 2013* (Vic) which provides a framework for making suppression orders.<sup>69</sup> The proper administration of justice will require a balancing between a number of interests but a court should be concerned to ensure (1) that adequate information is provided to group members so they can assess any settlement, including fees being charged, so they can provide informed submissions to the court; and (2) the public interest element of class actions is considered and weighed so that confidentiality is kept to a minimum.

### **Forum shopping**

An important issue for any reforms suggested by the VLRC and enacted into law is how those changes may impact on where class actions are commenced.

The VLRC's terms of reference require it to report on a number of issues "to ensure that litigants who are seeking to enforce their rights using the services of litigation funders and/or through group proceedings are not exposed to unfair risks or disproportionate cost burdens".<sup>70</sup>

Such a focus is entirely appropriate as group proceedings were designed to assist putative group members obtain access to justice.

However, in group proceedings it is not the litigant or the group members who determine where litigation will be commenced.

If the revised regime is seen as being adverse to plaintiff lawyers' interests or litigation funders' interests will that result in an exodus from Victorian courts, where possible, and the commencement of class actions in another jurisdiction. Alternatively, will developments favorable to the interests of plaintiff lawyers and litigation funders attract litigation to Victoria. Different constituencies will have different views as to the desirability of these two outcomes.

Another possibility is that Victoria adopts a range of reforms – some that help and some that hinder plaintiff lawyers and litigation funders. The ramifications of reform may be unclear.

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<sup>67</sup> See *Evidence Act 2008* (Vic) ss 118, 119.

<sup>68</sup> *Cook v Pasmenco Ltd (No 2)* (2001) 107 FCR 44; 179 ALR 462; [2000] FCA 1819, [45]–[48].

<sup>69</sup> *Strategic Management Australia AFL Pty Ltd v Precision Sports & Entertainment Group Pty Ltd* [2015] VSC 717, [5].

<sup>70</sup> VLRC, *Litigation Funding and Group Proceedings: Terms of Reference*, 16 December 2016.

The aim is to produce the most effective group proceeding regime. To minimise forum shopping it may be beneficial for the VLRC recommendations and/or legislative amendments to be raised for inter-governmental discussions with a view to maintaining uniformity in class action legislative provisions across the Australian jurisdictions where possible. Equally, compromise can be the source of mediocrity.



### Schedule 1 - Examples of Legal Fees

#### Allco Settlement Distribution Scheme - 2017<sup>71</sup>

| Person / Position                | Hourly Rate (ex GST) |
|----------------------------------|----------------------|
| Principal                        | \$800.00             |
| Special Counsel                  | \$715.00             |
| Senior Associate                 | \$595.00             |
| Associate                        | \$535.00             |
| Lawyer                           | \$455.00             |
| Trainee Lawyer/ Law Graduate     | \$370.00             |
| Paralegal / Law Clerk            | \$290.00             |
| Litigation Technology Consultant | \$250.00             |

#### DePuy Hip Replacement Settlement Distribution Scheme - 2016<sup>72</sup>

| Role  | Hourly rate (excluding GST) |
|---|-----------------------------|
| Principal or Partner                              | \$790                       |
| Special Counsel                                   | \$720                       |
| Senior Associate                                  | \$610                       |
| Associate   | \$540                       |
| Lawyer  | \$440                       |
| Graduate Lawyer / Trainee Lawyer / Articled Clerk | \$350                       |
| Paralegal / Legal Clerk / Law Clerk               | \$320                       |
| Litigation Technology Consultant                  | \$240                       |

#### GPT shareholder class action - 2013<sup>73</sup>

| Title  | Hourly Rate (incl GST) |
|--|------------------------|
| Practice Group Leader / Principal / Consultant | \$605.00               |
| Senior Associate                               | \$495.00               |
| Associate                                      | \$440.00               |
| Lawyer   | \$350.00               |
| Trainee / Law Clerk / Support Team Member      | \$250.00               |
| Legal Assistant                                | \$180.00               |

<sup>71</sup> Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liquidation), Federal Court of Australia NSD 1609 of 2013, *Allco Settlement Distribution Scheme*, 31 March 2017 Schedule A available at <https://www.mauriceblackburn.com.au/media/3721/170403-allco-settlement-distribution-scheme.pdf>

<sup>72</sup> Stanford and Dunsmore v DePuy International Ltd and Johnson & Johnson Medical Pty Ltd, Federal Court of Australia, Proceeding NSD 213 of 2011, *Settlement Scheme*, 17 June 2016 cl 13.1 available at <https://www.mauriceblackburn.com.au/media/3172/amended-settlement-scheme.pdf>

<sup>73</sup> *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626, [47].