BUSHFIRE RECOVERY THROUGH CLASS ACTION LITIGATION

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Climate change is increasing the frequency and intensity of bushfires. In the absence of private insurance, those who suffer losses in bushfires have few options available to support their recovery. In recent years, class actions have followed most of the large fire events. Bushfire class actions offer some hope of compensation but claimants face numerous hurdles in securing the compensation needed for prompt recovery. We identify the issues that arise in deciding whether to pursue and settle a bushfire class action, opportunities for improvement, and potential alternatives. We conclude that despite their shortcomings, class actions nonetheless provide a critically important mechanism for enabling individuals and communities to recover from bushfire.

I INTRODUCTION

Over the summer of 2019–20, Australia experienced one of the worst bushfires in recorded history.[1] Some 33 lives were lost, 3,000 homes destroyed and over 24 million hectares of forest and farmland were burnt,[2] with the economic cost estimated at $10 billion.[3] Australia has historically experienced severe bushfires, but climate change is increasing both the frequency and severity of fire risk.[4] Expansion of development in peri-

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[1] *Final Report of the NSW Bushfire Inquiry* (Report, 31 July 2020) iiv.

[2] *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 5.

[3] Ibid.

[4] Bureau of Meteorology, *State of the Climate 2020* (Report, 2020) 5; Intergovernmental Panel on Climate Change, Ove Hoegh-Guldberg et al, *Chapter 3: Impacts of 1.5 ℃ Global Warming on Natural and Human Systems*, 2018, 188–91. The shift to an overall warmer climate increases the occurrence of extreme daily heat events. The south-western and south-eastern corners of Australia have also experienced drying in recent decades which is the most sustained large-scale change in rainfall since 1990. The combination of drought and a prolonged heatwave or record high daily temperatures increases fire weather. Consequently, the severity of the most extreme fire weather days and the length of the fire season has increased in recent decades and will continue to increase.

urban areas is increasing the number of people and homes in harm's way.[5] This heightened exposure to bushfire risk poses a range of challenges for public and private land holders, infrastructure managers, and policymakers.[6] Incremental improvements in bushfire preparedness and response follow each major event, often on the recommendations of various inquiries.[7] These recommendations tend to focus on what steps government can take to improve community and agency preparedness and emergency response for the next fire season, issues over which government agencies have more control.[8] There is much less focus on what needs to be done to support recovery for those who have lost property or suffered personal injury or the loss of a loved one.

Successful long-term community recovery requires that those who have suffered loss can access the funds necessary to repair or rebuild, or to relocate to safer areas. Beyond short-term emergency relief, private insurance is assumed to be the primary source of funds to compensate for bushfire losses.[9] However, many fire victims are either un- or under-insured, for a range of reasons.[10] It is therefore unsurprising that litigation is a critical means by which to fill gaps in insurance coverage and secure the funds necessary to recover from fire.[11]

Australia is no stranger to bushfire litigation, but the target of litigation has changed over time.[12] In recent years, actions have been brought against any

[5] Michael Buxton et al, 'Vulnerability to Bushfire Risk at Melbourne's Urban Fringe: the Failure of Regulatory Land Use Planning' (2011) 49(1) *Geographical Research* 1.

[6] *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 410–4.

[7] See ibid; *Final Report of the NSW Bushfire Inquiry* (Report, 31 July 2020) ch 3; *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010) ch 6.

[8] *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 410–4; *Final Report of the NSW Bushfire Inquiry* (Report, 31 July 2020) ch 3; *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010) ch 6.

[9] *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) 416.

[10] Ibid 417–8.

[11] From one case every 10.4 years from 1925–77, to one case every 3.8 years from 1978–2009: Michael Eburn, *Trends in Australian Wildfire Litigation* (Presentation, Wildland Fire Litigation Conference, 1 May 2015).

[12] Ibid; Michael Eburn, 'Do Australian Fire Brigades Owe a Common Law Duty of Care: A review of three recent cases' (2013) 3(1) *Victoria University Law and Justice Journal* 65; *Rylands v Fletcher* (1886) LR 1 Ex 265; Tim Tobin and Andrew Fraatz, 'Bushfire Class Actions' (2012) 109 *Precedent* 4.

parties that contributed to damage, be they public land managers, energy infrastructure owners, or fire fighters.[13] The vast majority of cases involve claims in negligence, alleging failure to maintain electricity infrastructure,[14] or mismanagement of a controlled burn that escapes.[15]

As fires become more severe and widespread, more people suffer loss in single large-scale events. Multiple individuals suffering similar losses from the same event provide the ideal basis for the use of class actions. Class actions allow multiple plaintiffs to attempt to recover loss for damage that arises out of the same set of facts and legal issues through the use of a representative plaintiff,[16] offering significant benefits over the alternative of multi-plaintiff proceedings. If recent years are a guide, every major bushfire event results in at least one class action, mainly against energy distribution companies. Starting with the Black Saturday bushfires of 7 February 2009, class actions have been brought against Powercor Australia Ltd,[17] AusNet Electricity Services Pty Ltd,[18] and Infigen Energy Ltd,[19] as well as the State of Victoria and the Country Fire Authority.[20] Less frequently, multi-plaintiff actions have also been brought against individuals or private property owners alleging negligence in either starting

[13] Michael Eburn and Stephen Dovers, 'Litigation and Australian Bushfires', *Bushfire CRC* (Web Page, 2011)

<https://www.bushfirecrc.com/sites/default/files/managed/resource/2011_poster_michael_eburn_stephen_dovers.pdf>.

[14] See, eg, *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204; *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 ('*Matthews*'); *Lenehan v Powercor Australia Ltd* [2018] VSC 579.

[15] For example, a class action is being considered against firefighters for failing to control a small fire in the Guy Fawkes National park which grew to be uncontrollable during the summer of 2019–20. See Institute of Foresters of Australia and Australian Forest Growers, Submission No NND.001.00652 to the Royal Commission into National Natural Disaster Arrangements (23 April 2020) 25.

[16] See, eg, *Federal Court of Australia Act 1976* (Cth) s 33C; *Supreme Court Act 1986* (Vic) s 33C; *Civil Procedure Act 2005* (NSW) s 157; *Supreme Court Civil Procedure Act 1932* (Tas) s 66; *Civil Proceedings Act 2011* (Qld) s 103A.

[17] See, eg, *Perry v Powercor Autralia Ltd* [2012] VSC 113; *Thomas v Powercor Australia Ltd* (2012) 43 VR 220.

[18] See, eg, *Williams v AusNet Electicity Services Pty Ltd* [2017] VSC 474 ('*Williams*'); *Matthews* (n 14); *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232.

[19] See, eg, *Kuhn v Infigen Energy Ltd* (New South Wales Supreme Court, Hoeben CJ at CL, 10 December 2018).

[20] *Williams* (n 18); *Matthews* (n 14).

or failing to extinguish a fire started on their property.[21] To date, there has been a total of 23 bushfire class actions commenced in Australia:[22] one in the Federal Court,[23] five in New South Wales,[24] and 17 in Victoria.[25]

The opportunity for bushfire victims to participate in a class action offers some real advantages. Chief among these is the ability to share the costs of a legal proceeding across all members of the class, overcoming the financial and social barriers that otherwise exist.[26] Many of the people who suffer loss will lack the means to bring an action on their own and have far fewer resources than the energy infrastructure companies and land managers that are typically defendants. Law firms are unlikely to take on

[21] See, eg, *Ritchie v Advanced Plumbing and Drains Pty Ltd* [2019] NSWSC 1028; *Schmid v Skimming* [2020] VSC 493; Edith Bevan, 'Dunalley Fire Victims Launch Massive Class Action over Devastating 2013 Blaze', *ABC News* (Online, 16 December 2019) <https://www.abc.net.au/news/2019-12-16/dunnalley-victims-launch-class-action-on-fires/11804154>; *Daniel Herridge v Electricity Networks Corporation [No 4]* [2019] WASC 94.

[22] A bushfire class action refers to a proceeding brought by one lead or representative plaintiff on behalf of a group of people who have suffered loss as a result of the same bushfire, against the parties who are allegedly liable for the damage caused. Some events also result in multi-plaintiff proceedings. These are an alternative to class actions where each person who seeks to recover loss is listed as a plaintiff in the proceedings. This means each plaintiff is an active participant in the proceedings, which means that fewer plaintiffs tend to be involved in multi-plaintiff proceedings.

[23] *Buckee v Commonwealth* (2014) 220 FCR 54.

[24] *Johnston v Endeavour Energy* [2015] NSWSC 1117; *Eades v Endeavour Energy* [2018] NSWSC 801; *Weber v Greater Hume Shire Council [No 2]* [2018] NSWSC 1338; *Ritchie v Advanced Plumbing and Drains Pty Ltd* [2019] NSWSC 1028; *Kuhn v Infigen Energy Ltd* (New South Wales Supreme Court, Hoeben CJ at CL, 10 December 2018).

[25] *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204; *Matthews* (n 14); *Lenehan v Powercor Australia Ltd* [2018] VSC 579; *Perry v Powercor Autralia Ltd* [2012] VSC 113; *Thomas v Powercor Australia Ltd* (2012) 43 VR 220; *Williams* (n 18); *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232; *Schmid v Skimming* [2020] VSC 493; *Utility Services Corporation Limited v SPI Electricity Pty Ltd* [2012] VSCA 158; *Block v Powercor Australia Ltd* [2019] VSC 15; *Liesfield v SPI Electricity Pty Ltd* [2014] VSC 348; *Ramsay v AusNet Electricity Services Pty Ltd* [2016] VSC 725; *Campbell v Hazell Bros (Vic) Pty Ltd* [2014] VSC 54; *Francis v Powercor Australia Ltd* [2020] VSC 836; *Hawker v Powercor Australia Ltd* [2018] VSC 661; *Cohen v Victoria [No 2]* [2011] VSC 165; *Place v Powercor Australia Ltd* [2013] VSC 6. There have also recently been multi-plaintiff proceedings brought in Western Australia: *Herridge v Electricity Networks Corporation [No 5]* [2020] WASC 145.

[26] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) 49–50 [107] ('*ALRC Grouped Proceedings in the Federal Court*'); Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (8 June 2020).

costly litigation on a no-win, no-fee basis with only an individual client's payout in prospect. Class action proceedings can also relieve members of the (re)exposure to personal trauma of re-living at trial the events that gave rise to damage.

Despite these advantages, bushfire class actions give rise to many of the same issues that plague class actions (and litigation) generally, such as conflicting interests, the involvement of litigation funders, competing class actions,[27] and the 'twin evils of the civil justice system': costs and delay.[28] These evils can compound the personal trauma and loss that bushfire claimants experience.[29] There is also a risk of law firms or litigation funders encouraging class actions for fires that affect a smaller number of people where the costs of litigation risk exceed the potential recovery. The growing use of class actions also brings into sharper relief more fundamental questions about litigation as a mechanism for recovering bushfire losses, especially as climate change drives heightened risk and the likelihood of ever higher losses. These questions include the appropriate allocation of risk for bushfire mitigation, prevention and response, and the scope of liability for energy companies and statutory organisations.

In this article, we show that bushfire class action claimants face numerous hurdles in securing compensation needed for prompt recovery and identify opportunities to improve both the process for initiating a bushfire class action and the schemes for distributing settlements. Despite their shortcomings, we conclude that, compared with the alternative funding options, class actions nonetheless provide a critically important mechanism for enabling individuals and communities to recover from bushfire.

[27] These issues have been considered by the Australian Law Reform Commission and a Commonwealth Parliamentary Inquiry: Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-party Litigation Funders* (Report No 134, December 2018) ('*ALRC Class Action Inquiry*'); Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (December 2020) ('*Parliamentary Inquiry Report*').

[28] Michael Legg, 'Kilmore East Kinglake Bushfire Class Action Settlement Distribution Scheme: Fairness, Cost and Delay Post-Settlement' (2018) 44 *Monash University Law Review* 658, 659.

[29] Interview with Member of Parliament for Polwarth (Georgina Barnes, University of Tasmania by phone, 7 October 2019) ('*Interview with MP for Polwarth*'); Interview with defendant organisation (Georgina Barnes, University of Tasmania by video call, 6 September 2019) ('*Interview with defendant organisation*').

The article is based on a multi-methods study. A detailed review of bushfire litigation and analysis of the benefits and drawbacks of class actions provided a backdrop to the current use of class actions for bushfire events. This was complemented by detailed examination of judgements in bushfire litigation cases and class action settlements, and the 2018 ALRC review of class actions.[30] A series of semi-structured interviews with practitioners who had experience in class actions and bushfire litigation complemented findings from these traditional sources. Interviews were conducted with lawyers from plaintiff law firms, a litigation funder, a law firm who had previously acted for defendants, a defendant organisation, and a Member of Parliament for an affected area of Victoria.[31] The interviews confirmed preliminary conclusions based on our desk top and case review, and offered further insights into the practical experience of bushfire litigation generally, and class actions in particular. Finally, we briefly reviewed submissions to and the Reports of the Parliamentary Inquiry into Litigation Funding and the regulation of the Class Action Industry and the Royal Commission into National Natural Disaster Arrangements, to validate our findings.

The article is structured in six parts. In Part II, we outline the history of class actions in bushfire litigation in Australia, highlighting the emerging pattern of actions being brought following most major fire events over the past 12 years. In Part III, we explore the issues that arise in deciding whether to initiate class actions for bushfire losses, identifying pros, cons and potential reform options. This is followed in Part IV by an examination of whether current approaches to settlement of bushfire actions meet claimants' and community expectations of fairness, reasonableness and transparency. Part V considers the options available for reforming class actions to promote recovery from bushfire, and alternatives such as a no-fault natural disaster insurance scheme. We note that such schemes are attractive in theory but face logistical and philosophical problems in designing a mechanism that is fair, financially sustainable, and that does not promote maladaptive behaviour in the face of heightened bushfire risk. The paper concludes in Part VI with a recognition that further losses of life

[30] *ALRC Class Action Inquiry* (n 27).

[31] A range of potential participant law firms and organisations were identified through desk top review of cases and public statements. Approaches to each organisation or individual were made in accordance with University of Tasmania, Human Research Ethics Project Number H0018305. The study interviewed all participants who responded to these approaches.

and property are inevitable as Australia faces every growing bushfire risks. Litigation can play a critically important role in providing the financial resources needed for recovery. Reforms to the class action processes in their application to bushfire litigation can help ensure they meet individual and community expectations for bushfire recovery.

II A Short History of Bushfire Class Actions

Prior to the introduction of class actions rules in Australia, recovery for loss caused by bushfires had to be pursued by each individual who suffered loss. This did not serve the interests of efficiency and access to justice for bushfire claimants.[32] For example, the Ash Wednesday bushfires of 16 February 1983 caused extensive property losses across South Australia and Victoria ('Ash Wednesday').[33] As a consequence, Maddens Lawyers served over 400 individual writs against the Electricity Trust of South Australia,[34] a district council,[35] and a land management contractor.[36]

The 2009 Black Saturday bushfires gave rise to six of the biggest class actions in Australia's history.[37] Claims arising from the Kilmore East/Kinglake ('Kilmore East') bushfire and the Murrindindi/Marysville ('Murrindindi') bushfire[38] were brought against Ausnet Electricity Services Pty Ltd, who then joined their maintenance contractor ('UAM'),

[32] The introduction of class actions was driven by efficiency and access to justice goals: Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3176–7 (Michael Duffy, Attorney-General). Interview with plaintiff lawyer 1 (Georgina Barnes, University of Tasmania by video call, 19 August 2019) ('*Interview with plaintiff lawyer 1*').

[33] 'Ash Wednesday Bushfires: February 16 1983', *ABC News* (online) <https://www.abc.net.au/news/emergency/2013-02-14/ash-wednesday-bushfires-1983-from-the-archives/4519214>.

[34] See, eg, *Dunn v Electricity Trust of South Australia* (1985) 122 LSJS 201; *May v Electricity Trust of South Australia* [1993] SASC 4149.

[35] See, eg, *Casley-Smith v FS Evans & Sons Pty Ltd [No 5]* (1988) 67 LGRA 108; *Leslie v FS Evans & Sons Pty Ltd* (1988) 65 LGRA 168.

[36] See, eg, *Casley-Smith v FS Evans & Sons Pty Ltd [No 5]* (1988) 67 LGRA 108; *Leslie v FS Evans & Sons Pty Ltd* (1988) 65 LGRA 168.

[37] On 7 February fires began in 10 townships: 'About Black Saturday', *Country Fire Authority* (Web Page) <https://www.cfa.vic.gov.au/about/black-saturday>.

[38] Vince Morabito, *The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes* (Report No 5, July 2017) 24–5 ('*The First Twenty-Five Years*').

the Secretary to the Department of Environment and Primary Industries, the Country Fire Authority, and the State of Victoria as defendants.[39] The Kilmore East class action had more than 5,000 registered group members, comprising: 1,700 personal injury claims; 4,000 claims for uninsured property; and 5,000 claims for insured property.[40] Lasting 16 months,[41] it was the longest civil trial to have run in the Victorian Supreme Court, resulted in Australia's largest class action settlement of almost $500 million.[42] Despite its size, the settlement represented only around 70% of the assessed loss for personal injury and only around 30% of the assessed amount for economic loss and property damage.[43] Some group members objected to the small size of the settlement, but Osborn JA found it to be fair, just and reasonable in light of the risk of failure.[44] As Morabito et al noted, many claimants were injured, homeless, grieving, and unable to work, and the settlement offered them both finality and the financial means to rebuild.[45]

The Murrindindi action was brought against the same defendants on behalf of around 2,000 group members and resulted in a settlement of $300 million. This represented a recovery rate of around 70% of assessed losses for personal injury and around 60% for economic loss and property damage.[46] The large size of these settlements and the need to distribute the settlement in a just way meant that the distribution process took almost two

[39] *Matthews* (n 14) [9].

[40] Vince Morabito and Jarrah Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons — An Australian Study' (2016) 35(1) Civil Justice Quarterly 61, 84.

[41] Maurice Blackburn Lawyers, *Kilmore East – Kinglake & Murrindindi - Marysville Black Saturday Class Action Settlement Administrations: Final Report* (Report, 2018) <https://www.mauriceblackburn.com.au/media/4475/kilmore-east-kinglake-murrindindi-marysville-black-saturday-class-action-settlement-administrations-final-report-a4.pdf> ('*Kilmore and Murrindindi Administrations*') 7.

[42] Morabito, *The First Twenty-Five Years* (n 38) 18.

[43] Maurice Blackburn Lawyers, *Kilmore and Murrindindi Administrations* (n 41) 7.

[44] *Matthews* (n 14) [420], [427]–[434].

[45] Morabito and Ekstein, 'Class Actions Filed for the Benefit of Vulnerable Persons — An Australian Study' (n 40) 84.

[46] Maurice Blackburn Lawyers, *Kilmore and Murrindindi Administrations* (n 41) 8.

years.[47] Maddens ran smaller class actions against electricity companies[48] for the Black Saturday fires at Beechworth,[49] Coleraine,[50] Horsham,[51] and Pomborneit.[52] All were settled, with recovery rates from 40–60%[53] except for the Pomborneit fire, which settled shortly before the judgment was to be handed down and allowed the group members to recover 100% of assessed losses.[54]

All these actions were settled on a percentage of loss basis, meaning the defendant would pay each group member the portion of its losses specified in the settlement agreement. For such a payment to be made, each group member's losses was assessed individually. This required ongoing negotiation between the plaintiffs' solicitors and the defendants' insurer to accurately quantify the loss suffered by each group member. The time required to undertake this negotiation meant that the last payment occurred nine years after the settlement was first reached.[55]

Two class actions were brought following the 2013 NSW Blue Mountains bushfires.[56] The second action comprised claims from the first suit that insurers had opted out of,[57] but the opt out notices were held to be ineffectual so the original class action ultimately resulted in settlement of

[47] Ibid 31. The reasons for the delay are considered in detail in Legg, *Kilmore East Kinglake Bushfire Class Action Settlement Distribution Scheme* (n 28), and include the cost and time involved in designing and administering the settlement distribution scheme, which was unprecedented in both size and complexity.

[48] *Mercia v SPI Electricity Pty Ltd* [2012] VSC 204, [8]; *Perry v Powercor Australia Ltd* [2012] VSC 113, [2]; *Thomas v Powercor [No 10]* [2013] VSC 708, [8]; *Place v Powercor Australia Ltd* [2013] VSC 6, [3].

[49] *Mercia v SPI Electricity Pty Ltd* [2012] VSC 204.

[50] *Perry v Powercor Australia Ltd* [2012] VSC 113.

[51] *Thomas v Powercor [No 10]* [2013] VSC 708.

[52] *Place v Powercor Australia Ltd* [2013] VSC 6.

[53] *Mercia v SPI Electricity Pty Ltd* [2012] VSC 204, [20]; *Perry v Powercor Australia Ltd* [2012] VSC 113, [22]; *Thomas v Powercor [No 10]* [2013] VSC 708, [4].

[54] *Place v Powercor Australia Ltd* [2013] VSC 6, [6]

[55] 'Kilmore East – Kinglake Bushfire Class Action' Maurice Blackburn Laywers (Web Page, accessed 30 May 2021)

<https://www.mauriceblackburn.com.au/class-actions/past-class-actions/bushfire-class-actions/kilmore-east-kinglake-bushfire-class-action/>; Interview with plaintiff lawyer 1 (n 32).

[56] *Johnston v Endeavour Energy* [2015] NSWSC 1117, [1]

[57] Ibid [4], [10].

all claims.[58] Numerous other class actions against Victorian electricity infrastructure companies have resulted from smaller fires since 2013. A class action based on fires in Mickleham, Victoria in 2014 settled against AusNet Electricity Services.[59] This action had only 372 group members and settled for $16 million inclusive of costs.[60] It is estimated that the costs in this action may be as high as $7.3 million;[61] substantially more than the $800,000–$1.6 million originally estimated in the costs agreement.[62]

Four actions were brought against Powercor following fires on St Patrick's Day in March 2018. The Victorian Supreme Court dismissed one action summarily on the grounds that it was 'fanciful' to argue that Powercor created or aggravated the risk of bushfire by failing to clear healthy trees in a plantation.[63] The action in respect of the Gnotuk fire was settled with each party bearing their own costs.[64] The class actions from fires at Garvoc[65] and Terang[66] settled in December 2019 for $5 million (inclusive of interest and costs) and $17.5 million respectively. Insurers played an active role in these class actions without initiating separate claims[67] and while the Court has approved the amount of the settlement in the Terang action, there is an ongoing dispute over distribution to insurers for amounts they had already paid out to victims.[68]

In Tasmania, despite the availability of a class action regime comparable to that of Victoria and New South Wales, multi-plaintiff proceedings were commenced in 2019 in respect of the 2013 bushfires on the Forestier and Tasman Peninsulas in which over 440 plaintiffs lost property or suffered

[58] *Johnston v Endeavour Energy* [2016] NSWSC 1132.

[59] *Williams* (18) [1].

[60] Ibid [16]–[17].

[61] Ibid [94], [121]. Costs were not approved with the settlement but are subject to a decision of the Costs Court.

[62] Ibid [84].

[63] *Block v Powercor Australia* (2019) 57 VR 459, 520 [224].

[64] *Hawker v Powercor Australia Ltd* [2019] VSC 521, [3].

[65] *Francis v Powercor Australia Ltd [No 2]* [2020] VSC 877.

[66] *Lenehan v Powercor Australia Ltd [No 2]* [2020] VSC 159; *Lenehan v Powercor Australia Ltd [No 3]* [2020] VSC 404.

[67] Interview with MP for Polwarth (n 29).

[68] *Lenehan v Powercor Australia Ltd [No 2]* [2020] VSC 159, [4].

business impacts.[69] Unlike the actions in Victoria and NSW which have primarily targeted electricity operators, the action was brought against two private property owners. Estcourt J held that the two defendants were negligent in lighting a camp fire in a tree stump on their property in breach of fire bans and failing to extinguish the fire which escaped the property.[70]

In 2014, a fire at Perth Hills destroyed 57 homes and damaged more. Four actions were instituted on behalf of groups of plaintiffs, as Western Australia does not have a class action regime.[71] One such action resulted in Thiess (a contractor for Western Power) and a private landowner being ordered to pay $774,733.20 to the lead plaintiffs for failure to repair and replace a rotten power pole that fell and ignited ground vegetation.[72] Another of the actions is estimated to settle for $75 million.[73]

A fire in Tathra, New South Wales, in March 2018 is the subject of Australia's first bushfire class action to be funded by an international litigation funding company (IMF Bentham, now Omni Bridgeway). Run by William Roberts Lawyers, the action is still at the discovery stage.[74] As well as being the first funded action, the Tathra action differs from those outlined above as it is being brought in the Federal Court of Australia and, along with a potential claim in negligence and nuisance, includes a claim under s 60 of the *Australian Consumer Law*,[75] relating to the supply of electricity to claimants.[76]

While none had been commenced at the time of writing, it seems almost inevitable that one or more class actions will be brought based on Australia's 2019–20 Black Summer fires.[77] Maddens Lawyers have

[69] *Prestage v Barrett* [2021] TASSC 27; Bevan, 'Dunalley Fire Victims Launch Massive Class Action over Devastating 2013 Blaze' (n 21).

[70] Bevan, 'Dunalley Fire Victims Launch Massive Class Action over Devastating 2013 Blaze' (n 21).

[71] The Civil Procedure (Representative Proceedings) Bill 2019 (WA) would establish a class action regime in Western Australia.

[72] *Herridge v Electricity Networks Corporation (No 4)* [2019] WASC 94.

[73] *Herridge v Electricity Networks Corporation (No 5)* [2020] WASC 145, [26].

[74] *Essential Energy v Rose* [2020] FCA 722; *Rose v Essential Energy* [2020] FCA 214.

[75] *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

[76] *Essential Energy v Rose* [2020] FCA 722, [2].

[77] Bo Seo and Fiona Carruthers, 'Bushfires to inspire class action suits', *Financial Review* (online, 19 December 2019) <https://www.afr.com/politics/federal/bushfires-to-inspire-class-action-suits-20191219-p53lfr>.

commenced an action against SA Power Networks, in respect of a December 2020 fire in the Adelaide Hills.[78] MC Lawyers were investigating a class action about the NSW fires, but the status of this proceeding is unclear.[79] The Institute of Foresters Australia and Australian Forest Growers have also indicated that a class action may be brought against the NSW government for starting a hazard reduction fire in the Guy Fawkes National park which burnt out of control and destroyed adjacent production forests.[80]

III THE PROS AND CONS OF INITIATING A BUSHFIRE CLASS ACTION

Class actions offer many advantages, but they carry considerable risks for plaintiff law firms. Thus, it is the firm, and sometimes litigation funders, that decide whether to bring a class action. The relevant considerations in deciding whether anticipated returns justify bringing a class action are the same as for class actions generally,[81] but bushfire litigation raises some specific issues.

A *An available defendant?*

The availability of a defendant against whom there are reasonable prospects of success requires evidence to support a negligence claim about the cause of the fire or related damage. It is perhaps trite to note that if no one is at fault for a fire starting or spreading, those who have suffered loss

[78] 'Bushfire compensation experts launch Cudlee Creek class action', *Maddens Lawyers* (Web Page) <https://maddenslawyers.com.au/bushfire-compensation-experts-launch-cudlee-creek-class-action/>.

[79] 'Bushfires Class Action (2019-2020)', *MC Lawyers* (Web Page) <https://www.mclawyers.com.au/sectors-and-services/class-actions/bushfires/>.

[80] Institute of Foresters of Australia and Australian Forest Growers (n 15) 25.

[81] They include: the extent of the damage and hence the potential recovery, the size of the group, the availability of a defendant organisation with suitable resources or insurance, and the likelihood of the action's success. The length of time a plaintiff will have to wait before receiving compensation is also a factor. The application of these factors in any given case mean that many who have suffered considerable loss through bushfire will not have the benefit of a class action, because the risks are too high for the litigators or funders, or the costs of the action would outweigh any potential recovery. Interview with plaintiff lawyer 2 (Georgina Barnes, University of Tasmania by video call, 30 August 2019) ('*Interview with plaintiff lawyer 2*'); Interview with litigation funder (Georgina Barnes, University of Tasmania by video call, 20 August 2019) ('*Interview with litigation funder*').

will have no legal recourse. A plaintiff would face great difficulty in establishing a duty of care owed by fire fighters, given the exigent circumstances in which they act. Firefighting requires decisions to be made quickly without concern for impacts on individuals and without requiring specific justifications.[82] The approach taken in combatting a fire also involves decisions about the allocation of resources, and there will often be conflicting obligations owed by the fire service.[83] In any event, the decision whether to pursue a class action also requires a determination of whether potential defendants would be fully or partially protected from liability by statutory immunity.[84]

Given these constraints, it is not surprising that most bushfire class actions are brought against energy distribution entities that maintain network infrastructure (poles and wires),[85] rather than those managing the fire or the land. For a negligence action against an energy supplier to succeed, the plaintiff must establish that the energy company breached its duty to the plaintiff in failing to inspect and maintain infrastructure and that this resulted in fire starting or spreading. This requires the court to examine the entity's asset maintenance policies and practices, statutory obligations and any other countervailing considerations.[86] For example, failing to inspect a rotten pole to determine its condition has been found to constitute a breach

[82] *Warragamba Winery Pty Ltd v New South Wales* [2012] NSWSC 701, [749].

[83] Any breach of duty would have to satisfy the higher standard of being so unreasonable that no similar authority could property consider the act or omission to be a reasonable exercise of its functions: see, eg, *Civil Liability Act 2002* (NSW) s 43. NSW government agencies were found not to owe any duty of care in the course of responding to fires: *Warragamba Winery Pty Ltd v New South Wales* [2012] NSWSC 701, [707]–[710].

[84] Eburn (n 12); *Block v Powercor Australia (2019) 57 VR 459*; *Warragamba Winery Pty Ltd v New South Wales [No 9]* [2012] NSWSC 701 ('*Warragamba*'); *Electro Optic Systems Pty Ltd v New South Wales* (2014) 10 ACTLR 1 ('*Electro Optic*'). *Warragamba* and *Electro Optic* were not run as class actions but show the liability issues that can arise in actions against fire fighters.

[85] *Matthews* (n 14) [346]; *Mercia v SPI Electricity Pty Ltd* [2012] VSC 204; *Perry v Powercor Australia Ltd* [2012] VSC 113; *Thomas v Powercor Australia Ltd* (2012) 43 VR 220; *Place v Powercor Australia Ltd* [2013] VSC 6; *Johnston v Endeavour Energy* [2015] NSWSC 1117.

[86] See, eg, *Place v Powercor Australia Ltd* [2013] VSC 6, [4]; *Matthews* (n 14) [142]–[143], [164]–[165].

of duty,[87] but a failure to clear healthy trees on neighbouring private land was not.[88]

Claims have also been brought against state land managers and Country Fire Authorities[89] in relation to planned burns that burn out of control and failures to warn.[90] For the most part, however, fire mitigation activities attract statutory protection from liability through the low bar set out in most civil liability legislation. In approving the settlement in *Matthews*, Osborn JA considered that a claim based on a planned burn faced a real risk of failure because of the statutory immunity contained in the *Wrongs Act 1958* (Vic).[91]

Failure to warn claims do not necessarily fall within the statutory protections for firefighting activities, but they face evidentiary challenges in demonstrating causation. Osborn JA in *Matthews* commented that the claims that Victoria Police, the Country Fire Authority and the Department of Sustainability and Environment had failed to warn residents were likely to fail because there was no evidence that a warning could have prevented the harm suffered.[92]

Several research participants acknowledged that the need for fault in the cause of a fire or the resulting damage means that some bushfire victims are in a far better position than others.[93] As a defendant organisation noted:

> We'll only be liable if it's our fault and that seems fair… For a person affected by a fire it is unfair to that person in a cosmic justice sense whether that fire is because of a lightning strike, whether it's because of wind bringing a power line down or whether it's because the power company's been negligent, but life isn't fair and you really only get compensated for your loss if somebody's done something wrong.[94]

[87] *Daniel Herridge v Electricity Networks Corporation [No 4]* [2019] WASC 94.

[88] *Block v Powercor Australia* (2019) 57 VR 459, 520 [224].

[89] *Matthews* (n 14) [9].

[90] Ibid [253], [270]; *Warragamba* (n 84).

[91] *Matthews* (n 14) [269].

[92] Ibid [291].

[93] Interview with plaintiff lawyer 1 (n 32); Interview with litigation funder (n 81); Interview with plaintiff lawyer 2 (n 81); Interview with defendant organisation (n 29).

[94] Interview with defendant organisation (n 29).

While the requirement for fault is obviously essential in litigation based on negligence, it highlights the potential arbitrariness of whether a bushfire victim will have access to financial means to recover.

B *The long duration of class action litigation*

Class actions give bushfire plaintiffs access to justice for claims that would otherwise be inefficient to pursue.[95] But class actions take time and this delay can cause significant stress.[96] The large size and evidential complexity of bushfire class actions mean they can take much longer than non-representative civil litigation. Over 86% of civil claims in the New South Wales and Victorian Supreme Courts take less than 12 months to resolve,[97] whereas the average settled class action takes 2.5 years[98] and the longest took 11 years.[99] Class actions based in tort, including bushfire claims, take longer on average than investor or shareholder actions.[100] The trial alone of the Kilmore East bushfire class action took 16 months, excluding the settlement distribution process and interlocutory steps. Interlocutory proceedings can greatly extend these timeframes.[101] One research participant expressed a real concern that procedural requirements can 'become predominant … to the exclusion of the underlying clients'.[102] Two options might shorten the time taken to achieve recovery in bushfire class actions. First, earlier quantification of group members' losses would help defendants know their potential liability and thus aid the settlement negotiation process.[103] Second, early settlement offers can achieve faster

[95] *ALRC Grouped Proceedings in the Federal Court* (n 26) 26.

[96] Interview with MP for Polwarth (n 29); Interview with defendant organisation (n 29).

[97] Productivity Commission, *Report on Government Services 2019* (Report, 24 January 2019) ch 7, table 7A.20.

[98] Morabito, *The First Twenty-Five Years* (n 38) 30.

[99] *Milfull v Terranora Lakes Country Club Ltd* [2006] FCA 801, cited in Morabito, *The First Twenty-Five Years* (n 38) 14.

[100] The average length of a settled mass tort action is 101 days, while the average length of an investor class action is 962 days and a shareholder class action usually lasts 931 days: Morabito, *The First Twenty-Five Years* (n 38) 20.

[101] Michael Legg, 'Class Actions, Litigation Funding and Access to Justice' (2017) 57 *University of New South Wales Law Research Series* 1, 2.

[102] Interview with defendant lawyer (Georgina Barnes, University of Tasmania by phone, 11 September 2019) ('*Interview with defendant lawyer*'). Delays can also be exacerbated by overlapping or competing actions: see Part III.D

[103] Michael Legg, 'Discovery and Particulars of Group Members in Class Actions' (2012) 36 *Australian Bar Review* 119, 134; Interview with defendant organisation (n 29). On current practice, however, quantum assessment is often done by a third party,

recovery, but whether they do depends on the defendant's willingness to propose such an offer and how each group member values a faster recovery against full compensation.[104]

C *The public interest in clarifying responsibility for bushfire risk*

Although every negligence action turns on its own facts, judicial determinations can send an important message about how the risk of bushfire should be allocated across the community. This function is especially important as state legislatures start to enact broad statutory duties to mitigate bushfire risks on public and private land.[105] In practice, however, settlement of the vast majority of class actions means that the liability of defendant organisations is not subject to judicial determination, even though the court must evaluate the prospects of success when approving a settlement. This is often a highly motivating factor for a defendant organisation.[106] Moreover, since defendant organisations are almost always insured, class action settlements typically result in no substantial legal or economic consequences for the specific defendant, beyond whether they can secure insurance cover for such risks. The class action mechanism may therefore be ineffectual in allocating risk between private landowners and public land and asset managers.[107] As one participant observed:

> In all of these actions, [the defendant organisation] is insured. … We are not the decision maker … [we assist] our insurer in preparing our defence, giving them our views as to prospects, generally assisting them … but … from an

and the plaintiff firm acting on a conditional fee agreement may be unwilling to expend these costs before they know whether these costs will be recoverable. See *ALRC Class Action Inquiry* (n 27) 23–7.

[104] For example, in the Terang bushfire, the defendant, Powercor sent letters to all group members, including those represented by Maddens Lawyers and those with insurance, offering them 50% of their assessed loss as a settlement. See *Lenehan v Powercor* [2018] VSC 579, [9]. The offer was not accepted, and the matter settled for a total of $17.5 million, representing an estimated 90% of losses two years later, highlighting the trade-off between eventual recovery and time. See *Lenehan v Powercor Australia Limited* [2020] VSC 159, [36].

[105] See, eg, Bushfire Mitigation Measures Bill 2020 (Tas) cl 6.

[106] For example, the Pomborneit bushfire class action settled for 100% of group members' losses the morning that judgment was expected, with no admission of liability. *Place v Powercor Australia Ltd* [2013] VSC 6; Interview with plaintiff lawyer 1 (n 32); Interview with MP for Polwarth (n 29).

[107] Jacqueline Peel and Hari Osofsky, 'Sue to Adapt' (2015) 99 *Minnesota Law Review* 2172, 2244. Interview with MP for Polwarth (n 29).

> economic perspective we are not the people actually writing the cheque and they are the people making the decisions. … We provided for our insurance deductible … within a week or two of the fire. Economically, we've been done for 18 months, … the only interest for us at the moment is reputational and precedent value for future litigation.[108]

Even though there may be no formal finding of liability, there is anecdotal evidence that class actions against energy companies or other land or infrastructure managers can result in changed corporate practices and internal policies.[109] It is difficult to determine whether these changes stem from the litigation or public inquiry recommendations. One defendant organisation noted that it had introduced new bushfire management policies following the Black Saturday fires, but that these were primarily due to regulatory requirements rather than class action outcomes:

> In a sense of have we done things differently since Black Saturday, I think the simple answer is yes, because there's a whole range of initiatives that came out the Bushfire Royal Commission and regulation that followed. … Everything on that list, of course we've done. From an overall perspective of: have we fundamentally changed the way we go about inspecting and maintaining our systems? No, we haven't.[110]

D *Competing class actions*

The issue of competing class actions affects all class actions, but is of increasing concern to plaintiff lawyers in bushfire class actions.[111] Competing class actions arise where multiple actions are brought in respect of the same set of facts and people are (or may be) members of both groups.[112] While it is always open to an individual claimant to opt out of a

[108] Interview with defendant organisation (n 29).

[109] Interview with defendant organisation (n 29). See also, Manisha Blencowe, Ben Hardwick and Hannah Lewis, 'Carving out the Role for Environmental Class Actions in Australia' (2018) 32 *Australian Environmental Review* 237.

[110] Interview with defendant organisation (n 29).

[111] The competing class actions that could not be resolved by agreement between the parties to both proceedings arose in 2008, when actions were filed against companies in the Centro Group by both Maurice Blackburn and Slater & Gordon. See Morabito, *The First Twenty-Five Years* (n 38) 16.

[112] *Parliamentary Inquiry Report* (n 27) 65; *ALRC Class Action Inquiry* (n 27) 78. It is also problematic to have competing class actions and non-class actions in respect of the same event or conduct.

class action and pursue individual proceedings,[113] competing class actions undermine the efficiencies of scale that class actions offer.[114] Resolving multiple actions spreads thinly the courts' resources, and both plaintiffs and defendants suffer from the extra delay and cost.[115] Australian courts can consolidate proceedings, try the proceedings at the same time or consecutively, or stay any or all but one of the proceedings until the determination of others.[116] What action a court will take depends on what the facts of the case before it[117] suggest is in the best interests of the group members.[118] The court will consider a range of factors, including: the experience of legal practitioners and resources of the firms, the merits of the cases, relative numbers of group members, estimated costs, and the comparative consequences of any order made. Where the proceedings involve differing claims, the court may be more inclined to maintain separate proceedings but hear the actions together.[119]

In bushfire litigation, insurers may attempt to use contractual or subrogation rights to opt policyholders out of one class action and run their own action.[120] This can raise concerns about delay, additional cost, and questions about the plaintiffs' capacity to select their own legal representation. As a plaintiff lawyer explained:

> … [P]eople impacted by the fire event … didn't understand that their policy of insurance … might enable their insurer to make decisions on their behalf about how they pursue a claim for compensation and might ultimately have a

[113] Law Institute of Victoria, Submission No 3 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (9 June 2020).

[114] *ALRC Class Action Inquiry* (n 27) 102.

[115] *Perera v GetSwift Ltd* (2018) 263 FCR 1, 39 [122]; *Wigmans v AMP Ltd* [2021] HCA 7.

[116] See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 28.5; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 9.12.

[117] *Wigmans v AMP Ltd* [2021] HCA 7.

[118] *Perrera v GetSwift Ltd* (2018) 357 ALR 586; ibid.

[119] While run as a multi-plaintiff action rather than representative proceeding, an example of a court taking an inventive step in managing multiple actions concerning similar claims and facts occurred in *Daniel Herridge v Electricity Networks Corporation [No 4]* [2019] WASC 94. The plaintiffs in the various actions filed a single set of proceedings using different colours to identify claims specific to each plaintiff group.

[120] *Johnston v Endeavour Energy* [2015] NSWSC 1117; Interview with plaintiff lawyer 1 (n 32); Interview with litigation funder (n 81); Interview with defendant lawyer (n 102).

> huge impact on the way any compensation that is recovered is allocated between insured and uninsured losses.[121]

In litigation following the 2013 Blue Mountains fires, the NSW Supreme Court rejected the validity of insurer-filed opt out notices removing policyholders from one class action and commencing a separate class action.[122] Based on the applicable insurance policies, Garling J found no term that gave the insurer the power to opt out a class member and pursue their insured, uninsured and underinsured loss on their behalf.[123] While some plaintiffs resist being opted out of class actions, victims of the 2018 Saint Patrick's Day Terang bushfire encouraged it because they were frustrated by the class action procedure.[124] About two thirds of the original group members have opted out and their insurers have initiated a separate action, which is expected to allow for more complete recovery by the bushfire victims.[125]

The 2020 report of the Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry*, recommended that the Federal Court be given an express power to resolve competing and multiple class actions.[126] It recommended amendments to the Federal Court's Class Action Practice Notice to require the Court to hold a selection hearing to determine which action should proceed.[127] Commonwealth, state and territory governments with class action procedures were also encouraged to ensure that their Supreme Courts also adopt protocols with the Federal Court aimed at avoiding competing and multiple class actions.[128] While these recommendations are

[121] Interview with plaintiff lawyer 1 (n 32).

[122] *Johnston v Endeavour Energy* [2015] NSWSC 1117, [1], [10]

[123] Ibid [261]–[267]. The general law of subrogation may give an insurer a right to recover the amount that they have paid under an insurance policy, but they have no entitlement to deal with uninsured or underinsured damage suffered by insureds: ibid [268].

[124] Interview with MP for Polwarth (n 29).

[125] *Johnston v Endeavour Energy* [2015] NSWSC 1117. It is unlikely that insurers would take on such an action where the recovery is less certain. Energy Safe Victoria released a preliminary report about the Terang fire indicating that the fire was caused by improper maintenance of energy assets, so in this case liability seems fairly clear: Energy Safe Victoria, 'P3 High Street Terang Electrical Incident 17 March 2018' (Report, 2019) 25.

[126] *Parliamentary Inquiry Report* (n 27) recommendation 2.

[127] Ibid recommendation 3.

[128] Ibid recommendation 4.

directed towards reforming the Federal Court's class action procedures, the Committee also noted the importance of uniform class action rules across the country, to prevent forum shopping and the commencement of multiple actions.[129]

E *Sharing legal costs across class members*

Costs savings are one of the primary advantages of the class action procedure.[130] The Kilmore East Bushfire class action provides an example of these benefits. The court approved a sum of $60 million to be paid to Maurice Blackburn for the costs of, and incidental to, investigating and prosecuting the matter. This amount included an uplift on the Supreme Court of Victoria scale costs to reflect the complexity of the legal work and a further 25% uplift as a result of the conditional fee arrangement.[131] Shared among the 5,847 individuals represented in the class action, this amounted to $10,261 per individual. The average cost of assessing each claim as part of the settlement administration was a further $9,318 for I-D claims and $2,035 for economic loss claims. The cost of assessing the I-D claims is comparable to the statutory limits on inter-party costs[132] and far less than the estimated cost of an uncontested damages assessment in the Victorian Supreme Court or County Court.[133]

Despite safeguards aimed at preventing excessive costs,[134] there is still substantial criticism of the proportion of the settlement consumed by legal

[129] Ibid recommendation 3.

[130] The second reading speech for Part IVA of the *Federal Court of Australia Act 1979* (Cth) provided that the class action procedure will 'give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action': Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174 (Michael Duffy, Attorney-General).

[131] *Matthews* (n 14) [346]. Maddens Lawyers secured identical uplifts in the Beechworth and Colleraine actions. *Mercia v SPI Electricity Pty Ltd* [2012] VSC 204, [54]; *Perry v Powercor Australia Ltd* [2012] VSC 113, [27].

[132] Which excludes disbursements such as medico-legal assessments. See Catherine Mary Dealehr and Fiona Elizabeth Mullen, *Kilmore & Murrindindi Bushfire Class Action Settlement Administrations* (Report, 7 September 2017) 8–9.

[133] Ibid 11–3.

[134] Legislation governing class action regimes allows courts to consider and approve costs as part of any settlement regime as part of the supervisory jurisdiction of the court; *Federal Court of Australia Act 1976* (Cth) ss 33V, 33ZF; *Supreme Court Act 1986* (Vic) ss 33V, 33ZF; *Civil Procedure Act 2005* (NSW) ss 173, 183; *Supreme Court Civil Procedure Act 1932* (Tas) s 82; *Civil Proceedings Act 2001* (Qld) ss 103R, 103ZA; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 175–6.

costs.[135] The court may ensure that costs are legitimate and proportionate to the work required, but whether the costs are *proportionate to the settlement sum* is not relevant unless the costs were not reasonably incurred and required for the pursuit of the claim.[136] For example, the Pomborneit fire settled for 100% of losses plus party-party costs,[137] but it is understood that group members received a much smaller portion of their loss due to their obligation to pay the uplifts charged on the plaintiff lawyer's fees.[138] The high proportion of settlement sums consumed by legal costs was a primary concern of the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Litigation funding and the regulation of the class action industry. The Inquiry Report recommended the Australian Government consider rules limiting the ability for lawyers to charge an uplift fee when operating on a conditional fee arrangement.[139] The Committee also recommended the introduction of a statutory minimum gross return of 70% to group members.[140] This proposal is currently undergoing a further round of public consultation.

The basis upon which fees are charged also influences whether the outcomes of bushfire class actions are fair and efficient. Until recently, only litigation funders could charge contingency fees, so the most common arrangements for bushfire class actions are conditional fee agreements.[141] Since amendments in 2020, Victorian courts now have the power to order the payment of costs as a percentage of the final award or settlement, on

[135] Vince Morabito, 'Common Fund Orders, Funding Fees and Reimbursement Payments' (Research Paper, January 2019); 'The ALRC Class Actions report, from a defendant's perspective', *The Lawyers Weekly Show* (Lawyers Weekly, 1 March 2019) <https://podcasts.apple.com/au/podcast/the-lawyers-weekly-show/id1112746831?i=1000430836088>. One such criticism is that the use of costs assessors appointed by the law firm whose costs are being assessed leads to a conflict of interest, and that instead independent, court appointed assessors should be used: *ALRC Class Action Inquiry* (n 27) recommendation 8; Michael Legg, 'Class Action Settlements in Australia – the Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 619, 590.

[136] *Williams* (n 18) [89].

[137] *Place v Powercor Australia Ltd* [2013] VSC 6, [6].

[138] Ibid [20]; Interview with MP for Polwarth (n 29).

[139] *Parliamentary Inquiry Report* (n 27) recommendation 22.

[140] Ibid recommendation 1.

[141] *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ss 181, 182; applies in New South Wales pursuant to *Legal Profession Uniform Law Application Act 2014* (NSW) s 4. See, eg, *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204; *Matthews* (n 14) [346]; *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232, [118].

the application of the plaintiff in group proceedings.[142] The Class Action Inquiry expresses concern about the use of contingency fee arrangements and recommended the Federal Court be given expanded and strengthened powers to regulate litigation funding fees, including the ability to obtain advice from financial experts to ensure that fees are reasonable, proportionate and fair.[143]

Protecting class members from adverse costs orders is also a high priority. With conditional fee arrangements, the representative plaintiff may eventually be required to pay party-party costs if the action is unsuccessful. This exposes the lead plaintiff to considerable risk, while the litigation funder[144] or, in Victoria, the law firm is only exposed to the risk of being unable to recover their own costs.[145] This has been addressed in Victoria, with s 33ZDA(2) of the *Supreme Court Act 1986* (Vic) providing that where a 'group costs order' (ie an order for a contingency fee arrangement) is made, the law firm representing the plaintiff and group members is liable for any fees payable to the defendant.[146] An indemnity for costs given by a law firm or litigation funder protects the lead plaintiff, provides assurance to a successful defendant that their costs will be recovered, and deters unmeritorious or entrepreneurial actions.[147]

[142] *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) s 5 amending *Supreme Court Act 1986* (Vic) s 33ZDA. No such order has not yet been made in respect of a bushfire class action.

[143] *Parliamentary Inquiry Report* (n 27) recommendation 21.

[144] While litigation funders commonly provide indemnity for any adverse costs order and provide any required security for costs, the *Parliamentary Inquiry Report* (n 27) recommended that this become mandatory (recommendations 8, 9,10).

[145] For example, the summary dismissal of a bushfire class action against Powercor in 2019 means that the representative plaintiff may be liable for Powercor's costs in defending the action, estimated at $250,000. The orders were not included with the summary judgement so it is impossible to determine whether this occurred: *Block v Powercor Australia* [2019] VSC 15; Andrew Thompson, 'Bushfire Class Action Dismissed in Supreme Court', *The Age* (online, 7 February 2019) <https://www.theage.com.au/national/victoria/bushfire-class-action-dismissed-in-supreme-court-20190207-p50wci.html>.

[146] Some suggest that this creates conflicts of interest in respect of both conditional and contingency fee arrangements, though these are not unique to bushfire litigation. The capacity for conflicts of interest to arise between group members and litigation funders, or a lawyer operating on a conditional basis was recognised in the *ALRC Class Action Inquiry* (n 27) 177–81, 217–20 and was echoed in the interview with defendant organisation (n 29) and Interview with MP for Polwarth (n 29).

[147] *Parliamentary Inquiry Report* (n 27) 127.

A lead plaintiff may also be required to give security for the defendant's costs. This will be a significant exposure for an individual land owner, such as those commonly acting as a lead plaintiff in a bushfire class action. Despite the improbability of a security for costs being ordered in a bushfire class action, uncertainty over the amount of fees payable remains a barrier for some claimants.[148] As one plaintiff lawyer said:

> [The current costs structure] creates uncertainty for people; they are not sure if it is worthwhile for them, because they are concerned that the costs will outweigh their recovery … it leads to a level of distrust … I understand that they want a figure, is it going to be 20%, or 40% or 10%? … It does impact people's ability to make an informed decision, they … have these concerns that we can't address adequately with the way that costs are structured at the moment.[149]

The ALRC has recommended a class action fund to cover these costs[150] and the Victorian Law Reform Commission recommended the establishment of the Justice Fund in 2008, to provide an indemnity for security for costs to support meritorious class actions.[151] The recent Parliamentary Joint Committee on Corporations and Financial Services inquiry into the class action industry did not recommend the creation of a fund, instead focused on reforms to the existing system.[152]

The role of litigation funders is also critical to questions of fairness. Litigation funding is on the rise,[153] but to date only one potential bushfire class action has attracted litigation funding. There are pros and cons to the

[148] Ibid 128.

[149] *ALRC Class Action Inquiry* (n 27) 199–200. These views are echoed by a plaintiff lawyer; interview with plaintiff lawyer 1 (n 32).

[150] *ALRC Grouped Proceedings in the Federal Court* (n 26) 11.

[151] Ben Slade and Jarrah Ekstein, 'Class actions and social justice: achievements and barriers' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 281; Vince Morabito and Naomi Hatcher, 'Security for Costs in Unfunded Federal Class Actions: Back to the Future' (2018) 92(2) *Australian Law Journal* 105, 126; Australian Lawyers Alliance, Submission No 2 to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation funding and the regulation of the class action industry* (8 June 2020) 12.

[152] *Parliamentary Inquiry Report* (n 27).

[153] The IMF Bentham Ltd group funded two class actions in 2001 and the number generally has increased year on year since: *ALRC Class Action Inquiry* (n 27). Over the five years from 2012–7, the number of funded class actions in the Federal Court exceeded the number of unfunded actions: Morabito, *The First Twenty-Five Years* (n 38).

use of litigation funders. Litigation funders increase access to justice for individuals with claims that may not, on their own, be economically advantageous to litigate. However, the use of funders commercialises access to justice, and so may be inappropriate in instances of personal injury, and may create conflicts of interest.[154] The High Court has sanctioned their use in representative proceedings, satisfied that it did not constitute an abuse of process and was not contrary to public policy,[155] however the 2020 Parliamentary Inquiry into Litigation funding and the regulation of the class action industry was scathing of litigation funders and recommended stricter regulation of the industry. The recommendations focused on shifting liability for adverse costs orders to litigation funders,[156] creating a presumption that a litigation funder provide the respondent with security for costs,[157] and giving the Federal Court the express power to make a costs order against a litigation funder.[158] The Inquiry also recommended changes to the Federal Court's Class Action Practice Note requiring information about the litigation funder and its involvement in the case to be put before the Court and provided to group members.[159]

The issues outlined above are not necessarily unique to bushfire litigation, but emerged strongly as either benefits or challenges to commencing such actions. The next section considers the way in which settlement arrangements can also influence the overall fairness and appropriateness of class achieving in aiding recovery from bushfire.

[154] Interview with plaintiff lawyer 2 (n 81). Commercialisation of loss occurs already, even where funders are not involved. Provided a law firm can withstand the risk, it is able charge up to 25% uplift on their fees when operating under a conditional arrangement. *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ss 181, 182; applies in New South Wales pursuant to *Legal Profession Uniform Law Application Act 2014* (NSW) s 4.

[155] *Cambell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 226 CLR 386, cited in Morabito, *'The First Twenty-Five Years* (n 38) 15.

[156] *Parliamentary Inquiry Report* (n 27) recommendations 8, 9.

[157] Ibid recommendation 10.

[158] Ibid recommendations 15, 27.

[159] Ibid recommendations 17, 18, 24, 25.

IV SETTLEMENT OUTCOMES IN BUSHFIRE CLASS ACTIONS

Only one of the bushfire class actions initiated to date has proceeded to final judgment on all issues; most settle.[160] Settlement, especially early settlement, offers substantial advantages for both the group members and defendants. It saves parties the cost and burden of a trial, provides certainty for defendants, and reduces the risk of plaintiffs recovering nothing. The Federal Court has recognised the desirability of settlement in class actions because of 'the uncertainty of their result, difficulties of proof, complexities in the assessment of damages, as well as the expense of a long trial'.[161] In bushfire proceedings, settlement can have additional advantages of reducing the stress and anxiety felt by group members as a result of the litigation proceeding.[162]

However, settlement also has its drawbacks. Protecting the interests of the class members is the primary consideration throughout the settlement process.[163] Settlement rarely results in full recovery, so a careful evaluation is needed of whether the settlement amount can still deliver the overriding priority of compensation. [164] In large class action suits, assessing the amount of compensation needed to return a party to its original position can take time and delay receipt of compensation even after settlement is reached.[165] The mechanism by which losses are assessed will also influence whether the settlement process itself exacts an additional emotional and psychological toll on victims. These issues are explored below.

[160] See *Weber v Greater Hume Shire Council [No 2]* [2018] NSWSC 1338; Morabito, *The First Twenty-Five Years* (n 38) 37: 52% of class actions from 1992 to 2017 settled.

[161] *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029, [2].

[162] See *Matthews* (n 14) [322]–[324].

[163] *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029, [4].

[164] *Haines v Bendall* (1991) 172 CLR 60, 63, cited in Michael Legg, 'Class Action Settlement Distribution: Compensation on the Merits or Rough Justice' (2016) 16 *Macquarie Law Journal* 89, 96.

[165] Legg, 'Class Action Settlement Distribution: Compensation on the Merits or Rough Justice' (n 164) 89–90.

A *Determining fairness and reasonableness in bushfire settlements*

The court hearing a class action is required to approve all discontinuations or settlements.[166] This is a unique feature of class actions that is not required for non-representative litigation. The court's approval is a vital safeguard on the interests of class members as well as defendants. [167] In approving a class action settlement, the court's role is to protect the class members' interests during settlement.[168] It will consider: first, whether the settlement is fair and reasonable between defendants and plaintiffs, having regard to the claims of the class members; and second, whether it is fair and reasonable among the class members.[169]

The court's role in protecting class members' interests includes protecting those class members who are not represented by the lead plaintiff's solicitors. This is especially important given that class action members have limited capacity to participate in the proceedings, provide input into a settlement, or to otherwise protect their own interests.[170] Where group members are given different settlements,[171] the court must consider whether this is fair and reasonable and if there are strong and compelling

[166] *Federal Court of Australia Act 1976* (Cth) s 33V(1); *Supreme Court Act 1986* (Vic) s 33V(1); *Civil Procedure Act 2005* (NSW) s 173; *Supreme Court Civil Procedure Act 1932* (Tas) s 82; *Civil Proceedings Act 2011* (Qld) s 103R.

[167] As recognised by a plaintiff lawyer: '…the supervisory role that the courts play in class actions in approving … and reviewing the fairness and reasonableness of … settlements … it is really important that is maintained': Interview with plaintiff lawyer 1 (n 32).

[168] See *Lenehan v Powercor Australia Ltd [No 2]* [2020] VSC 159, [20]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029, [4]; *Money Max Int Pty ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 204–5 [50].

[169] Supreme Court of Victoria, *Practice Note SC Gen 10: Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.1]; Federal Court of Australia, *Practice Note GPN-CA: Class Actions*, 15 December 2019, [15.3]; see also, Legg, 'Class Actions, Litigation Funding and Access to Justice' (n 101) 6; Legg, 'Kilmore East Kinglake Bushfire Class Action Settlement Distribution Scheme: Fairness, Cost and Delay Post-Settlement' (n 28) 664; *Williams* (n 18) [31]. A framework list of factors was set down in *Williams* (n 18) [35] (Emerton J), citing *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459.

[170] Morabito and Hatcher, 'Security for Costs in Unfunded Federal Class Actions: Back to the Future' (n 151) 113, citing *Winterford v Pfizer Australia Ltd* [2012] FCA 1199, [4].

[171] For example, a lead plaintiff may receive some additional payment or advantage, as compensation for taking on the risk of being the lead plaintiff, and the time and effort they expend in performing that role: See, eg, *Williams* (n 18) [29]; *Rowe v Ausnet Electricity Services Pty Ltd* [2015] VSC 232, [138]; *Johnston v Endeavour Energy* [2016] NSWSC 1132, [50].

reasons for differentiation.[172] In the Kilmore East and Murrindindi Fires settlements, the group members were split into two classes of loss: loss caused by personal injuries and the loss of a dependant ('I-D'), and economic loss or property damage. The I-D claimants received a higher proportion of their loss, in part because settlement money contributed by state government defendants was only to be paid to group members suffering I-D losses.[173] While this created some disparity between the parties, Osborn JA found the disparity to be logically justified and reasonable for the group as a whole to accept because the strongest claim against the state party was open only to I-D claimants.[174]

B *The fairness and efficiency of settlement distribution mechanisms*

The mechanisms for distributing class action settlements can either support efficiency and justice trade-offs or exacerbate their shortcomings. How the competing interests of individual justice and efficiency in distribution are balanced will often be a challenge for the plaintiff lawyers in negotiating and administering the settlement distribution.[175] They affect both the quantum received and the time it takes to distribute funds.

Settlement figures are either agreed as a percentage of each claimant's losses, or as a single lump sum amount to be divided by the settlement administrator according to the terms of the settlement distribution. Settlements determined as a percentage of each claimant's loss require negotiation between the parties over each group member's loss before the percentage can be applied and the total figure calculated. Quantifying each group member's damages precisely may best achieve justice, but will add considerable delay. For example, the Black Saturday actions that resolved

[172] *Farey v National Australia Bank Ltd* [2016] FCA 340; *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541; *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 320–1 [51]–[53].

[173] *Matthews* (n 14) [13]; *Rowe v Ausnet Electricity Services Pty Ltd* [2015] VSC 232, [32].

[174] *Matthews* (n 14) [388]–[394].

[175] Legg, 'Class Action Settlement Distribution: Compensation on the Merits or Rough Justice' (n 164); Legg, 'Kilmore East Kinglake Bushfire Class Action Settlement Distribution Scheme: Fairness, Cost and Delay Post-Settlement' (n 28) 668; Interview with plaintiff lawyer 2 (n 81); Interview with plaintiff lawyer 1 (n 32).

on a percentage-of-loss basis took up to nine years to fully resolve and pay.[176]

Quantifying individual loss also increases emotional hardship, particularly for group members suffering psychological injuries who must recount their trauma in a detailed manner. As one bushfire plaintiff lawyer commented:

> There are some people who …are still suffering very significant scars … and emotional trauma … [The assessment process used] was still traumatic because they still had to recount what had occurred to them on the day and the ongoing issues, but it was relatively not as traumatic as a full assessment … so I think the balance was struck.[177]

Lump sum settlements can be resolved much faster. In contrast to those Black Saturday actions that settled on a percentage of loss basis, the distribution of the Kilmore East and Murrindindi fires lump sum settlements took just under two years each.[178] In approving the settlement, Osborne JA concluded that:

> The obvious commercial advantages to the defendants of settling on a lump sum basis are so overwhelming that it would not be realistic to suggest that the case should only settle on the basis of an agreed percentage of damages to be ascertained on an open-ended basis hereafter. A lump sum also offers the plaintiff and group members the advantage of minimising the cost of the assessment of individual claims and, in effect, maximising the benefit each receives from a sum which has been offered on an all-in basis. The heterogeneous natures of the claims overall and the domestic character of many of them makes this advantage doubly attractive.[179]

Faster settlement and payout is generally desirable in the interests of efficiency and justice, but is especially important in bushfire class actions where long settlement periods limit plaintiffs' ability to rebuild and recover. Class action settlements inject significant funds into bushfire-

[176] Legg, 'Kilmore East Kinglake Bushfire Class Action Settlement Distribution Scheme: Fairness, Cost and Delay Post-Settlement' (n 28) 669–70. The risks of delay and additional cost in distribution mean that the court's protective role continues throughout the distribution phase. The court may require periodic updates from the administrator to ensure supervision and critique of any costs or delay.

[177] Interview with plaintiff lawyer 2 (n 81).

[178] Maurice Blackburn Lawyers, *Kilmore and Murrindindi Administrations* (n 41) 31. See also, ibid 7–8; *Matthews* (n 14) [63]–[64]; *Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232, [31].

[179] *Matthews* (n 14) [62]–[63].

affected areas,[180] but delays in delivering payouts undermine their potential economic benefit to affected regions.

Following the Kilmore East and Murrindindi class actions, for example, lawyers Maurice Blackburn analysed the economic impact of the settlement. They found that the payments to class members were likely to increase the economy in that region by up to $183 million and increase employment by up to 73 full time jobs in the nine years between 2016–7 and 2024–5.[181] The actual economic outcome depends on how funds are spent and affected regions derive the greatest economic benefit when more is spent on capital purchases such as repairing houses or infrastructure.[182] Where the fire has burned through agricultural areas, farmers need to begin restoring their land as soon as they can to take full advantage of the seasonal processes,[183] but if compensation payments are delayed for months or years, the capacity of these victims to recover is further reduced and the value to the group member of any eventual compensation is also diminished.[184] Distribution of the settlement from the Black Saturday fires was not completed until 2017, nine years after the event[185] and this meant either that capital repairs had already occurred before the payout, or were coming eight years too late.

In his critique of the Kilmore East Kinglake bushfire settlement, Legg argues for several reforms that would improve the fairness and justice of settlement distribution schemes, including interim distributions of funds and a fast-track settlement distribution mechanism.[186] These recommendations would go some way to minimising the hardships of

[180] For example, the total economic loss caused by Black Saturday is estimated to be approximately $4 billion: Danuta Mendelsohn and Rachel Carter, 'Catastrophic Loss and the Law: A Comparison between 2009 Victorian Black Saturday Fires and 2011 Queensland Floods and Cyclone Yasi' (2012) 31(2) *University of Tasmania Law Review* 32, 34.

[181] Deloitte Access Economics, *The Economic Impact of Selected Communities Receiving Bushfire Compensation Payments* (Report, September 2017).

[182] Ibid.

[183] Interview with MP for Polwarth (n 29).

[184] Ibid; Interview with defendant organisation (n 29).

[185] Maurice Blackburn Lawyers, *Kilmore and Murrindindi Administrations* (n 41).

[186] Legg, *Kilmore East Kinglake Bushfire Class Action Settlement Distribution Scheme* (n 28).

protracted proceedings and settlement processes, but it is unlikely that they can ever be fully avoided.

C *Confidentiality and the public interest in allocating responsibility for bushfire*

As we noted in Part III.B, the high profile of bushfire class actions means that they have potential public interest and deterrent effect beyond direct compensation.[187] The absence of judicial determination on important issues of liability and potential contributory negligence may become increasingly problematic as the number of bushfire claims increases. It may also inhibit objectives of open justice, particularly where the terms of the settlement are not publicly available.[188]

Ordering that the terms of settlement remain confidential can incentivise settlement, but there is a wider public interest and precedent value in publishing the detail of class action settlements. While approving a settlement does not require the court to make any determination of points of law and fact, it does involve assessment of the likelihood that the action will be successful, which necessarily involves some consideration of underlying points of law and fact.[189]

The need for more transparent settlement outcomes in class actions has been previously recognised by courts and researchers alike.[190] Currently, firms informally publish summaries of settlements reached on their websites, subject to any confidentiality obligations.[191] These summaries allow practitioners, academics and the interested public to gain an understanding of the outcomes of bushfire class actions. This can inform further development of the law to enable more efficient recovery for

[187] Blencowe, Hardwick and Lewis (n 109); Interview with plaintiff lawyer 1 (n 32); Interview with plaintiff lawyer 2 (n 81).

[188] Vince Morabito, 'Class Actions: Looking into the Fishbowl – Open Justice and Federal Class Action Settlements' (2019) 93(6) *Australian Law Journal* 446, 446–7.

[189] *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289, [105].

[190] Ibid [105]–[107]; Legg, 'Class Action Settlements in Australia – the Need for Greater Scrutiny' (n 135).

[191] See, eg, 'Black Saturday Bushfire Class Actions', *Maurice Blackburn Lawyers* (Web Page)
<https://www.mauriceblackburn.com.au/class-actions/past-class-actions/bushfire-class-actions/>; 'Kilmore East - Kinglake Bushfire Class Action', *Maurice Blackburn Lawyers* (Web Page) <https://www.mauriceblackburn.com.au/class-actions/past-class-actions/bushfire-class-actions/kilmore-east-kinglake-bushfire-class-action/>.

plaintiffs affected by bushfires in the future. The Australian Law Reform Commission's Report on Class Actions made recommendations that would formalise these obligations. It recommended that settlement administrators be required to provide the class with a report on the completion of the distribution of the settlement sum, which is also posted on the Court's national class actions database.[192]

V IMPROVING RECOVERY FROM BUSHFIRE

Throughout the foregoing discussion, we have identified opportunities to improve or overcome impediments to recovery in bushfire class actions. These reform options are not necessarily unique to bushfire litigation: many apply to class actions more generally and there are other problems with class actions that are not *especially* problematic in the case of bushfire. The ALRC[193] the Victorian Law Reform Commission[194] and the Parliamentary Inquiry into Litigation funding and the regulation of the class action industry have all made extensive recommendations relating to costs and conflicts of interest, aimed at increasing the benefits of class actions and litigation funding for claimants.[195] The Federal Government is yet to release its response to the most recent Parliamentary Inquiry. The recommendations of the Parliamentary Inquiry include increased obligations for lawyers and funders to disclose any conflicts of interest to the Court and group members, and the inclusion of guidance in the Federal Court of Australia Class Actions Practice Note on scenarios where conflicts are likely to arise. The Inquiry also proposes a presumption that a contradictor is appointed to represent the interests of group members in settlement approval proceedings where there is significant potential for conflicts of interest.[196] These reforms, if implemented, would enable the Court to assess and protect the interests of group members throughout the class action process.

[192] *ALRC Class Action Inquiry* (n 27) recommendations 10, 151; Morabito, 'Class Actions: Looking into the Fishbowl – Open Justice and Federal Class Action Settlements' (n 188) 446, 448.

[193] *ALRC Class Action Inquiry* (n 27).

[194] Victorian Law Reform Commission, *Access to Justice: Litigation Funding and Group Proceedings* (Report, March 2018).

[195] *Parliamentary Inquiry Report* (n 27) recommendations 15, 23, 24, 25.

[196] Ibid recommendation 18.

In the absence of such reforms, the litigation alternative to class actions — individual suits — is also problematic. As we noted in Part II, prior to the introduction of class actions in Australia, the Ash Wednesday fires gave rise to over 400 individual claims in respect of one bushfire event.[197] Conventional forms of civil litigation still face the high costs, potential for delay, and difficulty of with assigning liability for what is commonly thought of as a natural disaster. So, if the alternative to class actions is individual suits, there are clear cost and efficiency benefits to bushfire class actions to plaintiffs, courts and defendants.

Alternatives to litigation are limited. For those who have it, insurance is the most common way to recover losses caused by bushfires. However, there are high levels of un-insurance and under-insurance.[198] There is often a large part of each victim's loss that cannot be recovered through an insurance claim and this uninsured loss is what is recovered from a class action. As the severity and frequency of bushfires increases, properties in high-risk locations are likely to become uninsurable or insurance will be even more expensive, so it is reasonable to expect larger shortfalls in insurance coverage.[199]

The alternative compensation mechanisms to private insurance and litigation are public emergency relief and publicly-funded insurance pools. Emergency relief is critically important in the immediate aftermath of an extreme event.[200] However, emergency relief is temporary and aimed only at providing funds for short-term accommodation and other necessities; it is unrealistic to expect the public purse to fully compensate private individuals for bushfire losses.

A statutory insurance and compensation scheme for natural disasters, including bushfire, is another model worth considering for compensating the victims of natural disasters. This could be modelled on the catastrophe insurance programs in operation in a range of countries, including New Zealand, Spain, France and the United States National Flood Insurance

[197] See Part II.

[198] See, eg, *Royal Commission into National Natural Disaster Arrangements* (Final Report, October 2020) ch 20.

[199] Ibid 417.

[200] *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010) ch 8; 'Boost for Bushfire Recovery', *Prime Minister of Australia* (Web Page) <https://www.pm.gov.au/media/boost-bushfire-recovery>.

Program.[201] A national disaster insurance scheme has been floated for many years. It was revisited following the 2011 Queensland floods,[202] but has yet to really traction. A key advantage of such a scheme over class actions, or indeed any litigation, is that it would remove the need for the claimant to prove fault and would enable recovery where the fire started naturally. On the other hand, it would require a new tax or levy, paid either by the pool of potentially affected claimants (based on location) or, if a Medicare-style levy were preferred, the entire taxpayer base.[203]

Apart from a new tax being politically unpalatable, legitimate questions arise over whether the availability of a no-fault compensation scheme may indirectly promote maladaptive behaviour, which limits long-term goals of disaster risk reduction. Research undertaken for the Victorian Bushfires Royal Commission showed that 25% of the homes destroyed in the Black Saturday fires were within one metre of the bush — essentially becoming part of the fuel load itself.[204] As climate change increases the frequency and severity of bushfires, effective adaptation should see people move away from areas that are likely to suffer this damage or undertake significant risk mitigation. No-fault disaster insurance may enable people to avoid difficult questions about whether some areas are simply too hazardous to live and to avoid undertaking expensive risk mitigation works of their own, impeding adaptive bushfire recovery.[205] Conversely, no-fault

[201] John McAneney et al, 'Government-sponsored natural disaster insurance pools: A view from down-under' (2016) 15 (March) *International Journal of Disaster Risk Reduction* 1.

[202] John Trowbridge, Jim Minto and John Berril, *Natural Disaster Insurance Review – Inquiry into flood insurance and related matters* (Report, September 2011); Productivity Commission, *Natural Disaster Funding Arrangements* (Report, 2015) vol 1; Productivity Commission, *Natural Disaster Funding Arrangements* (Report, 2015) vol 2.

[203] The Commonwealth Government imposed a temporary levy of this sort to retrospectively cover the $30 million cost of the 2010–1 Queensland floods: *Tax Laws Amendment (Temporary Flood & Cyclone Reconstruction Levy) Act 2011* (Cth); *Income Tax Rates Amendment (Temporary Flood & Cyclone Reconstruction Levy) Act 2011* (Cth).

[204] McAneney et al (n 201) 7, citing Ryan Crompton et al, 'Influence of Location, Population, and Climate on Building Damage and Fatalities due to Australian Bushfire: 1925–2009' (2010) 2(1) *Weather, Climate & Society* 300.

[205] McAneney et al (n 201); David Guthrie, 'Facilitating Adjustment or Maintaining the Status Quo? The Role of Insurance in Adaptation to Climate Change' (2014) 26 *Insurance Law Journal* 49, 49–52; Kate Booth and Stewart Williams, 'Is insurance an under-utilised mechanism in climate change adaption? The case of bushfire

disaster insurance also demands that those who live in areas or properties with a low risk of flood, cyclone, bushfire or storm surge contribute to a scheme that they will likely never need. This may also be unfair if the scheme does not require or incentivise adaptation and risk-mitigation from beneficiaries.[206] Finally, instead of being an insurer of last resort, poorly designed and under-priced government schemes also risk the viability of private insurance, especially as private insurers shift to a risk-based pricing model, under which premiums have increased tenfold in some places.[207]

Given these issues, it seems unlikely that recovery for bushfire losses will be moved to a public insurance pool any time soon. Addressing the shortcomings of class action litigation and providing incentives for property owners to obtain private insurance are the best ways to promote recovery in the short term. Class action litigation does not eliminate the risks of maladaptive behaviour, especially since it provides compensation that would enable claimants to rebuild in high-risk locations. This is tempered, however, by the possibility of a claim being reduced on grounds of contributory negligence. Ultimately, decisions about whether we should continue to live in bushfire-prone locations is a matter for broader public debate and improved planning laws and policies.

VI CONCLUSION

While the 2020–1 bushfire season did not inflict the scale of damage seen during the 2019–20 Black Summer, a bushfire on Queensland's world heritage listed Fraser Island threatened a major tourist resort and numerous other smaller fires threatened property in New South Wales.[208] As climate change increases fire risk across the country[209] and our cities and towns

management in Tasmania' (2012) 27(4) *Australian Journal of Emergency Management* 38, 41.

[206] McAneney et al (n 201) 6.

[207] Ibid. The long-term financial sustainability of such schemes is also a challenge in the face of more severe extreme weather events increasing the number of claims: Ruth Biggs, 'Paying for disaster recovery: Australia's NDRRA and the United States' NFIP' (2012) 27(2) *Australian Journal of Emergency Management* 26.

[208] Kevin Nguyen, 'Northmead fire under investigation as NSW RFS flags hot weather and grassland fires', *ABC News* (Online, 30 November 2020)

<https://www.abc.net.au/news/2020-11-30/nsw-rfs-says-sydney-fire-suspicious-flags-more-hot-weather/12933754>.

[209] 'State of the Climate 2018', *Bureau of Meteorology* (Web Page)

grow, it is inevitable that more people and property will be exposed to more severe risks and experience losses of life and property.

The long road to recovery from bushfire requires a combination of social, technical and financial capital. While it is assumed and hoped that most who suffer loss have access to insurance to provide the financial capital, evidence suggests that many people will have either no insurance or inadequate insurance to cover the various costs of rebuilding. In the absence of a national disaster insurance scheme, litigation can offer some a chance for recovery. Class actions can bring the security of shared costs while also shielding class members from the trauma of having to re-live their experience.

Bushfire class actions face huge barriers, including high costs, delay, and the need for an appropriate defendant. Some issues, such as competing class actions and legal costs are inherent in the current class action mechanism. Others are unique to, or at least worse in, bushfire litigation. It seems likely that the use of class actions in the future may be influenced by factors such as the commercial incentives available to plaintiff firms, trends in the use of litigation funders, the quality of maintenance of electricity assets, and how courts view the obligations land holders and residents who choose to live in fire-prone areas.[210] Understanding these issues and challenges can help all parties to bushfire class actions make more informed decisions. Improvements to settlement processes, costs, and parallel proceedings can ensure class actions achieve the right balance between individual interests and community-wide adaptation priorities in enabling recovery from bushfire.

<http://www.bom.gov.au/state-of-the-climate/australias-changing-climate.shtml>.

[210] Interview with defendant organisation (n 29); Interview with defendant lawyer (n 102); Interview with MP for Polwarth (n 29); Interview with litigation funder (n 81).