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Costs and funding commissions in class actions

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> '*Like a forest fire in this era of climate change, costs in class proceedings have gotten out of control.*
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> The tendency of Class Counsel or Defence Counsel to exercise little restraint because the courts will not second-guess either side's allocation of legal resources needs to be stopped because it is not fair to the litigants and because runaway legal expense is an obstacle for access to justice for both plaintiffs and defendants.
>
> The court is part of the problem. The court's failure to rein in the expectations of the parties to what is a genuinely reasonable allocation of legal resources, even for a high risk-and-reward class action, just fuels the fire storm. It requires no change in the law to bring some control, proportionality, and reasonableness back. All it requires is for the court to do its job and not leave it to the lawyers to unreasonably determine what is a reasonable costs award in a class action.'[3]

Whether such judicial comments, made in a Canadian context, have relevance to Australia may be subject to debate. We hope that the empirical data and other information in this Research Paper will contribute to a more informed discussion on legal costs and the financing of class actions.

The two most acute problems with class actions are costs and delay.[4] They both necessitate and aggravate the need for private commercial funding in the absence of a public funding mechanism.

In the Annexure to this Research Paper we provide detailed information on the legal costs and litigation funding commissions incurred in 90 class actions, some of which involve multiple related class actions.[5] In 26 of these cases (29%) the reported legal costs in each case exceeded $10 million. In many cases, the total final legal costs were substantially greater than the reported legal costs because in most instances the costs figures are those before the court on the application for court approval of settlements, before the substantial additional costs of claims administration had been incurred.

In a number of instances, the total legal costs were very substantial indeed, including in the Victorian bush fire litigation and the VW diesel-gate litigation.

In our view, in many class actions the legal and transaction costs are excessive. We deal in further detail below with the components of such costs and the question of whether the quantum can be considered to be 'reasonable'. This is, of course, a matter of some significance, not only from the

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[2] Solicitor; Research Assistant.
[3] Perell J, *Heller v Uber Technologies Inc*., 2018 ONSC 1690 [1]-[3] (Reasons for decision on costs). In this Canadian class action, an issue arose as to the enforceability or unconscionability of a mandatory arbitration clause (requiring arbitration in the Netherlands) that purported to preclude class action proceedings. The case went all the way to the Canadian Supreme Court which upheld, by majority, the decision of the Court of Appeal that the arbitration provision was invalid: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (CanLII).
[4] We examined the problem of delay and provided empirical data on delays in class actions in an earlier Research Paper: Peter Cashman & Amelia Simpson, *The problem of delay in class actions*, Class Actions Research Paper #4 (9 October 2020).
[5] For example, the VW diesel-gate consumer class actions are listed as one (*Cantor v Audi Australia Pty Ltd*) but encompass five related and partially overlapping class actions which were conducted concurrently with the penalty proceedings brought by the ACCC.

perspective of professional and commercial beneficiaries, class members and judicial officers presiding over applications for approval of settlements, but also in considering the price of access to justice and in evaluating the operation of the civil justice system. However, in a number of cases respondents have agreed to pay all of the costs incurred by the applicants, in addition to the settlement amounts payable to class members.

There are a number of factors that contribute to the very substantial costs incurred in class actions. Some of these are characteristic of complex civil litigation generally whereas others are inherent in class actions in particular.

Factors which give rise to substantial costs include:

- the complexity of the legal and factual issues arising out of claims and defences
- the wide ambit of many of the claims pleaded and pursued by applicants
- the joinder of multiple respondents
- the denial of liability and the vigorous defence of claims by respondents
- cross claims and contribution claims by respondents
- specific procedural factors unique to class actions
- competing and overlapping class actions
- delays in obtaining hearing dates and delays in the delivery of judgments
- interlocutory disputation and appeals
- legal profession cultural factors impacting on the conduct of class action litigation
- the time billing practices of lawyers
- economic incentives for the prolongation of litigation
- litigation funding arrangements, including funding commissions calculated as a multiple of costs incurred and remuneration arrangements with those managing the litigation on behalf of the funders providing the capital
- the absence of any effective applicant client control over legal costs and funding commissions
- the 'divided' legal profession and the role and costs of counsel
- duplication of work and over servicing
- the role and costs of expert witnesses
- the review and processing of voluminous document discovery
- the absence of effective procedural and evidentiary mechanisms for getting to the truth early
- the disinclination to seek the expedited resolution of dispositive issues
- perceived and legal constraints on proactive judicial intervention
- the need for a claims resolution process to resolve individual claims of class members.

A number of these issues were touched on by experienced class action practitioners and were discussed in a previous Research Paper.[6] We further explore a number of these factors below.

Those factors contributing to excessive costs encompass forensic, procedural, commercial and cultural factors.

The wide ambit of claims and multiple causes of action

On the applicants' side, many claims are formulated in wide terms and a number of causes of action are pleaded and pursued.

Many, if not most, consumer and product liability cases can succeed on the basis of causes of action which impose strict liability. Yet, they are usually pursued alongside additional causes of action

[6] Peter Cashman & Amelia Simpson, *Class actions and litigation funding reform: the views of class action practitioners*, Class Actions Research Paper #3 (17 September 2020). Some of these findings are published in our article in *Lawyerly*, 2 October 2020.

requiring proof of knowledge, intention or fault. This can unnecessarily complicate the litigation, give rise to wide ranging document discovery and substantially increase costs, complication and delay.

Claims against multiple defendants

In some cases more defendants are sued than is arguably necessary. For example, in product liability cases questions arise as to the necessity to join all of the various local and international corporate entities that may have been involved in the development, testing, manufacture and marketing of the product. Difficult questions may also arise in shareholder litigation as to the joinder of the company and/or director and/or financial and other advisers.

Denial of liability unmeritorious defences and putting applicants to proof

On the respondents' side, liability is usually denied and defences are pursued which do not always have substantial merit.[7]

The problem is compounded a *corporate culture* in which recalcitrant defendants continue to affirmatively deny liability. All too often the *corporate culture* may be characterised not only by affirmative *denial* of legal liability but by what an American author has described in a recent book as '*Industrial strength' denial*.[8]

Legal profession culture

There is a risk that lawyers with a direct personal economic interest in the continuing conduct of the litigation, on both sides of the bar table, will not always seek to achieve the expeditious, efficient and inexpensive resolution of the case.

This risks the development of a *legal culture* giving rise to a symbiotic relationship between plaintiff and defence firms whereby both professional adversaries are commercial beneficiaries of the excessive transaction costs frequently incurred.

Components of transaction costs

It is clear that commercial practices and regulations in respect of fees and funding are critical determinants of the utility and cost of class actions. In this Research Paper we examine in some detail the transaction costs incurred in class action litigation in Australia. Such transaction costs encompass, amongst other things:

- solicitors' fees
- counsels' fees
- court fees
- expert witness fees
- transcript expenses
- other out of pocket expenses incurred in conducting litigation
- commissions and other fees paid to commercial litigation funders
- premiums and other expenses incurred in obtaining adverse costs ('after the event' or ATE) insurance.

Our primary focus is on legal costs (particularly legal fees) and the commissions charged by commercial litigation insurers in class action litigation. We refer to, and analyse in some detail, the empirical data on costs and funding commissions in class action litigation compiled by the Law Council of Australia and recently submitted to the Parliamentary Joint Committee on Corporations and Financial Services in connection with its inquiry into litigation funding in class actions.[9]

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[7] In our previous Research Paper (Ibid), however, defence practitioners explained that laborious processes of document review are often required before they are able to gauge the merits of the claims. It was contended that initial denials of liability are not improperly made by practitioners acting for defendants to class actions.
[8] Barbara Freese, *Industrial Strength Denial* (University of California Press, 2020).
[9] Law Council of Australia, *Litigation funding and the regulation of the class action industry* (16 June 2020). The first author (a) is a member of the Law Council Class Actions Sub-committee which assisted with the preparation of that submission and (b) along with other members of the Sub-committee, compiled the statistical

We also refer to:

- selected empirical research on costs in civil litigation generally
- a number of observations by judges and civil justice scholars in respect of the 'problem' of costs
- the recommendations of a number of law reform commissions concerning costs
- comparative information on costs in class action litigation in Canada and the United States
- the views of experienced class action practitioners in Australia in relation to costs
- various mechanisms for the regulation, scrutiny and control of costs
- some billing practices that are problematic and, in some instances, arguably improper.

We also consider the nature of fiduciary duties in class action proceedings.

Costs in civil litigation

In Australia, there has been relatively little empirical research on civil litigation generally or costs in particular. There is an 'absence of reliable or comprehensive empirical data' on litigation costs and the impact of the various reform initiatives of recent decades.[10]

As Justice Sackvillle observed in 2018:

> In Australia, the absence of detailed empirical studies makes it difficult to determine whether comparable reforms to the litigious process have reduced costs and delay to the extent that at least some disadvantaged people are better able to enforce their rights or to resist unjust claims against them… As Hazel Genn has pointed out, too many civil justice reviews have been conducted without the benefit of detailed empirical work that enables assumptions to be tested.[11]

Professor Morabito's ongoing research has been referred to at various points in our previous Research Papers and provides valuable empirical data on class actions.[12]

In relation to the costs of civil litigation, a noteworthy exception to the dearth of research is the study conducted by the Civil Justice Research Centre (CJRC) established and funded by the NSW Law Foundation.[13] The study by Worthington and Baker examined the costs of civil litigation in the higher courts in NSW and Victoria based on samples of law firms and cases conducted by those firms.[14] The study examined:

- types of fee arrangements

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data which was incorporated in the Law Council Submission (Attachment A) and which is Annexure A to this Research Paper.

[10] Peter Cashman, *The Cost of Access to Courts* (Conference Paper, 'Confidence in the Courts' Conference, 9-11 February 2007) 8.

[11] Ronald Sackville AO QC, 'Law and Poverty: A Paradox' (2018) 41(1) *UNSW Law Journal* 80, 90.

[12] In one of his recent papers, Professor Morabito reported that '26.95% of all the settlement proceeds generated in federal funded class actions ($527,717,953 out of $1,957,971,672) were applied toward the funding fees of the funder supporting the litigation. 26.87% of all the settlement proceeds generated in all funded class actions ($582,953,453 out of $2,169,021,672) were applied towards the funding fees of the funder supporting the litigation' (Vince Morabito, *An Evidence-Based Approach to Class Action Reform in Australia Common Fund Orders, Funding Fees and Reimbursement Payments* (January 2019) 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326303>).

[13] The first author was a member of the interim steering committee of the CJRC which formulated the issues for research in that study.

[14] Deborah Worthington and Joanne Baker, 'The Costs of Civil Litigation: Current Charging Practices, New South Wales and Victoria' (Civil Justice Research Centre, December 1993) <http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/The_costs_of_civil_litigation.pdf>.

- how solicitors calculate fees
- the types and costs of disbursements incurred
- a comparison of party-party and solicitor client costs
- the hours spent on cases
- legal costs at different stages of the disposal of cases
- the relationship between the duration of cases and the quantum of costs
- the damages amounts recovered by plaintiffs
- a comparison of legal costs with the amounts recovered in damages
- a comparison of plaintiff and defendant legal costs
- a comparison between NSW and Victoria.

While the data are somewhat dated, and of limited relevance to our present study of costs in class actions, there are some findings which are of interest. In NSW party-party costs were 60% of solicitor client costs in cases that settled and 70% in cases that proceeded to verdict.

This was broadly similar in Victoria. In NSW District Court cases the median of plaintiffs' legal costs was 27% of the gross amount of damages recovered. In the NSW Supreme Court, the median was 20%. The corresponding figures in Victoria were a median of 32% in the County Court and 15% in the Supreme Court. Overall, plaintiffs' legal costs and disbursements were higher than defendants' legal costs and disbursements. There was a difference between the two jurisdictions in terms of how legal costs were calculated. In NSW firms mainly calculated their fees based on the time spent (64%). In Victoria, most firms calculated fees on the basis of a court scale (69%). In both jurisdictions some firms used other methods, including 'a reasonable amount having regard to the result' or a subjective assessment of the value of the work done. The median hourly rate for solicitors' fees was: $215 in the NSW Supreme Court; $164 in the District Court; $193 in the Victorian Supreme Court and $161 in the County Court. Curiously, the passing of time (i.e. delay) did not appear to be associated with an increase in either fees or disbursements in either NSW or Victoria. However, costs and disbursements were lower in cases that settled before the hearing date, consistent with other research at the time.[15]

The 2014 Productivity Commission report on access to justice arrangements included some analysis of data on costs.[16]

The NSW Law Reform Commission noted in 2011 that:[17]

> There is a lack of current statistical information about the costs of civil litigation in Australia. However, there is some evidence that the costs of litigation have been increasing. The Law and Justice Foundation of NSW conducted a study that revealed that litigant costs in the District Court had "increased significantly": the litigation costs for that jurisdiction rose by a quarter on average over the years 1994–1997. For example, the average litigation costs incurred by plaintiffs in non-motor accident proceedings increased from $12,193 to $14,781 during this period, while those of defendants increased from $8,241 to $13,864.

There has been some comparative research on legal costs and the funding of civil litigation.[18]

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[15] Dr Philip Williams et al, *The Costs of Civil Litigation Before Intermediate Courts in Australia*, AIJA, Victoria, 1992. See also, Philip Williams and Ross Williams, 'The Cost of Civil Litigation: An Empirical Study' (1994) 14 *International Review of Law and Economics* 73.

[16] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, September 2014) 118-122 and 879-901.

[17] NSW Law Reform Commission, 'Security for costs and other associated orders' (Consultation paper 13, May 2011) 8 [1.32].

[18] For a comparative discussion of litigation funding of class actions in Canada and Australia, see Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding" 61:2 *American Journal of Comparative Law* (2013).

In their 2010 report, Marfording and Eyland compared data on various aspects of civil litigation in NSW and Germany, including litigation costs and lawyers' fees.[19] The study involved an analysis of case studies and interviews with legal practitioners. They found that there were 'considerably higher' litigation costs in NSW.[20] According to their analysis, costs were the main cause for complaint in NSW and this 'is likely due to the relative freedom given to lawyers by the *Legal Profession Act 2004* (NSW) as to the basis on which to charge fees'.[21] Time billing was said to encourage labour intensiveness, inflate costs and lead to a lack of proportion to the value of the matter, with further negative implications for the availability of legal aid and insurance.[22]

Australian civil litigation costs were reviewed as part of a comparative study of 34 jurisdictions in 2009.[23] Australia was identified as one of the jurisdictions with the highest legal fees and litigation costs.[24] However, as Camille Cameron notes:[25]

> Understanding litigation costs and funding in Australia is hampered by a lack of empirical information. These issues have not attracted much attention from researchers, most likely because of the obstacles that are encountered in getting enough information from sufficiently wide samples. This is exacerbated by the fact that there is limited statistical information gathered by individual courts, tribunals and other service providers. A recurring theme in policy and law reform reports is the need for more empirical information, comparative analyses across various State, Territory and Commonwealth jurisdictions, and a more systematic approach by courts and tribunals to gathering statistics about costs. The lack of such information imposes limits on any attempt to answer costs-related questions about proportionality, predictability and efficiency.

There have also been a number of economic analyses[26] and some complex multivariate statistical studies in other jurisdictions.[27]

Times and legal proceedings have changed. Although legal costs agreements are now the subject of detailed regulatory requirements, hourly rates have become largely unregulated in Australia. However, in class actions, applicants' costs and disbursements, together with funding commissions and other payments (including premiums for adverse costs insurance) are subject to judicial scrutiny. They may require judicial approval in the context of settlements. A judicial imprimatur is required where some or all of the costs are payable out of amounts of compensation or damages otherwise payable to class members. We refer below to the presently available data on costs and funding commissions in class action litigation in Australia.

Judicial and other observations on costs in civil litigation and class actions.

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[19] Annette Marfording and Ann Eyland, 'Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany' [2010] *University of New South Wales Faculty of Law Research Series* 28 <http://www.austlii.edu.au/au/journals/UNSWLRS/2010/28.html>.
[20] Ibid 19.
[21] Ibid 19.
[22] Ibid 19, 57-79.
[23] Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study* University of Oxford Legal Research Paper Series Paper No 55/2009 (December 2009). A book on the project was published in November 2010: Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010).
[24] Ibid 19.
[25] Camille Cameron, 'Australia' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka (eds) *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010) 195.
[26] See e.g. Ben Chen & José A. Rodrigues-Neto, *Cost Shifting in Civil Litigation: A General Theory*, ANU Working Papers in Economics and Econometrics 2017-651, Australian National University, College of Business and Economics, School of Economics (2017).
[27] See e.g. Emery G Lee III and Thomas E Willging, 'Defining the Problem of Costs in Federal Civil Litigation' (2010) 60(3) *Duke Law Journal* 765.

As a former Chief Justice of the High Court observed in 1998: 'civil litigation is far too expensive, and that the result of this is serious injustice to many people'.[28]

In similar terms the former Chief Justice of Western Australia, Wayne Martin has stated:

> The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.[29]

Federal Court Justice Murphy has remarked:[30]

> That our system of justice has a fundamental problem in relation to legal costs is plain, and there is a rare unanimity of view amongst senior figures in the law that our legal system is unaffordable for many people.

As Victorian Supreme Court Justice Bell stated in *Russells v McCardel*[31]:

> Clarity, freedom of informed choice and proportionate legal expenses are important not only for the relationship between lawyer and client but also for the operation of the system of justice. Remembering that lawyers enjoy a statutory monopoly that can only be justified in the public interest, excessive legal costs undermine public confidence in the legal system and present a significant barrier to obtaining access to justice, which is a fundamental human right.

The Law Council has observed:

> The cost of litigation and accessing legal representation in Australia is an issue of ongoing concern to the community and the legal profession. Clients must be able to have confidence that what is charged by lawyers, and what may be recovered, is appropriate and reasonable, while legal practitioners have a right to be fairly remunerated for their skill and labour.[32]

As civil justice scholar Camille Cameron notes:

> Asking whether legal costs are proportionate, however, requires an analysis of various factors in samples of cases sufficiently large to produce valid results, including the amounts involved, the amounts recovered, the fees charged by lawyers and the gap between costs incurred and costs recovered by the successful parties. If we interpret 'proportionality' broadly, our analysis would also have to include court time and resources used, the cost to the public of the tax deductibility of legal fees as a business expense, the costs to a business entity of the time and resources directed to the litigation effort (thus diverted from other efforts) and (arguably) the less tangible but real emotional and psychological costs often associated with litigation. We do not yet have this information. One risk is that large, complex cases and a relatively small number of high profile 'mega- litigation' cases have become our data source. The

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[28] The Hon Murray Gleeson AC, 'Commentary on Paper By Lord Browne-Wilkinson' (Speech, Supreme Court Of New South Wales Judges' Conference, 11 September 1998).Chief Justice Gleeson considered that time charging practices lead to 'delay, inefficiency, and slow thinking'. <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_cj2.htm>.
[29] Cited in Productivity Commission (n 16) 6.
[30] Justice Bernard Murphy, 'The Problem of Legal Costs: Lump Sum Costs Orders in the Federal Court' (Speech, The National Costs Law Conference, 17 February 2017) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-murphy/20170217>.
[31] [2014] VSC 287 at [7].
[32] Law Council of Australia, *2020 Inquiry into Legal Practitioners' Scales of Costs* (3 September 2020) [2] <https://www.lawcouncil.asn.au/publicassets/a76f6215-2ef2-ea11-9434-005056be13b5/3877%20-%202020%20Inquiry%20into%20Legal%20Practitioners%20%20Scales%20of%20Costs.pdf>.

> substantial demands which those cases place on the civil justice system has to be addressed, but they are not sufficiently representative of all of the work that courts and tribunals do to become the justification for broad-ranging policy decisions.[33]

Class actions are commonly large and complex. They place substantial demands on the civil justice system. While they are not representative of all of the work of the courts, the demands they impose are of such significance, and in many ways unique, as to warrant specific policy consideration.

Class actions and representative proceedings 'give rise to a number of unique and vexed issues in relation to costs.'[34]

Writing extrajudicially, the former Chief Justice of the High Court noted that in a number of class actions, there are examples of 'defendants whose interests lie in increasing the cost and delay of litigation, and in making sure that people who contemplate suing them understand that they will be in for a long and expensive haul'.[35]

By way of example, the costs incurred by the parties in the recently settled Volkswagen 'defeat device' litigation exceeded one hundred million dollars.[36]

The current Chief Justice of New South Wales and Sarah Schwartz have commented that 'The costs of class action litigation can be incredibly onerous for a representative party'.[37]

With reference to the procedural warfare in *Bright v Femcare* Justice Murphy and Cameron have noted that:[38]

> … the applicant's wasted costs and disbursements exceeded $1 million. The action was eventually discontinued because the class action mechanism was not providing effective relief. This may be pointed to as evidence that the action should not have been instituted in the first place, and to justify the manner in which the respondent conducted the litigation. However, it might well be asked: did the claim fail to provide effective relief because it was an inappropriate matter to have ever been brought as a class action, or because of the intensity with which the defendants resisted it? Consider that there were two appeals to the Full Court of the Federal Court and two appeals to the High Court — even before the applicant had received a defence. The applicant won both Federal Court appeals. The High Court had not heard the appeals to it at the time the case was discontinued as a class action. It is at least possible that the resulting expense contributed to the applicant's decision to terminate the class action.
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> …The cost of conducting class actions means that a significant proportion of the damages payable to group members will often be consumed by solicitor–client costs. This cost is exacerbated by the satellite litigation — technical challenges, attacks on pleadings and other interlocutory applications — that has become commonplace in such actions. As the size of the damages 'pool' is reduced by the increasing solicitor–client costs, the action becomes less valuable for the group. One way of addressing this difficulty is for courts to respond

[33] Cameron (n 25) 215.
[34] Cashman (n 10) 64.
[35] Gleeson (n 28).
[36] *Cantor v Audi Australia Pty Limited* (No 5) [2020] FCA 637. The applicants' costs and expenses to the date of settlement were approximately $51,980,351 (including $7,800,696.50 incurred in the two class actions run by Bannister Law and $43,296,810.22 incurred in the three class actions run by Maurice Blackburn), compared to a settlement amount of $120 million. Further substantial costs continue to be incurred at present in relation to the administration of the settlement.
[38] Ibid 412-3.
[38] Ibid 412-3.

> favourably to requests for indemnity costs against respondents. However, Australian courts have hitherto proved reluctant to make such orders.[39]

More recently, O'Bryan J has observed: 'The early history of representative proceedings under Part IVA of the FCA Act was marked, if not marred, by protracted pleading disputes. On occasions, the Court has indicated its impatience with unnecessary pleadings disputes…'[40]

In a judicial capacity, Murphy J has emphasised the protective role of courts in supervising costs in the class action context because of the information asymmetries between solicitors and group members.[41] In *Petersen*, Murphy J referred to disproportionate legal costs and legal funding charges as 'an increasing problem in class action litigation'.[42]

Proportionality of costs is required by various statutes and has been considered extensively by the courts.[43] The reasonableness and proportionality of costs will depend on the circumstances and procedural history of the litigation at hand:

> '[I]n determining whether costs have been reasonably and properly incurred, it is relevant to consider whether those costs bear a reasonable relationship to the value and importance of the subject matter in issue.'[44]

In *Lenehan v Powercor* [2020] VSC 82 at [11] Nichols J stated:

> The proportionality measure looks to the relationship between the costs incurred and the value and importance of the subject matter in issue. The requirement for proportionality as it concerns legal costs generally is expressed in s 172 of the *Legal Profession Uniform Law* (Vic) (the Uniform Law) and in s 24 of the *Civil Procedure Act 2010* (Vic). It is a forward looking assessment which compares the cost of the work with the benefit that could reasonably be expected from the work, at the time at which the work was performed.

As noted by Moshinsky J in *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 at [54]:

> …a very large costs sum might readily be approved in a settlement following a lengthy trial, while an apparently-modest costs sum might require more exacting validation if it is associated with a modest-sized proceeding and represents a significant proportion of the overall settlement sum. The relevant considerations are discussed in *Modtech* at [26]-[36], *Matthews* at [348]-[353] and *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (*Bonsoy*) at [179]-[181].

In response to a claim that court approval of settlements in which group members receive less than half of settlement monies was 'not unusual', Lee J stated '[t]here must be a good reason why a settlement could be considered fair from the perspective of group members, when the lawyers, experts and the funders get more out of it than the people who have allegedly suffered a wrong.'[45]

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[39] Ibid 423.
[40] *Reilly v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502, O'Bryan J at [12] referring to *Bright v Femcare Ltd* [2002] FCAFC 243; (2002) 195 ALR 574 at [160] per Finkelstein J.
[41] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 at [87]-[88] citing Tadgell J in *Redfern v Mineral Engineers Pty Ltd* [1987] VR 518 at 523; *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 at [26]; *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* (2016) 335 ALR 439; [2016] FCA 323 at [332].
[42] Ibid [4].
[43] See *Legal Profession Uniform Law* (2014) (NSW) s 172.
[44] *Skalkos v T & S Recoveries Pty Ltd* [2004] NSWCA 281 at [8] (Ipp JA).
[45] *Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 5 at [29] (Lee J).

Class actions are complex and lengthy proceedings. There are a number of factors which lead to legitimately incurred and unavoidable costs. However, where costs are disproportionate to amounts recovered, there is cause for concern.

The views of experienced class action practitioners

In an earlier Research Paper, we set out the views of experienced class action practitioners whom we interviewed.[46] The issue of costs was one of the main issues considered.

Most interviewees were of the view that transactions costs were a problem in class action litigation. In some instances, this was said to be attributable to procedural requirements. Multiplicity and uncertainty were said to be significant drivers of high transaction costs in the course of litigation. Expert costs in securities class actions were described as 'unbelievably exorbitant' and discovery costs were criticised. Discovery costs may be large because of a lack of specificity in pleadings. However, interviewees also expressed optimism about reduced costs of discovery in the future through greater use of technology. Settlement administration costs were also described as a problem.

One interviewee queried whether driving up costs is part of the business model of law firms running the litigation. It was suggested that there was an amount of over servicing and a need for greater discipline in the management of escalating costs by plaintiff law firms. The absence of a cost-conscious client on the plaintiff side was said to lead to higher costs than those accrued by defence lawyers who experience more competition, are instructed by large commercial clients and face additional scrutiny from insurers. It was also stated that defendant conduct leads to exorbitant and unnecessary costs and that, in some instances, this may be a deliberate tactic employed to drive up plaintiff costs until they become an intolerable burden.

Transaction costs associated with commercial litigation funding were criticised. However, other interviewees believed that funders may increase efficiencies and lead to greater commercial realism on the plaintiff side.

A number of those interviewed expressed the view that such problems were characteristic of complex litigation generally, rather than class actions per se. Others were of the opinion that class action costs were not comparable to other forms of large, complex litigation.

Some of those interviewed suggested that the costs of class action litigation are mostly proportionate. In their view, class actions can be viewed as cost effective in comparison to the individual litigation of those claims.

Recommendations by Australian law reform bodies

Legal costs have also been the subject of numerous law reform inquiries.

Cost shifting was the subject of an Australian Law Reform Commission review in 1995.[47] The ALRC noted that affordability is a 'key element in improving access to justice'.[48] Recommendations included court powers to cap costs, to award costs against parties who bring vexatious or frivolous proceedings and to make disciplinary costs orders against legal representatives of any other person involved in the litigation who, inter alia, significantly increases the costs of the matter by unreasonably pursuing issues on which they fail or causes the other party to incur unnecessary costs.[49] The ALRC recommended powers to make orders disallowing costs, directing representatives to repay costs ordered against their client, or any other costs the client incurred where the court is of the opinion that

[46] Cashman and Simpson (n 6).
[47] ALRC, Report No. 75 *Costs Shifting — who pays for litigation* (October 1995) <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC75.pdf>.
[48] Ibid [2.20].
[49] Ibid recommendations 34, 35, 38 and 39.

the representative is responsible for improperly incurred costs or costs incurred without reasonable costs.[50] In addition, the ALRC recommended that the court should be empowered to order parties or legal representatives to pay costs incurred by other parties as a result of an unreasonable claim or defence.[51] Further, the ALRC recommended that courts be able to order legal representatives to provide clients with a statement of the costs incurred and an estimate of the further costs on the basis of specified assumptions.[52] The ALRC also proposed a
federal legal assistance indemnity fund, a public interest litigation fund and a federal appeals assistance fund.[53]

In 2000, the ALRC published its report on the civil justice system, including a number of recommendations on legal costs.[54] The ALRC recommended uniformity of legislation requiring lawyers to provide clients with cost estimates on an early, ongoing basis and the development of practice rules of professional associations to set out factors which are relevant to determinations of whether fees are reasonable.[55] The ALRC recommended new legislation be scrutinised by Senate Committees scrutinising new legislation or regulation to have regard to the likely impact of the legislation on increased litigation or legal costs.[56] The ALRC recommended greater availability of information on fee rates for consumers of legal services.[57] The introduction of event based fee scales as proposed by Professor Phillip Williams and changes to court fees were also recommended.[58]

The Victorian Law Reform Commission considered the cost of litigation in its 2008 *Civil Justice Review*. The Commission noted that:

> 'Contemporary concerns about costs in civil litigation are many, varied and well documented. At least in the higher courts, it is often contended that problems arise out of a multitude of factors which either singularly or in combination prevent access to the courts, give rise to injustice, or result in justice at too high a price. Some of these factors can be directly attributed to costs rules and principles, including:
>
> • fear of adverse costs which may prevent many claimants from commencing meritorious claims, or may impact on the conduct of claims and defences
> • the open-ended method of calculating legal fees based on hourly rates, which leads to uncertainty and which is conducive to inefficiency, over-servicing and in some instances overcharging
> • the high cost of out-of-pocket expenses and disbursements, particularly those which include substantial mark-ups on the real cost to the law firm of the items
> • the inherent complexity of the subject matter of some types of cases
> • the disproportionate relationship between costs and the subject matter of the dispute
> • the inability of successful parties to recover a substantial proportion of their costs in the event of success.'[59]

The submissions received in response to its Consultation Paper identified a multiplicity of issues of concern in relation to costs.[60] Factors contributing to excessive or prohibitive costs were discussed throughout the Report along with various recommendations for reform. Such factors included:

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[50] Ibid recommendation 36.
[51] Ibid recommendation 37.
[52] Ibid recommendation 54. The ALRC recommended that the cost of preparing this information be borne by the legal representatives.
[53] Ibid recommendations 59-61.
[54] ALRC, Report No. 89, *Managing justice: A review of the federal civil justice system* (2000) 34-5, 318-82.
[55] Ibid 15.
[56] Ibid.
[57] Ibid.
[58] Ibid 15-16.
[59] Victorian Law Reform Commission (VLRC), *Civil Justice Review Report* (2008) chapter 11, 'Reducing the Cost of Litigation' 638.
[60] Ibid 639-640.

- 'the lack of incentives or mechanisms to facilitate disclosure of the strengths and weaknesses of the parties' positions both prior to and following the commencement of proceedings
- the absence of procedures or powers to require persons with knowledge relevant to the issues in dispute to disclose such information other than through being called as a witness at trial
- the failure of parties and their legal representatives to limit the factual or legal issues in dispute and the perceived necessity to cover all issues because of concern about professional responsibilities and potential liability
- the multiple processing of the same information and documents by multiple parties
- the deployment of numerous professional personnel on each side, both within firms and through the use of counsel as a result of the divided legal profession
- the predominant use of oral argument and adversarial processes at both interlocutory proceedings and at trial
- insufficient use of ADR techniques, both in and outside the court process
- a lack of proactive judicial management of litigation
- the wide ambit of document discovery, which is alleged to be a major contributor to excessive costs in complex matters
- the use of multiple expert witnesses and the increasing cost of the professional services of such experts
- the apparent increase in the number of self-represented litigants.
- the complexity and technicality of civil procedural rules
- factors relating to behaviour and 'litigation culture', including adversarial conduct and gamesmanship.'[61]

The Commission thus concluded that the high costs of civil litigation 'arises out of a combination of complex factors relating to the conduct of participants in the process, the business practices of the legal profession, micro-economic considerations, the legal and procedural framework governing the conduct of litigation, the managerial methodology adopted by courts and a variety of diffuse cultural considerations.'[62]

Many of these factors continue to contribute to the high costs incurred in class action litigation throughout Australia.

Among its key recommendations, the VLRC proposed the establishment of a Civil Justice Council with a special Costs Council division to facilitate ongoing research and reform to ensure the collection of empirical data, appropriate performance measures and stakeholder feedback.[63] The commission highlighted the lack of empirical data on legal costs:[64]

> The commission has been considerably hampered in the course of the present inquiry by the lack of comprehensive and reliable data on legal costs incurred and recovered in civil litigation before Victorian courts. There is clearly a need for more research and empirical data on legal costs. Information about court ordered disclosure of costs incurred (and estimated further costs) at the commencement of litigation, and costs actually incurred at the conclusion of litigation, would be of considerable value, not only to the parties and to assist the court in the management of proceedings, but also to facilitate further research and reform.
>
> The proposed Civil Justice Council and Costs Council could play a valuable role in facilitating such further research and reform. The commission understands that three years ago the Supreme Court proposed that a Court Statistics and Information Resources Centre should be established. In its recent submission the Victorian Bar stated that this is an important initiative that should be pursued with urgency and urged the Government to support

[61] Ibid 638-639.
[62] Ibid 639.
[63] Ibid.
[64] Ibid 99, 691.

> it. The establishment of such a centre would no doubt assist in facilitating further research on costs and on the operation of the civil justice system generally.

Recommendation 163 of the review stated:[65]

> There is a need for more data and research on costs. One means by which this might be achieved is by empowering the court to require parties to disclose costs data at the conclusion of the matter or at any other stage of the proceeding.

The VLRC also recommended that the court have an express power to order the parties to disclose estimates of costs and actual costs incurred.[66] Fixed or capped costs were viewed as problematic in some areas of litigation and their development was supported in particular areas, subject to consultation with and agreement of stakeholders.[67] The VLRC recommended the establishment of a justice fund.[68]

In class action proceedings, the VLRC made a recommendation in respect of proportionate and other types of fee arrangements:

> The Costs Council, after consultation with the Legal Services Commissioner, the Law Institute of Victoria and the Victorian Bar should also consider whether proportionate and other types of fees, including fees based on the work actually done with a multiplier (similar to the 'lodestar' method applied by Canadian and US courts) should be recoverable in class action proceedings. However, fees in class action proceedings should be subject to court approval where they will ultimately be paid or reimbursed by class members who have not individually consented to the fee arrangements.

Other recommendations included simplification of taxation of costs and a presumption against taxation of interlocutory costs prior to final determination of the case.[69] The VLRC recommended that party-party costs should usually be all costs reasonably incurred and of a reasonable amount, subject to the discretion of the court to order otherwise. Further, other methods for the recovery of legal costs should be utilised, such as costs as a percentage of the actual reasonable solicitor-client costs.[70] The VLRC recommended the revision or update of the court scales of costs and a common scale to be used across courts with further consideration of what variation and flexibility should be in the scale.[71] In addition, the VLRC recommended a prohibition on law firms profiting from disbursements such as photocopying except where clients of reasonably substantial means agree otherwise and profits on disbursements should not be recoverable under party-party costs.[72]

The VLRC also suggested the reconsideration of percentage fees, the simplification and standardisation of court fees, review of cost consequences of offers of compromise and the creation of a Justice Fund.[73] In its report there is also a review of costs reforms in other jurisdictions.[74]

The Productivity Commission report on access to justice arrangements in 2014 outlined a number of recommendations on the costs of civil litigation, given the 'widely held views that accessing justice through the civil legal system is beyond the financial reach of "ordinary" Australians.'[75] The costs of the courts were viewed as the most prohibitive with higher costs associated with the stage of

[65] Ibid 694.
[66] Ibid recommendation 142.
[67] Ibid recommendation 144.
[68] Ibid recommendations 161 and 162.
[69] Ibid recommendations 145 and 146.
[70] Ibid recommendations 147 and 148.
[71] Ibid recommendations 149 to 151.
[72] Ibid recommendation 152.
[73] Ibid recommendations 154-7, 159-162.
[74] Ibid 651-666.
[75] Productivity Commission (n 16) 114.

resolution and the number of court events. This was said to 'underscore the cost savings of resolving disputes early and of effective case management processes'.[76]

The Commission recommended the introduction of a more systematic approach for the determination of court fees.[77] However, it was noted:[78]

> The Commission has estimated that court fees on average comprise roughly one tenth of a party's legal costs. Consistent with this estimate, empirical studies have found that court fees are not a significant source of financial concern to litigants. Further, recent fee increases in the federal courts have not significantly reduced filings, suggesting that fees do not pose a barrier to most parties at their current levels.

The Commission recommended that the Legal Profession Acts should provide consumer protections in line with statutes in NSW and Victoria, including requirements that fees be fair and reasonable.[79] Other recommendations included a scale for costs awards in the Magistrates' courts and Federal Circuit Courts informed by empirical information and analysis reviewed every three years, the discretion for judicial officers in superior courts to require parties to submit costs budgets at the start of litigation and to cap recoverable costs where parties do not agree on a budget.[80] The Commission suggested that the possible application of a costs budgeting regime in Australian courts could occur after the examination of the performance of the English and Welsh systems.[81] In addition, the report contained recommendations on the need for greater research on the justice system, the establishment of a civil justice data clearinghouse and a committee to advise on quantitative research.[82]

The downsides of time billing were noted.[83] However, the Commission concluded that express prohibitions on particular fee structures would inhibit market innovation and that reform should focus on reducing information asymmetry through increased transparency and accessible online guidance on fair and reasonable fees.[84] Inefficiencies leading to disproportionate costs can be partly remedied through the broader use of court reforms such as limiting the scope of discovery and active case management.[85] The Commission also considered reform to expert evidence, recommending greater discretion be afforded to the courts.[86]

In addition to recommendations on common fund orders, security for costs, contingency fees and a statutory justice fund, the Victorian Law Reform Commission has recommended reforms to the guidance and guidelines on the appointment and use of cost experts in the Victorian Supreme Court and to clarify the power of the court to provide cost estimates.[87]

The alleged risk of exorbitant legal costs for plaintiffs was part of the justification for the inquiry into class actions and litigation funding by the ALRC in 2018.[88] In a subsequent report, the ALRC

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[76] Ibid 120.
[77] Ibid 2.
[78] Ibid 19.
[79] Ibid 43.
[80] Ibid 55.
[81] Ibid.
[82] Ibid 71-2.
[83] Ibid 193-4.
[84] Ibid 187, 200-212. For example, the Commission suggested the publication of anonymised reviews by cost assessors and the development of guidelines for assessors.
[85] Ibid 383. The Commission noted on pp. 389-90 that if the balance is not right, case management can lead to increased costs.
[86] Ibid 417.
[87] VLRC, *Access to Justice: Litigation Funding and Group Proceedings*, Ch 5 recommendations 25 and 26 <https://www.lawreform.vic.gov.au/content/5-risks-and-cost-burdens-class-actions>.
[88] The Honourable George Brandis QC, 'Protecting Australians from Exorbitant Legal Fees' (Media Release, 15 December 2017) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/5689479%22>.

recommended the introduction of percentage fee arrangements and the power of the Federal Court to refer the reasonableness of legal costs to a referee.[89]

Current regulation of costs agreements under the *Legal Profession Uniform Law*

Section 173 of the *Legal Profession Uniform Law (LPUL)*[90] as enacted in Victoria and New South Wales, provides:

> A law practice must not act in a way that unnecessarily results in increased legal costs payable by a client, and in particular must act reasonably to avoid unnecessary delay resulting in increased legal costs.

A costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and reasonable for the purposes of s 172 of the *LPUL*, subject to compliance with cost disclosure requirements and the cost agreement provisions in Part 4.3, Divisions 3 and 4.[91]

Clients have a right to a negotiated costs agreement.[92] Costs agreements must be written or evidenced in writing and cannot by their terms exclude cost assessment processes.[93] Costs agreements must comply with the general law of contracts and may be enforced in the same way as any other contract.[94]

The *LPUL* allows for conditional costs agreement where the payment of some or all of the legal costs is conditional on the successful outcome of the matter.[95] A conditional cost agreement must be in writing and in plain language and set out what constitutes success.[96] It must be signed by the client and include a statement that the client has been informed of their rights to seek independent legal advice prior to entering into the agreement.[97] It must include a cooling-off period of at least 5 business days, during which the client may terminate the agreement by written notice.[98] A conditional cost agreement may provide for disbursements to be paid irrespective of the outcome.[99] Conditional costs agreements are not permitted in criminal or *Family Law Act* proceedings.[100] Conditional cost agreements may include an uplift fee of up to 25% where the law practice has a reasonable belief that a successful outcome is reasonably likely.[101] Where an uplift fee is included, the agreement must identify the basis on which the fee is to be calculated, include an estimate or a range of estimates of the fee, and explain the major variables that could affect its calculation.[102]

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[89] Australian Law Reform Commission, Final Report 134 *Integrity, Fairness and Efficiency* (Commonwealth of Australia 2018) 9, 11 <http://www.alrc.gov.au/inquiry-categories/class-action-proceedings-and-third-party-litigation-funders> .
[90] *Legal Profession Uniform Law 2014* (VIC) and *Legal Profession Uniform Law 2014* (NSW).
[91] Cost agreements which contravene, or are entered into in contravention of, Division 4 are void: s 185. For a more detailed discussion of costs agreements, see Chapter 14 of Gino Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 2016).
[92] S 180.
[93] S 180(2) and (4).
[94] S 184.
[95] S 181(1). Subsection 8 provides that a contravention of the Act or Uniform Rules relating to conditional costs agreements by a law practice is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner involved in the contravention.
[96] S 181(2).
[97] S 181(3).
[98] S 181(4). This requirement does not apply where the agreement is made between law practices only. S 181(5) clarifies which fees are amounts recoverable in the event of termination during the cooling-off period.
[99] S 181(6).
[100] S 181(7).
[101] S 182(1)-(2). Law firms which enter into a costs agreement in contravention of s 182 will be liable for a civil penalty; s 181(4).
[102] S 182(3).

Contingency fees are prohibited by s 183 of the *LPUL*.[103] This prohibition will not apply to a costs agreement to the extent to which it adopts an applicable fixed costs legislative provision.[104]In an earlier Discussion Paper we examined a number of issues in relation to the recent legislative reform in Victoria where group costs orders (on a percentage basis) are now permitted.[105]

In entering into costs and funding agreements in connection with class actions there are a large number of legal and commercial considerations that need to be taken into account.[106] Curiously, it is not uncommon to see in costs or funding agreements entered into in class actions a purported contractual entitlement for legal fees and/or funding commissions to be deducted from and paid out of compensation entitlements recovered on behalf of class members as a whole. It should go without saying that representative parties have no authority to enter into any such agreements and neither funders nor lawyers have any *contractual* entitlements to payments out of settlements or judgments providing for the payment of compensation or damages to persons who have not agreed.

Review of costs and the role of independent costs consultants

Until relatively recently, in order to persuade the court of the reasonableness of the costs incurred by the lawyers acting on behalf of the applicant, the applicants' solicitors would often choose the costs consultant whose opinion was sought and provided to the court.[107] A close professional and commercial relationship often developed between the law firms and the consultants engaged. This was such as to raise questions, in some cases, as to the objectivity and independence of the views expressed. Not infrequently, the opinion was to the effect that the fees charged and costs incurred were reasonable, occasionally with some relatively minor qualifications.

As noted by Professor Legg:[108]

> The downside is not that a review of legal fees is conducted by a costs expert, but that the costs expert is retained by the lawyers seeking the fee award. The expert may become dependent on the lawyers for repeat work, which is unlikely to continue if legal fees are substantially reduced. Adversarial bias in relation to experts, including selection bias whereby an expert is chosen because their views will support the party's case, has been of longstanding concern amongst the courts.

For example, the court noted in the *Banksia* litigation that the cost consultant may have engaged in conduct that was misleading or deceptive or likely to mislead or deceive and joined the consultant to the proceedings.[109]

As Lee J remarked in 2018:[110]

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[103] S 183. This is a civil penalty provision and may constitute unsatisfactory professional conduct or professional misconduct on the part of any principal of the law practice or any legal practitioner involved in the contravention.
[104] S 183(2).
[105] Cashman and Simpson (n 6) 85-93.
[106] See e.g. the 'Checklist of matters for consideration in drafting a costs agreement in a class action proceeding' in Peter Cashman, *Class Action Law and Practice* (Federation Press 2007) 151-155.
[107] In *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [111] Murphy J refers to the use of such party appointed costs experts in: *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925; (2000) 180 ALR 459 at [19]; *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980 at [15] per Moore J; *Guglielmin v Trescowthick (No 5)* [2006] FCA 1385 at [16] per Mansfield J; *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663 (*Matthews*) at [356]-[386] per Osborn JA.
[108] Michael Legg, 'Class Action Settlements in Australia - The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 601-2. Professor Legg highlights the concerns Gordon J expressed about the adequacy of the review conducted by the costs expert in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013) [38]–[52].
[109] *Bolitho v Banksia Securities Ltd & Ors*[2020] VSC 524 [36]-[38], [41].
[110] *Lifeplan Australia Friendly Society Ltd v S&P Global* Inc [2018] FCA 379, [40].

> I regard such evidence as next to useless… I am yet to see a cost assessor retained by a solicitor who has formed the robustly independent view that the fees charged by his retaining solicitor were unreasonable.

Murphy J has suggested:[111]

> If a panel of competent and reputable independent costs consultants can be developed and the Court chooses an expert from that panel, the reasons for conscious or unconscious bias are reduced. That should assist in the protection of class members' interests in relation to costs in circumstances where the Court does not have the benefit of an opposing expert's report and usually does not have a contradictor. The use of referees should provide a just, efficient and cost-effective procedure consistent with the overarching purpose in s 37M of the Act.

In recent years, some courts have chosen and appointed the costs experts, or in some cases independent contradictors[112] or referees,[113] in the expectation that the views expressed were likely to be more independent and objective.[114] On occasion, the court has raised concern at some aspects of the costs sought and referred various matters to another court officer for investigation and report.[115] In other instances, such as in the VW diesel-gate class action litigation, a hybrid alternative has been adopted whereby the parties to the settlement agreed on the need for an independent review of costs, the court made orders for the appointment of a costs consultant, but the applicants' solicitors chose and instructed the costs expert and collaborated closely with the consultant in the preparation of a report to the court.

Where persons with expertise on costs are engaged or appointed as experts, in the Federal Court (and in other jurisdictions) compliance with the applicable expert witness code of conduct is required. In the Federal Court there are also requirements or recommendations concerning the role of a court appointed referee in examining the reasonableness of legal costs set out in the Class Actions Practice Note.[116]

There is some judicial guidance on a number of issues in relation to the reasonableness of legal costs claimed.

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[111] *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [123].

[112] For arguments in support of the use of contradictors, see Jeremy Kirk, 'The Case for Contradictors in Approving Class Action Settlements' (2018) 92 *Australian Law Journal* 716, 720. One notable instance in which the contradictor has assisted the court by identifying disentitling conduct such as the use of potentially fraudulent and inflated invoices on the part of the legal practitioners and funder involved in a class action is *Bolitho v Banksia Securities* (Victorian Supreme Court Case S CI 2012 07185).

[113] See e.g. Clime Capital Limited v UGL Pty Limited (Murphy J); *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 (Murphy J). Section 54A of the *Federal Court of Australia Act 1976* (Cth) confers a power to refer questions to a court appointed referee.

[114] See the Federal Court authorities cited by Murphy J in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 at [91]: *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [111]-[124]; *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 at [40]-[41] and *Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395 at [66]. In *Caason*, Murphy J also refers at [121] to the appointment of referees by the Victorian Supreme Court in assessing the reasonableness of costs incurred in administering settlements in class actions: *Matthews v AusNet Pty Ltd & Ors (Ruling No 40)* [2015] VSC 131 at [29] per Forrest J; *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731 at [1]-[7] per John Dixon J; *Downie v Spiral Foods Pty Ltd & Ors* [2016] VSC 411 at [20] per J Forrest J and orders made on 27 July 2016; see also *Matthews v AusNet Pty Ltd & Ors (Ruling No 44)* [2016] VSC 732 at [13] per J Forrest J.

[115] See e.g. *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 2)* [2013] FCA 1163 (Gordon J). As Murphy J notes in *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 at [117] judges have used officers of the court to assist in assessing the reasonableness of costs in cases other than *Modtech*: *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 at [199]-[201] (Forrest J); *Williams v Ausnet Electricity Services Pty Ltd* [2017] VSC 474 at [106] and [121] (Emerton J) (referral of questions to the Costs Court for determination by Wood AsJ, see *Williams v Ausnet Electricity Services Pty Ltd (Ruling No 3)* [2017] VSC 528).

[116] Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 20 December 2019, [16.3]-[16.4].

In *Modtech*, court approval was sought of costs that had been given the imprimatur of a costs consultant. After referring various matters to a Registrar for investigation and report, Gordon J disallowed professional fees which were:

- incurred before the costs agreement was entered into, and not expressly provided for in the costs agreement
- in respect of the entering into the costs agreement and the litigation funding agreement
- based on higher than expected hourly rates
- for administrative tasks
- unreasonable or excessive in respect of the time claimed.[117]

In *Courtney v Medtel*, Sackville J declined to accept the evidence of the Applicant's solicitors as to the reasonableness of the costs claimed and required evidence from an independent solicitor or costs consultant as to:

- the reasonableness of the terms of the retainer agreement
- whether the fees and disbursements had in fact been calculated in accordance with the costs agreement
- whether or not any significant proportion of the fees and disbursements had been inappropriately or unnecessarily incurred in conducting the proceeding 'so far as the solicitor or costs consultant can determine.'[118]

In *Foley v Gay*,[119] Beach J examined considerations relevant to 'proportionality'. His Honour cautioned against simplistic calculations of the quantum of costs and recovery amounts and the dangers of hindsight bias. In his opinion, costs should be compared with the benefit reasonably expected to be achieved in the litigation, at the time when the work being charged for was actually performed, not the benefit actually achieved at the conclusion.

In *Petersen v Bank of Queensland*[120] the costs referee determined that most of the costs incurred by the applicant's solicitors were reasonable, although it was accepted (by the solicitors, the referee and the Court) that the costs agreement, which provided for the charging of a 25% premium in the event of success, failed to comply with the requirement to specify the circumstances said to amount to a successful outcome. In any event, Murphy J discounted the allowable costs having regard to the limited settlement amount and the need for proportionality.[121]

Of necessity, or at least to minimise costs and delay, costs experts do not carry out an analysis which is analogous to an assessment or 'taxation' of costs. In the VW diesel-gate litigation, in preparing his report for the Federal Court in connection with the application for approval of the recent settlement, the costs consultant noted that if he was to prepare a fully itemised bill of costs on a solicitor and own client basis (which was the basis upon which the respondents agreed to pay the applicants' costs) the process would take approximately two and a half years and the costs of the costs consultant would be in the range of $2.65 million to $2.95 million, plus GST. Thus, in large, complex class actions a simplified methodology is commonly adopted.

In many instances, the methodology adopted by costs experts engaged at the conclusion of the case is similar. A retrospective review is carried out of selected billing records and electronic costs data; compliance with legislative requirements in respect of costs agreements is scrutinised; hourly charge rates are examined and compared with what are considered to be the going 'market' charge rates in other class actions; whether charges were made in accordance with the costs agreement is examined

[117] *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 2)* [2013] FCA 1163 at [23]-[24] (Gordon J).
[118] *Courtney v Medtel (No 5)* [2004] FCA 1406 at [61]. See also *Pharma-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 227 at [24) (Flick J) referring to the decision of Sackville J in *Courtney v Medtel*.
[119] [2016] FCA 273 at [24].
[120] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842.
[121] Ibid [74].

and there is a consideration of whether the costs charged are disproportionate to the overall scope and nature of the claim. Items of work or charges considered to be unnecessary, excessive, duplicative or not in conformity with the costs agreement are identified and deducted from the total of the costs considered to be 'reasonable'.

Whilst this has become customary this methodology has inherent limitations and is flawed in a number of respects. Whilst costs consultants are usually lawyers experienced in costs assessment, they are not necessarily in a position to make informed independent assessments of whether particular work was either necessary or caried out efficiently. It is difficult, if not impossible, to determine retrospectively what time certain tasks should have taken (as distinct from how long they in fact took). It can be argued that someone not actively involved in the litigation will rarely be able to make an informed judgment about various strategic decisions made during the course of the case and their cost implications. As a result, billing records are likely to be accepted at face value. Commercial billing rates of solicitors and counsel are usually endorsed. Charges by experts retained in the litigation are almost invariably approved.

Of interest for present purposes is the recent decision of Justice Lisa Nichols in the Victorian Supreme Court to permit consolidation of two otherwise competing shareholder class actions filed by Maurice Blackburn and Slater & Gordon against Treasury Wine Estates.[122] The cases are to be run on the basis of a joint representation agreement entered into between the two firms and subject to the appointment of an independent costs consultant. The consultant will examine costs incurred *during the course of the litigation*, at six monthly intervals, with a view to ascertaining whether there is any duplication in work, as it occurs, rather than at the conclusion of the case.[123] The cases are being conducted in the Victorian Supreme Court under the new legislative arrangements permitting group costs orders (i.e., the charging of legal fees on a percentage basis). However, whether legal work is duplicated is one question. Whether it is necessary or carried out in an efficient and costs effective manner is another.

Leaving aside questions of methodology, the appointment of independent costs experts, contradictors or referees can be expensive and the question of who should meet such costs may be a vexed issue.[124] While it is an exceptional case, in the ongoing litigation over legal fees and the funding commission in the *Banksia* matter,[125] there are, at last count, nine persons or parties appearing, represented by eight different sets of counsel (comprising six senior counsel and eight junior counsel), instructed by eight firms of solicitors. Although the Court has approved of the settlement amount the ongoing proceeding over fees and the funding commission has generated its own interlocutory warfare and appeals. Increased costs arising out of the appointment of a contradictor are further increased where separate solicitors are also appointed to instruct the contradictor, such as has occurred in the *Banksia* litigation. However, in other recent and current cases contradictors have been appointed and appeared without the necessity for an additional firm of solicitors to be engaged.[126]

The liability of lawyers for costs incurred

Historically there is a considerable amount of jurisprudence in relation to the professional responsibilities of lawyers and the circumstances in which they may be ordered to pay some or all of

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[122] *Stallard v Treasury Wine Estates; Napier v Treasury Wine Estates* [2020] VSC 679 at [101]. The two proceedings are *Steven Napier v Treasury Wines Estates* (S ECI 2020 01983); *Brett Stallard as trustee for the Stallard Superannuation Fund v Treasury Wine Estates Ltd* (S ECI 2020 01590).
[123] Ibid at [70]-[73], [103].
[124] For an example of where a judge has declined to appoint a contradictor after balancing the risk of greater costs and delays, see *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers Appointed) (in liq) (No 3)* (2017) 118 ACSR 614 at [90].
[125] *Laurence John Bolitho v Banksia Securities Limited (receivers and managers appointed) (in liquidation) & Ors.*
[126] For example, in the VW diesel-gate class actions, in connection with the application by the funder of two of the class actions for a funding commission (*Cantor v Audi Australia Pty Ltd* (No 5) [2020] FCA 637) and in the pending Full Federal Court appeal in relation to the power of the Court to make a common fund order at the conclusion of proceedings (*Davaria Pty Ltd v 7-Eleven Stores Pty Ltd & Ors and Pareshkumar Davaria & Anor v 7-Eleven Stores Pty Limited & Anor* (VID180 of 2018 and VID182 of 2018).

the costs incurred in civil litigation. Much of the case law has been superseded by changes in legislation, procedural rules and professional conduct regulations. Recent changes and the conduct of litigation have been perceptively analysed by Lee J in *Kadam v MiiResorts Group 1 Pty Ltd* (No 4):[127]

> 'An informed participant or observer would likely conclude that the conduct of modern litigation reflects a number of interrelated developments, several of which are relevant for present purposes. The *first* is the increased complexity and size of litigation. The *second*, connected to the first, but also partly explained by technological innovation, is the size and scale of the evidentiary material placed before courts in the process of quelling disputes. The *third* is the commercialisation of the law, discussed by a number of economic analysts of civil procedure who have observed that the primary modern method of remuneration of lawyers provides an incentive to maximise work and perform tasks that may genuinely be thought desirable or justifiable, but are unnecessary for the determination of the true issues in proceedings. The *fourth* is that the courts are an arm of government dependent upon public resources at a time of focus on efficient allocation of those resources.
>
> The response to these and related developments has caused what might be described as a revolution in case management. Over the last 20 years, almost every Australian jurisdiction has introduced a provision by either legislation or by way of Rules of Court, setting out the 'overriding' or 'overarching' purpose of procedural rules…
>
> Of course, this stress on active case management is not entirely new nor has it arisen spontaneously. In 1935, the Supreme Court of the United States appointed an Advisory Committee comprised of academics and lawyers (including a former Senator), to prepare a unified system of general rules for federal courts. The procedural rules that resulted, two years later, provided that the rules were to be construed and administered "to secure the just, speedy and inexpensive determination of every action and proceeding": *Federal Rules of Civil Procedure* (US), r 1. More recently, in 1996, the report by Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, highlighted how considerations of public and private efficiency necessitated major reform, and the regulatory result of the Woolf Report (*Civil Procedure Rules 1998* (UK), r 1.1) was the immediate progenitor of the various Australian case management reforms.
>
> The developments in modern litigation which partly spurred this case management revolution have deep roots. Like turning a battleship, it is to be expected that there is some 'time lag' before the changes sought to be wrought by the procedural reforms become fully realised…'

After referring to these observations whilst sitting as a member of the Full Court in *Dyczynski v Gibson*[128] Lee J proceeded to note:

> Part VB sought to drive behavioural change (and make the battleship turn somewhat more quickly) by, among other things, placing direct obligations on lawyers and by making compliance with the overarching purpose obligation central to determining issues as to costs. This is reflected by s 37N(2) of the Act requiring a party's lawyer to take account of the duty imposed on the party by the overarching purpose obligation, and to the further obligation to assist the party to comply with that duty. Further, s 37N(4) provides that in exercising the discretion to award costs, the Court must take account of any failure of a lawyer to comply with these obligations. Similarly, s 37M(3) provides that all civil practice and procedure provisions must be interpreted and applied, and any power conferred must be exercised or carried out, in a way that best promotes the overarching purpose.
>
> The position in the Federal Court is to be contrasted to that which applies in New South Wales. Section 99 of the *Civil Procedure Act 2005* (NSW) deals with the liability of legal practitioners for unnecessary costs. By reason of s 99(1), the section applies:
>
> … if it appears to the court that costs have been incurred –

[127] [2017] FCA 1139; (2017) 252 FCR 298 at 300–1 [1]–[4]. The context was the appointment of a referee, which was opposed by one of the parties.
[128] [2020] FCAFC 120

> (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or
>
> (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
>
> By the operation of this section, the circumstances in which costs are to be awarded against a lawyer by reason of the failure to comply with the cognate obligations which are imposed on the legal practitioner by state legislation, are specified. These provisions expressly incorporate the necessity for the court to be satisfied that conduct of a particular kind has occurred, being the sort of conduct referred to in the previous case law. Part VB has approached the same problem somewhat differently. In exercising a discretion to award costs, the relevant mandatory obligation is to take account of any failure to comply with the obligations of the lawyer, coupled with the requirement to facilitate the overarching purpose in exercising any power including the power to award costs.
>
> Although it is unnecessary for me to form a definitive view for the purposes of this application, it seems to me arguable that the pre-Part VB cases dealing with awards of costs against practitioners need to be approached with some degree of caution to the extent that they are said to delimit the circumstances in which costs can be awarded against Solicitors notwithstanding the proof of a failure to comply with the statutory obligation on lawyers imposed by s 37N(2) of the Act. Put another way, it is arguable the bar has been somewhat lowered in this Court as compared with that applying in New South Wales by reason of s 99(1) of the *Civil Procedure Act 2005* (NSW). The reason why this is an issue that is unnecessary to decide, is that I think the conduct of the Solicitors in the present circumstances does rise to the level of unreasonable and unjustifiable conduct within the meaning of those earlier authorities.[129]

However, there is no reference to the considerably broader statutory obligations, and the increased array of sanctions, adopted in the *Civil Procedure Act 2010* (Vic), to which we refer in this Research Paper.

Other methods for the regulation and control of costs in class actions

Scales of costs

Scales of costs provide for amounts which will be recoverable for work carried out in the course of litigation. The gap between the costs incurred by parties and the amount they will be able to recover on a party-party basis can act as an incentive to keep costs low. However, the Law Council has stated that scales of costs in the Federal Court and other Commonwealth courts 'have failed to keep pace with actual costs incurred by parties and do not reflect the value of the intellectual work undertaken by practitioners; current charging practices; or changes in the technology used within firms and by practitioners'.[130]

Costs budgets

In the United Kingdom, parties to Part 7 multi-track litigation (other than self-represented litigants) and other proceedings where the court so orders are required to file and exchange costs budgets setting out their estimated costs for each phase of the proceedings.[131] Cost budgets will then be used by the court to make cost management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost without a cost management order.[132] This prospective exercise is

[129] Ibid [408].
[130] Law Council of Australia (n 32) [3]..
[131] *Civil Procedure Rules 1998* (UK) r 3.13 and Practice Direction 3E. See the Hon. Tom Bathurst and Sarah Schwartz, 'Costs in representative proceedings, costs budgeting and fixed costs schemes (2017) 13(2) *Judicial Review* 203, 209-10.
[132] Ibid r 3.15.

designed to promote efficiency. Tidmarsh has described cost budgets as 'perhaps the boldest and most significant procedural innovation in memory—not just in the British but in any civil-justice system.'[133] Tidmarsh argues that costs budgets do not go far enough. They have only an indirect effect on lowering costs as they apply to recoverable costs and judicial revision of budgets is limited to where parties have not agreed on budgets.[134] Further, it has been suggested that the reforms have led to front-loading of costs, not to lowered litigation costs overall.[135]

Further, as noted by practitioners interviewed for our previous research paper, it may mean that plaintiffs are 'at the mercy of defendants who could throw out their budgets by engaging in unnecessary interlocutory skirmishes' and budgets may be merely inaccurate guesses.[136]

Limiting certain types of charges to clients

In its review of civil justice arrangements, the VLRC considered whether the courts should have an express power to make orders limiting chargeable or recoverable costs in connection with discovery:[137]

> In Exposure Draft 2 the commission proposed that the courts be given the power to limit the commercial costs incurred in connection with discovery by ordering that the costs able to be charged to clients and/or able to be recovered from another party by way of costs orders be limited to the actual cost to the law practice of such work. At the AIJA seminar the comment was made that costs of discovery processes were often marked up by law firms, although it was noted that large corporate clients and litigation funders are now moving to cap discovery costs and are increasingly contracting directly with litigation support service providers.

In submissions to the VLRC, stakeholders expressed support and opposition for the proposal. In opposition, it was suggested that discovery processes are not subject to widespread abuse and the proposal could discourage those with fewer resources from bringing litigation and have a negative impact on the fairness of litigation.[138]
In the context of class actions in particular, at a recent case management hearing in the class action against Westpac over superannuation fees Lee J raised his concerns at endless court hearings concerning discovery disputes in large class actions and costly discovery processes that result in a '*tsunami of material'* most of which is incredibly expensive but never relied upon at trial. He is reported to have said: '…what can happen in these large cases is discovery takes on a life of its own… there's so much money wasted on these endless disputes about discovery which at the end of the day so rarely matter. And solicitors love them.'[139]

Fixed costs

Another method by which costs may be moderated is through a fixed costs regime, whereby recoverable costs are limited to a set amount with only a limited judicial discretion to vary this amount. Fixed costs are applied to some kinds of litigation in the United Kingdom.[140]

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[133] Jay Tidmarsh, 'Realising the Promise of Costs Budgets: An Economic Analysis' (2016) 35(3) *Civil Justice Quarterly* 219.
[134] Ibid 224-225.
[135] Bathurst and Schwartz (n 131) 211.
[136] Cashman and Simpson (n 6) 45.
[137] VLRC (n 59) 463.
[138] Ibid.
[139] *Tracy Ghee v BT Funds Management Limited & Anor*, as reported in *Lawyerly*, 15 October 2010.
[140] Bathurst and Schwartz (n 131) 213-14. As noted by the authors, most Australian courts are empowered to make an order for fixed costs and can exercise the power to award costs at any stage of the litigation so as to 'avoid the issues and costs associated with the costs assessment process in complex cases, where the party awarded costs is unlikely to be able to recover all of its assessed costs, or where the expense of an assessment

There are also hybrid arrangements between fixed and time-based fees. Fixed fees may increase certainty, transparency and value for money but can also lead to additional transaction costs in the planning and agreeing of fixed amounts.[141] In addition, inflexible fixed costs may be inappropriate in the context of complex, mega-litigation such as class actions. Adrian Zuckerman noted that fixed costs regimes may be counterproductive where they are inappropriately structured, for example where interlocutory applications are excluded, there are incentives to exaggerate the complexity of disputes to avoid the application of the fixed fee regime, or high fees are shifted onto disbursement amounts which are not included in the fixed fee.[142] However, fixed costs regimes may be effective at lowering costs if they are properly structured. On the German use of fixed costs, Zuckerman wrote:[143]

> The German system proves the effectiveness of the strategy of reversing the economic incentives. In Germany, lawyers are paid a fixed litigation fee, which represents a small and reasonable proportion of the value of the dispute. As a result, they have no reason to complicate litigation unnecessarily. Access to justice in Germany is affordable by large sections of the public because costs are low. The predictability of costs has led to a thriving litigation cost insurance which places litigation within the reach of even citizens of modest means. Consequently, there is a greater volume of litigation in Germany which, in turn, enables lawyers to generate high incomes without subvention by the public purse.

Recoverability of all costs

One possible solution to the problem of the transaction costs incurred by successful applicants in class action litigation (and which is also arguably in the interest of winning respondents) is to do away with the substantial disparity between solicitor-client and party-party costs and to provide for the recovery of *all* costs from the losing party.

Civil procedural reforms in the UK at the end of the twentieth century caused significant disruption to the recoverability of costs and the civil justice system more generally[144] Following cuts to public funding of civil litigation, success fees in conditional fee agreements and after the event insurance (ATE) premiums were recoverable from unsuccessful defendants. Success fees were not capped and could amount to up to 100 per cent of the lawyers' base costs.[145] The structure provided incentives for solicitors to only run cases with a high likelihood of success or early settlement in order to obtain the substantial success fees from insurers. The overall effect of such a system is that 'the total costs of all parties in all cases, regardless of which side wins, is borne by the defendants.'[146] Solicitors had to comply strictly with requirements set out in the regulations of the agreements would not be enforceable. The changes led to a period of litigation known as the 'cost wars' between claimants' lawyers and defendants' insurance companies over recoverability of the fees and premiums.[147]

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would be disproportionate to the amount of costs recoverable. See, e.g., *Civil Procedure Act 2005* (NSW) s 98; *Federal Court of Australia Act 1976* (Cth) s 43(3)(a).

[141] Productivity Commission (n 16) 197.

[142] Adrian Zuckerman, 'Lord Woolf's Access to Justice: Plus ça Change' (1996) 59 *Modern Law Review* 773, 783-4.

[143] Ibid 795-6.

[144] *Access to Justice Act 1999* and the *Conditional Fee Agreements Regulations 2000* (SI 2000/692).

[145] See e.g., 'Conditional fee agreements and fixed success' (2005) 1 *Journal of Personal Injury Law* 106. For example, in defamation and privacy cases such as the litigation over the publication of articles and photographs about the drug addiction of model Naomi Campbell in The Daily Mirror in 2001, in which the counsel and solicitors involved claimed success fees of between 95 to 100 per cent of base costs. The European Court of Human Rights subsequently condemned the success fees as a violation of the right to freedom of expression (see Eleanor Steyn and Gillie Abbotts, '*MGN Ltd v United Kingdom* - ECHR condemns excessive success fees' (2011) 22(4) *Entertainment Law Review* 125)

[146] Ministry of Justice, *Review of Civil Litigation Costs: Preliminary Report Volume 2* (May 2009) 480 [3.9] <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>.

[147] See Adrian Zuckerman, 'Lord Justice Jackson's Review of Civil Litigation Costs - Preliminary Report' (2009) 28(4) *Civil Justice Quarterly* 435, 437; Andrew Hopper QC 'Professional regulation and personal injury

The problematic history of such a reform in England and Wales was touched on by the Victorian Law Reform Commission:

> 'In England and Wales, with the introduction of conditional fees and success fees in civil litigation, the government introduced 'full recoverability' of legal fees and expenses concurrently with its curtailment of legal aid funding for civil litigation. Thus, not only are the basic expenses and legal fees (usually calculated on hourly rates) recoverable from the losing party, the losing party is also required to foot the bill for the 'success fee' component. The understandable concern on the part of losing parties has been exacerbated by the fact that success fees are permitted to be up to 100 per cent of the underlying base amount of the fee. Moreover, as in most Australian jurisdictions, the quantum of the base fee is not itself regulated or restricted, at least insofar as the contractual relationship between solicitor and client is concerned. To make matters worse for the losing party, any premium paid or payable by the plaintiff for 'after the event insurance' (in respect of legal costs) is also payable by the losing party. The primary regulatory focus in relation to legal fees, as in Australia, is on disclosure and compliance, with quite onerous obligations on lawyers when entering into retainer agreements with clients. Alleged noncompliance with these onerous requirements has led to a considerable amount of 'satellite litigation' whereby unsuccessful defendants (or, more usually, their insurers) have sought to avoid the impact of adverse costs orders. This 'costs war' has been conducted because technical or other breaches of disclosure and other obligations may give rise to an unenforceable fee agreement as between solicitor and client. In this event, the losing party has no obligation to indemnify any amount, let alone the full amount.[148] Recent judicial rulings and changes in the law have sought to bring an end to this litigious war.'[149]

Dissatisfaction with the 'high, disproportionate and above all unpredictable' costs in civil litigation led to the inquiry and reports of Lord Jackson and the implementation of a number of reforms.[150]

Judicial scrutiny and approval of costs

The courts in Australia exercise scrutiny over costs at the conclusion of matters through the settlement approval process or following judgments. However, this oversight occurs after the proverbial horse has bolted. There may be benefits of scrutiny by the court at the outset of litigation or throughout, through reviews of costs agreements, budgets or funding agreements.

In this Research Paper we have given relatively little attention to the awarding of costs by the court at the conclusion of contested proceedings. Although important, relatively few class actions proceed to judgment. Where this occurs, several potential problems arise, from the perspective of the successful party.

Although there is no guarantee that an order for costs will be made, given that most courts have a broad discretion in relation to costs,[151] generally an award of costs in made in favour of the successful

litigation: an historical perspective' (2015) 3 *Journal of Personal Injury Law* 191; Herbert Kritzer, 'Fee regimes and the cost of civil justice' (2009) 28(3) *Civil Justice Quarterly* 344, 346.

[148] In *Hollins v Russell* [2003] EWCA Civ 718 the Court of Appeal gave guidance on technical challenges to conditional fee agreements with a view to curtailing the highly technical arguments based on relatively minor infractions of the requirements contained in the primary and secondary legislation.

[149] VLRC (n 59) 658-659.

[150] Zuckerman (n 147) 435. Subsequent reforms included qualified one way costs shifting which did not include ATE premiums and success fees, mandatory caps on the amounts of success fees and the application of fixed costs principles to some forms of civil litigation.

[151] See e.g. s 43 *Federal Court of Australia Act 1976* (Cth).

party.[152] However, there is usually a significant shortfall in the costs recovered given the conventionally adopted distinction between solicitor-client and party-party costs. Thus, a successful applicant will not recover a substantial proportion of the costs incurred in conducting the case. Therefore, the shortfall will erode the damages otherwise recoverable by the class members.

As O'Bryan J has recently observed: 'In the context of a representative proceeding, difficult questions may arise as to the manner in which the costs of the proceeding are dealt with in connection with a judgment of the Court under s 33Z or the approval of a settlement under s 33V of the FCA Act, and particularly whether compensation awarded to successful group members may be indirectly diminished by the treatment of the costs of the overall proceeding.'[153]

Although in theory indemnity costs awards can be made their practical availability in class actions is limited. There are inherent difficulties in making *Caulderbank*[154] offers or notices of offer of compromise, the rejection of which will often lead to an award of costs on an indemnity basis if an amount higher than that offered to compromise the litigation is obtained. While in most cases it may be relatively easy to quantify the claim of the lead applicant(s), quantification of the claims of the class as a whole may be problematic or impossible.

There is another issue that appears to have received relatively little attention. As Lee J has recently observed,[155] it is often suggested that the exercise of judicial discretion in relation to costs is unfettered but at both state and federal level there are legislative *requirements* to take account of any failure by a party to comply with various overriding obligations in the conduct of civil litigation. At the federal level there is an *obligation* to facilitate the resolution of disputes quickly, inexpensively and efficiently as possible.[156] In the Supreme Court of Victoria far more extensive obligations are imposed on litigants, lawyers, funders, insurers and (to a more limited extent) expert witnesses.[157] These Victorian statutory obligations loom large in the ongoing dispute as to costs and the funding commission in the *Banksia* litigation. However, in most class actions which have proceeded to judgment there appears to have been relatively little application of either the federal or the state provisions in cases which have clearly not been conducted as quickly, inexpensively or efficiently as possible.

Disclosure of the respondents' costs

One of the points raised by interview participants to our previous research paper[158] is a sense of imbalance in disclosure and accountability to the court in class actions. Plaintiff lawyers' costs are subject to court scrutiny because of ethical issues arising out of their role in class action proceedings. Defendant law firms, in contrast, do not confront the same ethical issues. However, the disclosure of the defendants' costs at the settlement stage would provide a useful indicator of the reasonableness of the applicants' costs.[159]

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[152] See e.g. *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 (at [62]–[63], [25])
[153] *Reilly v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502, O'Bryan J at [14].
[154] See *Calderbank v Calderbank* [1975] 3 All ER 333 and *UCPR* Pt 42 Div 3.
[155] *Commonwealth of Australia v Prygodicz* [2020] FCA 1516 at [36]. See also his observation in *West v Rane (No 2)* [2020] FCA 616, (at [71]–[76]):
'The concession by the Solicitors that the introduction of ss 37M and 37N of the Act may have broadened the circumstances in which the Court may make a personal costs order against a lawyer is well founded.' This was reiterated in *Dyczynski v Gibson [2020]* FCAFC 120 [408].
[156] Section 37M(1) *Federal Court of Australia Act 1976* (Cth).
[157] Part 2.1 – 2.4, ss 7-31 *Civil Procedure Act 2010* (Vic).
[158] Cashman and Simpson (n 6).
[159] In a number of class actions, confidential access to information concerning the respondents' costs has been given to independent costs experts to assist them in forming a view as to the reasonableness of the applicants' costs.

Proportionality

As noted by the ALRC, proportionality was the 'central theme' of the proposals which litigation should be best managed in the Woolf report.[160] The UK *Civil Procedure Rules 1998* contain an overriding objective of 'enabling the court to deal with cases justly and *at proportionate cost*'.[161] Proportionality can be obtained by judicial intervention. As noted above, Murphy J invoked the concept of proportionality in approving the settlement in the *Bank of Queensland* case to reduce the amount of the proceeds paid to the law firm and funder.[162]

Tax deductible status of respondents' costs

Where parties incur expenses that are 'sufficiently connected to gaining or producing assessable income, including legal expenses, to deduct those costs from their taxable income.'[163] In class actions, commercial respondents' costs are often tax deductible whereas the applicants' costs are usually not. This is a factor which may provide an incentive for defendants to defend litigation robustly rather than quickly to resolve disputes and in the process to incur significant costs. This, in turn, spurs greater expenditure by the other party. For parties to class actions, these deductions reinforce or increase disparities between the parties and may be considered inequitable. The Productivity Commission concluded that this factor is only relevant in a small number of disputes and solutions are either costly or may be objectionable on policy grounds.[164] It is also argued that there are other factors, such as reputational damage, which prevent businesses from defending litigation in an overly robust or costly manner.[165]

Although there has been some focus in the current Joint Parliamentary Inquiry on litigation funders who derive profits in tax havens, such as the Cayman Islands, and who avoid tax on income in Australia, there has been little focus on the fact that for defendant corporations, and their insurers, legal costs incurred in the defence of *meritorious* claims are tax deductible- win, lose or draw.

Successive federal governments have failed to implement recommendations from numerous law reform bodies that a *statutory fund* is required in connection with class actions. This is presumably on the grounds that they don't wish to commit scarce public funds. However, the public purse is at present substantially depleted by the loss of tax revenue from the unrestricted deductibility of legal expenses available to defendant corporations who lose class actions. Moreover, a statutory fund which operates in a competent and cost effective manner to be self-funding from commissions derived from funding successful cases. In its *Civil Justice Review Report*, the Victorian Law Reform Commission identified various ways in which the proposed Justice Fund would operate so as to minimise expenditure and maximise profitability.[166]

From a *public policy* perspective some may consider it perverse that the Commonwealth is unprepared to provide financial assistance for deserving plaintiffs with meritorious claims but allows defendants who defend, delay and lose class actions to deduct all of the costs from otherwise taxable income. The reduced availability of legal aid from state legal aid authorities occurs in part due to the continuing decline in funding from the Commonwealth. In its most recent increase in the amount payable to private practitioners for legal aid work, the NSW Legal Aid Board increased the base hourly rate for solicitors from 1 July 2020 from $150 per hour to $160 per hour. In class actions most firms bill out paralegal and administrative work at hourly rates considerably in excess of that.

[160] [1.92]-[1.94].
[161] R 1.1 (emphasis added).
[162] *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 at [10]-[16], [74].
[163] S 8.1 *Income Tax Assessment Act 1997* (Cth). See Productivity Commission (n 16) 525.
[164] Ibid.
[165] Ibid 527.
[166] VLRC (n 59) chapter 10.

Conflicts of interest

Whilst the focus of debate in respect of class actions is usually on *conflicts of interest* on the plaintiffs side, with concerns about lawyers having an economic interest in the outcome; on the defendant's side the large law firms advising defendants whether to defend claims are the commercial beneficiaries of the protracted forensic trench warfare that has become customary when they do.

The role of insurance

In many instances defendants' insurance policies cover defence costs, thus insulating corporate wrongdoers from the transaction costs incurred in the defence of claims, including those that have substantial merit.

Time billing mechanisms

Costs might be rendered more proportionate through the reform of time billing methodologies and the use of different fee structures, such as value pricing, capped fees, and blended hourly rates. Upfront and interim disclosure to the court and to the parties of charge out rates and costs incurred or budgeted would at least enhance transparency.

Lawyers usually bill on the basis of hourly rates that are arguably excessive and virtually unregulated. Hourly billing has become the norm; hourly rates have substantially increased and a premium is now permissible in cases conducted on a 'no win no' fee basis. In the conduct of class actions these changes have substantially increased costs incurred for work done.

The de-regulation of the quantum of legal fees, the prevailing use (and sometimes abuse) of hourly billing, and the increasingly mercantile practices of law firms, has morphed major sectors of the legal profession into a commercial business operation.

Large legal teams in law firms, acting for both sides, are organised and motivated to maximise profitability. This is usually, but not always, within the boundaries of what is considered to be acceptable and ethical professional conduct. The current disputation in relation to legal fees and the funding commission in the *Banksia* litigation illustrates that this is not always the case.

In class actions, on the plaintiffs' side, current base hourly billing rates are relatively high. In a recently settled class action in the Federal Court the *base* hourly billing rates (inclusive of GST) were as follows:

- Administrative assistant: $298
- Paralegal: $395
- Junior lawyer: $544
- Associate: $658
- Senior Associate: $750
- Principal: $944

The *average* of those hourly billing rates is just under $600 per hour ($598 including GST).

Such billing rates are usually considered by independent costs experts as commercially acceptable.

In that case a total of over 50,000 billable hours was recorded by one of the firms conducting the class actions (excluding time by counsel). If we assume that one fee earner may bill 7.5 hours per day, 5 days a week for (say) 45 weeks per annum (i.e. 1687.5 hours per annum) the billable time in that case by one of the firms equates to 30 (29.84) years of professional work. A settlement agreement was reached 4 years after the litigation was commenced. To this total of 50,000 billable hours should be

added the additional billable time expended by the other law firm acting for the applicants in the two other class actions which proceeded concurrently, plus the billable time expended by the domestic and international firm(s) acting for the respondents, plus the time expended by the numerous counsel engaged, plus the substantial additional billable time now being spent on the claims resolution process which will extend for a period of more than a year from when the settlement agreement was initially reached. On a conservative estimate, the total professional time of all lawyers and fee generators engaged in this class action litigation is likely to be in excess of 150,000 billable hours.

Legal costs conservatively estimated in excess of $100 million dollars have been paid to date, with further billable time continuing to accrue throughout 2020 and into 2021. However, given that no claims will be paid until all claims have been assessed, claimants have not received any compensation to date and will not do so until more than 5 years from when the proceedings were commenced. As Foster J noted in the orders made on 1 April 2020, on average the estimated payment for each eligible participating class member is likely to be $2,800 (with a range of expected payments between $1,589 and $6,554). Assuming that there are 40,000 class members who receive compensation payments, the transaction costs in this litigation, per class member, are likely to approximate or exceed the amount of compensation that each class member will receive (out of the currently projected total settlement amount of around $120 million). In may be roughly estimated that, in broad terms, of the total costs to the respondents of this class action litigation around 50% represents the settlement amount payable to the class members and around 50% is in respect of the legal and transaction costs incurred by the applicants and respondents.

The adjustment of billing rates during the course of the litigation.

Costs agreements may permit firms to increase their hourly billing rates, on an annual or other periodic basis, during the course of the litigation, subject to compliance with notice requirements. However, such notice is only provided to the lead applicant (and other class members who may have entered into retainer and costs agreements). Class members who may be ultimately responsible for the payment of such costs are neither informed nor have any effective say over such charges, other than through a theoretical but, in practice, illusory right to object at the conclusion of the case where judicial approval is sought.

The artificial inflation of hourly time

Hourly charges are often artificially inflated by permitting billing in 6 minute units, rather than in real time. Thus a one or two minute attendance may be billed at a rate that may be two or three times the hourly rate for the actual time spent. Whether this occurs and if so, how often is not known to the present authors. However, billing using 6 minute units of time has become acceptable commercial practice in both legal firms and accountancy practices.

In those legal practices where time records for billable time are produced by fee earners separately from attendance notes or other electronic records of work actually done there is an opportunity to record more time for billing purposes than was actually spent. Particular problems occur when retrospective estimates or records are made of the time previously spent.

A further potential problem arises with the electronic recording of time. Many modern computer and practice management programs have a facility for the automatic recording of time spent on tasks. When a task is commenced the ‘clock’ feature of the program may be activated and time is automatically recorded until the fee earner manually inputs an instruction to cease time recording. This gives rise to an obvious potential problem where the person is interrupted during the ‘billable’ task at hand. This may arise out of inadvertent human error.

The add on of an additional 25%

On the applicants' side, where the matter is conducted on a 'no win no fees' basis, or on a partial no win no fee basis where the fees are paid in part by a litigation funder, the mark up on the contingent part of the costs is routinely increased by 25%. Although a 25 % *premium* is the maximum permitted under legal profession regulations, it is the norm.

When a 25% uplift/premium is added to the abovementioned average hourly billing rate, the *average* billable hour is around $750 ($747.50).

Whether this 'average' is charged over the life of the matter depends on the distribution of work amongst those involved in the case. Ordinarily, one would expect that more of the work will be done by junior rather than senior people and thus, in practice, the average recoverable billable hour will be less than $750.

The addition of interest

In addition, in some instances, firms charge *interest* on the deferred costs, from the date when the work is done to the date on which the bill is rendered and further interest if there is a delay in payment. In long running matters the interest component alone can be very substantial.

Goods and services tax.

GST adds a further 10% to the total legal bill.

Work generation

In class actions a substantial amount of work is generated. Not infrequently, numerous legal and paralegal personnel are deployed. Furthermore, the hourly billing targets for employee solicitors in many firms have increased.

Not all that long ago, civil litigation practices in many law firms in Australia were conducted on the basis of an expectation that employee solicitors would bill three times their salary. This was often said to be on the basis that one third of the account rendered covered the salary costs of the employee; one third covered the firm's overheads in employing them and one third went to profit. Recording and billing based on time was not customary in plaintiff firms.

According to the AFR (17 July 2020) the 'award' minimum payment for recently graduated lawyers is $51,000 per annum. So called 'top tier' law firms are said to pay around $85,000 per annum (AFR 21 July 2020). Young lawyers in such firms usually work long hours, most of which are billable.

Junior lawyers are usually expected to bill 6-7.5 hours a day and often achieve more. It is not unusual for billed time to be up to ten or more hours per day when there are deadlines or court hearings. It is not clear to the authors whether billable time targets are also used for paralegal work.

Employee lawyers are now often expected to generate gross revenue, per annum, of at least five to six times their salary and may achieve more.

A relatively junior employee solicitor on an annual salary of $80,000 per annum, may generate fees of $500,000 to $800,000 per annum.

This has contributed to a substantial escalation of legal costs.

Improper or questionable billing practices

Although most lawyers are highly ethical and carry out their professional responsibilities appropriately most of the time, the current *Banksia* litigation makes it clear that this is not always true, even in the case of senior practitioners.

In some instances, of which the first author is aware, work charged for does not appear to have actually been done by the solicitor(s) involved.

Further, while practices of billing in six-minute intervals have been subject to significant criticism, where billed time is not recorded contemporaneously, but is instead approximated after the task is completed, there is a risk that this will lead to accidental or fraudulent inflation of the time spent on particular tasks.

In the course of our research, the first author has been informed of a number of instances of allegedly improper or questionable billing conduct in a number of class actions. The first author was informed by a number of employee solicitors, in different firms, and counsel acting in class action litigation, that: (a) along with paralegals employee solicitors had been instructed to do legal work on a case that was not necessary, in order to increase the billable time on the matter; (b) some time records included in billing records were for work not actually done; (c) that billable time has been included for some activities where charging was questionable, such as discussions over lunch etc, (d) extensive work has been carried out in connection with discovery that was of questionable utility and which was carried out primarily to increase billable time; (e) research tasks were instructed to be carried out in respect of issues that were already the subject of advice from counsel (f) a considerable amount of 'unnecessary' billable time was spent on individual files of class members who were clients, in advance of settlement or judgment in the litigation and (g) time records were inflated to achieve billable time budgets or to increase revenue. It should be pointed out that none of the sources of this information were any of the members of the Federal Court Class Actions Users' Group or the Federal Court Class Actions Sub-Committee whom we interviewed. Moreover, no attempt was made to verify this with the firms concerned. It should also not be inferred that such alleged conduct is widespread.

However, even benign time billing practices have been the subject of critical commentary by judges and law reformers. Former NSW Chief Justice commented on the 'tyranny' of the billable hour.[167]According to the Law Commission of New Zealand:

> 'Hourly billing can drive costs up, especially in firms where lawyer performance is measured by targets of billed hours. This can make 'bill padding' a temptation and rewards inefficiency. Also, hourly billing does nothing to inform a client's understanding of how much a lawyer's services will in fact cost.'[168]

There are of course many factors that increase billable time and costs. In a number of open or 'opt out' class actions a number of firms have often sought to recruit members of the class as clients. Leaving aside the necessity or desirability of this, the work in 'signing up' and dealing with such class members, including in connection with entering into fee and retainer agreements is recorded on the matter as billable time. It is not suggested that this practice is unethical, and there is an argument to be made that such costs might be considered necessary to conduct a viable class action. However, where this occurs, it is necessary to carefully consider whether some or all such work should be billed to the class action file, billed to individual clients, or not billed at all. In the assessment of costs, costs experts will often disallow some or all charges for administrative tasks, including the registration or 'signing up' of class members as clients.

[167]The Hon J J Spigelman, 'Opening of Law Term' (Speech delivered at the Opening of Law Term Dinner, Sydney, 2 February 2004)
[168] New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report No 85 (2004), 47.

Although class members have no legal liability for costs in a class action (with limited exceptions, such as when they may become a subgroup representative), in some cases conducted on 'no win no fees' basis, plaintiff law firms seek to sign up substantial numbers of group members in an open class action to costs and retainer agreements, contractually obliging such class members to pay a share of the costs incurred in bringing the action.

On one view, this practice is problematic. It is perhaps motivated by commercial concern on the part of the law firm to sign up (and hence capture) the class, in order to stave off competitor actions. It is not clear why any well advised class member would agree to enter into such an arrangement. However, at the end of the case, the contractual obligations of such class member clients may be inconsequential. Following a favourable settlement or judgment, courts almost invariably order that any costs not recovered from the defendant be apportioned over the class as a whole and deducted from any amounts otherwise payable to class members. Moreover, in some cases, the respondents may agree to pay the entirety of the costs incurred by the applicant.

The 'divided' legal profession and the role of counsel

The costs problem is exacerbated by the engagement of multiple counsel in many if not most class actions. Fees routinely charged by experienced senior counsel are considerable[169]. At the other end of the spectrum, the fees of junior counsel are often relatively modest.[170]

The problem is further compounded by the regular attendance of a multiplicity of lawyers (including multiple counsel and numerous law firm representatives) at court hearings, including at case management and directions hearings, even where the orders to be sought have been resolved between the parties.

Duplication and over servicing

There is often a considerable amount of duplication and over servicing, within law firms, between solicitors and counsel and between numerous counsel retained in the same matter.

The expense of expert witnesses

A further factor adding to costs includes the substantial professional fees charged by expert witnesses. Such charges are usually calculated on the basis of commercial hourly rates.

In many if not most class actions, expert witnesses adopt and support the adversarial posture of the side that has retained them. It is extremely rare for the parties to support, or for the court to appoint, experts other than those selectively retained by the parties.

This substantially increases the adversarial forensic posture of the parties and costs.

Additional costs and out of pocket expenses

Additional costs and out of pocket expenses include court fees; transcript costs; electronic document management consultancy fees; discovery costs and, in some cases, the engagement of public relations and media consultants by the law firms.

[169] Although fees for senior counsel vary, in one recent matter various senior counsel charged rates ranging from $1,400-$4,000 per hour and from $14,000 to $18,000 per day.
[170] Fees of junior counsel vary considerably, but it is not unusual for quite experienced junior counsel to charge at rates ranging from $250 to $400 per hour, which is relatively modest given that charge out rates by law firms for paralegals and junior solicitors will often exceed this.

A further area of concern in class actions (and civil litigation generally) arises out of the charges made by law firms for items such as internal photocopying, printing, facsimile and communication charges. Where such matters are handled internally, the charges often made are relatively large and in excess of the commercial cost of outsourcing this work. For example, it is not unusual for costs agreements to provide for photocopying and facsimiles to be charged at $1 per page or more. External commercial photocopying charges are usually considerably lower. Many costs agreements provide for an additional 25% uplift on out of pocket expenses and disbursements incurred in conducting the matter.

Costs agreements in class actions often refer to disbursements as those *expenses incurred* in acting on behalf of the client(s). Apart from external photocopying expenses incurred by the firm where third party service providers carry out this task, it is not unusual for firms to charge for their internal photocopying. Often these charges are reduced by costs experts to 0.35 cents per page (exclusive of GST). This is often said to be the per page rate allowed in costs assessments in the Supreme Court of NSW and in costs taxations in the Federal Court.

Premiums for Adverse Costs Insurance

A further major cost in both commercially funded and non-funded class actions is the substantial cost of premiums for 'After the Event' (ATE) insurance policies. The initial transaction cost in taking out such policies is relatively modest as only a small percentage of the total premium is payable upfront. Moreover, at that stage there is little disincentive to take out a policy as the balance of the premium is usually payable only in the event of a successful outcome in the litigation. However, at that point the problem of the cost looms large as the total premiums are very substantial and are usually calculated as a substantial percentage of the adverse costs cover provided under the terms of the policy. Thus, a premium for $1 million adverse costs cover (which is relatively modest given the substantial costs incurred in most class actions) may be 30-40% or more of the cover provided.

When the balance of this substantial total premium becomes payable, contentious issues often arise as to who should bear it. Although the policy is often taken out by the representative applicant the amount in issue is invariably considerably in excess of the total amount of the representative applicants individual claim and the applicant could not reasonably be expected to pay it. In some funded classes, the commercial funder may meet both the initial and final premium and absorb this cost in consideration of the funding commission received. In other instances, issues may arise as to whether this is recoverable as part of any costs order against an unsuccessful respondent. In settlement discussions attempts will usually be made to get the respondent to agree to bear this costs as part of any settlement agreement. Where this is not achievable and the case is not commercially funded or the funder declines to meet this expense it will presumably be sought to be recovered out of the compensation or damages payable to the class, subject to judicial approval. Some large commercial funders may have their own 'internal' adverse costs protection indemnity arrangements, the cost of which they may absorb. In other instances, the law firm acting for the applicant and class members may meet some or all of the cost of the premium and will usually seek to recover this by one means or another at the conclusion of the case.

Although the substantial costs of the premium is a problem in itself, a question also arises as to the rationale for substantial funding commissions sought by commercial funders in cases where the risk of adverse costs is in effect passed to a third party insurer. However, the indemnity for costs provided by an insurer is always capped and often insufficient so the commercial funder remains at risk of the insurer not paying and for any amount above the cover limit.

The lack of client control

Controls which operate to constrain the costs in traditional civil litigation, and in particular the required consent of the client on whose behalf the case is brought, have little influence in class action litigation either at the inception or conclusion of the case.

Applicants in class actions are usually persuaded to enter into fee and retainer agreements, and funding arrangements, in the expectation that fees and funding commissions will only be payable if

the case is successful. The further expectation is that a proportion of the costs will be recoverable from the unsuccessful respondent and that most of the unrecovered component and any funding commission will be payable out of any compensation of damages payable to the class as a whole. In some cases solicitors and/or funders seek to 'sign up' large numbers of class members so as to obligate them to assume contractual liability for costs incurred in conducting the litigation and/or funding commissions.

At the time of commencement, neither the court nor the class members (other than those who are 'signed up') are aware of the fee and retainer agreement entered in to with the lead applicant. Whilst the court is provided with a copy of any funding agreement at the outset of the litigation this is not usually subject to adversarial scrutiny or judicial imprimatur at this stage.

At the conclusion of the case, the requirement to obtain court approval of any settlement results in disclosure of the proposed costs and funding charges, an opportunity for class members to object and judicial scrutiny. Increasingly at settlement approval hearings courts are also requiring input from costs experts and/or contradictors, which is of assistance but further adds to the transaction costs.

The normal constraining influence of a potential adverse costs order is circumvented by indemnities to the lead applicants given by solicitors and/or funders and/or commercial third-party insurers.

Discovery procedures

Costs might be saved through the use of pre-trial procedures such as those available in the United States of America. Rules including mandatory disclosure of documents of which parties are aware or depositions by those who have control or knowledge about documents could streamline discovery processes and reduce costs. It should be noted, however, that depositions can be a costly exercise.

Use of technology

The use of technology to produce efficiencies in the conduct of litigation can lead to lower costs. Common tasks involved in bringing a class action such as identifying and signing up class members, obtaining information from class members, or compiling databases of those who have opted out of proceedings are facilitated by available digital technology.[171] Electronic filing has also led to cost savings in Australia courts. In discovery, technology has facilitated an expansion in the volume of information available but it has also led to techniques for the efficient review of documents, such as through the use of Technology Assisted Review (TAR).[172]

The first Australian court to order the use of TAR in discovery in civil litigation was the Supreme Court of Victoria in *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd*:[173]

> The Supreme Court of Victoria was the first court in Australia to order the use of TAR techniques to assist in the process of discovery in civil litigation. In the first Victorian case in which TAR was ordered, 4 million documents had been produced on discovery. After the elimination of duplicates, this was reduced to 1.4 million. According to Justice Vickery, a junior solicitor taking one minute to review and catalogue each document manually would have taken 583 working weeks, or 10 years, to compete the task. Hence, TAR was ordered to

[171] Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39, 64.
[172] Ibid 65-6; Erick Gunawan and Tom Pritchards, Technology and the Law Committee, 'Technology Assisted Review' (Research paper, Law Institute of Victoria, 24 November 2017) 1 .
[173] See *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* (2016) 51 VR 421, 422; *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 2)* [2017] VSC 640, cited by Cashman and Ginnivan (n 171) 67.

> expedite and simplify the process. This resulted in a reduction to 300,000 documents, 210,000 of which were likely to be irrelevant, thus reducing the pool to 100,000 documents.[174]

There has been a degree of resistance to the use of technology in some areas of civil litigation among the profession and the judiciary.[175] Following the global pandemic in 2020, there may be less resistance to the use of technology in the conduct of litigation, such as through witness testimony or trials facilitated by videolink. In areas such as the administration of settlements, recourse to technology may lead to greater efficiencies and reduced costs in the future.[176]

Reviews of costs by third parties

There may be greater scope for the review of costs estimates and bills by third parties such as litigation funders. It should be noted, however, that funders interests do not necessarily align with those of class members.

Control and case management by the courts

As proposed by interviewees in our prior research paper, the courts could play a greater role in reducing the costs of litigation in the class action context by exercising greater control over the conduct of the litigation, encouraging early settlement and facilitating communication between the parties early in the proceedings on the value of the claim to ensure that costs remain proportionate. It was suggested that the courts could encourage defendants to cooperate in this process to a greater degree. In addition, the courts could assist class actions to progress expeditiously through facilitating the early determination of separate questions. As O'Bryan J has recently noted: 'Early determination [of a contested legal question] may reduce costs for both the applicant and the respondent'.[177]

The role of judges in the management of complex civil litigation has been the subject of some scholarly research, including by Olijnyk who interviewed judicial officers in Australia and in the United Kingdom.[178]

There is of course provision for court ordered mediation in the Federal Court and in other jurisdictions and many class actions have settled or resolved during or in the aftermath of proceedings before a mediator. In many United States class actions, mass tort cases and MDL proceedings, federal courts have appointed Special Masters with a view to facilitating settlement of either the proceedings as a whole or particular contentious issues such as discovery. These are often experienced practitioners[179] or academics[180] with particular expertise in this area. Their conduct and role is often more proactive than that traditionally adopted by mediators in Australia.

Judicial creativity has also extended to judges giving an indication of their thinking, in a manner that is intended to preclude an application for recusal on the grounds of reasonable apprehension of bias, with a view to encouraging the parties to settle.

Judges have little if any effective control over the transaction costs incurred in the course of litigation and little if any knowledge of what is happening behind the scenes. Obligations to ensure procedural fairness constrain judicial interventionism.

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[174] Ibid.
[175] Ibid 69.
[176] Ibid 70-1.
[177] *Reilly v Australia and New Zealand Banking Group Limited (No 2)* [2020] FCA 1502, O'Bryan J at [13].
[178] Anna Olijnyk, *Justice and Efficiency in Mega-Litigation* (Hart Publishing, 2019). See Peter Cashman, 'The role of judges in managing complex civil litigation' (2020) 42(1*) Sydney Law Review* 141.
[179] For example, Ken Feinberg.
[180] For example, Professor Francis McGovern.

In some instances, the role of the court in approving settlements serves to ameliorate the problem of excessive or 'disproportionate' costs. However, there is often an 'adversarial void'[181] in connection with costs and funding commissions both at the inception and conclusion of class action litigation.

Settlement administration costs

Following settlement approval there has developed a somewhat unique Australian practice of appointing the law firm which acted on behalf of the applicant and class members in the course of the adversarial litigation to become the claims administrator. This is often on the same commercial terms (including hourly billing rates) that were adopted in the litigation. Thus, the firm becomes the arbiter of the settlement entitlements of all class members, including those class members have been signed up as clients during the course of the class action litigation.

Whilst some judges have indicated a preference for competitive tenders for this work,[182] as proposed by the ALRC,[183] this would appear to have only arisen recently and still appears to be the exception.

The common practice in other jurisdictions, such as in the United States, is for settlements to be administered by independent trustees. In one class action settlement approved by the Australian Federal Court in 2017, an accounting firm was appointed to administer the settlement.[184]

Costs and funding commissions in class actions in Australia

One of the unstated *disadvantages* of litigation funders paying the legal costs of law firms conducting class actions is that it removes the financial incentive, otherwise applicable in no win no fee arrangements, for the firms or counsel to expedite resolution of the case, and in fact creates an economic incentive to prolong it.

In Annexure A we set out the empirical data on costs and funding commissions in class action litigation in Australia in the period 2001-2020 incorporated in the Law Council submission to the Parliamentary Joint Committee. According to the Law Council, these data reveal that:

> (a) the total settlement amount over the period is $4.489 billion, inclusive of costs;
> (b) the approved legal costs and disbursements for those matters totals $679.86 million being 15.14% of the gross settlement amount;
> (c) of the funded matters identified (and for which funding commissions are known), the total settlement sum over the period is $2.389 billion, inclusive of costs;
> (d) commissions earned by funders totalled $642.63 million, being 26.9 %of the gross settlement sum referred to at (c) above;
> (e) of the funded matters identified the proportion of approved legal fees plus commission paid to the funders to the approved gross settlement sum is 41.4 %; and
> (f) there are indications that there was a significant reduction in commission rates over the period in which common fund orders were being made, reflecting the increased level of competition between funders and the greater involvement of the courts in setting rates when common fund orders were available.

According to the Law Council, these results were said to be consistent with the data analysed by Professor Morabito in respect of the period to the end of 2018. During this period commissions paid

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[181] In the Canadian context, see the reference to Canadian jurisprudence (e.g. *Martin v Barrett* [2008] OJ No 2105) and the discussion by Jasminka Kalajdzic, *Class Actions In Canada: The Promise and Reality of Access to Justice* (UBC Press, 2018) 136-140.
[182] *Caason Investments Pty Limited v Cao (No 2)* [2018] FCA 527 [157]-[158]; *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2018] FCA 1030 at [148]; *Pearson v State of Queensland (No 2)* [2020] FCA 619 [20].
[183] ALRC (n 89) 9.
[184] *Hardy v Reckitt Benckiser (Australia) Pty Ltd* [2017] FCA 341.

to commercial funders comprised 26.87% of the settlement proceeds and the median funding commission was 25%.[185] The Law Council noted that '[w]hether or not such percentages are reasonable is open to debate.'[186]

Based on the most recent data it is apparent that on average approximately 40% of the amounts otherwise payable to class members is paid by way of transaction costs to lawyers and litigation funders. In considering whether such a percentage is 'reasonable', we examine below some comparative data from the United States and Canada. This includes reference to funding commissions payable to the (non-profit) statutory class action funds in Ontario and Quebec.

Curiously, as Rachael Mulheron has observed,[187] law reformers in Canada were *not* supportive of statutory class action funds but they have been established and continue to operate successfully. By way of contrast, in Australia, numerous state and federal law reform commissions have recommended the establishment of a class actions fund[188] but these recommendations have *not* been implemented.

In the absence of a statutory fund in Australia, and given the prospect of enormous costs and substantial delays in conducting class actions, many meritorious claims would simply not be pursued in the absence of some form of litigation funding.

In the absence of funding, very few law firms have the capital or the appetite to take on class actions on a no win, no fee basis.

The fact that the transaction costs have become so enormous means that amounts otherwise payable to successful class members will be substantially eroded by legal fees and funding commissions, unless the defendants agree to pay them on top of any compensation payable to class members. This rarely occurs.

From a consumer and class member perspective these transaction costs are *excessive*. Whether they are *unreasonable* is a value judgment. The views of those who are the commercial beneficiaries should not be automatically accepted as objective.

The fact that commercial funders are risk averse is hardly surprising but their unwillingness to take on cases other than high value low risk claims, particularly in the area of investor claims, is troubling.

The unavailability of commercial funding for product liability claims in respect of personal injury claims is a problem and the explanation offered to the current Parliamentary Joint Committee by the representative of litigation funder Omni Bridgeway is problematic.

The fact that the largest commercial litigation funder in Australia has expressed a preference for limited 'opt in' classes and is opposed to common fund orders and percentage fees for lawyers is perhaps not surprising from its business development perspective. It is, however, questionable from a policy and access to justice perspective.

The obvious problem with *opt in* classes is evident from the experience with the recent VW clean diesel case. The Australian 'opt out' classes comprised all 100,000 consumers and others who acquired the diesel cars.[189] In the UK a similar number of around 95,000 affected car owners are currently seeking compensation in the High Court group action. However, the UK procedure requires claimants to *opt in* to pursue a claim. The 95,000 who have done so represent only about 8% of the total of 1.2 million affected vehicles.

Fees and costs in class actions in the United States

[185] Citing Morabito (n 12).
[186] Law Council of Australia (n 9) [16].
[187] Rachael Mulheron, *Class Actions and Government* (Cambridge University Press, 2020) 133.
[188] Ibid.
[189] However, less than half of the total number of class members registered timely claims during the current settlement administration process.

We referred in an earlier Research Paper to legal fees and costs arrangements in class action litigation in the United States.[190] With the exception of some limited fee shifting statutes, by and large costs are not recoverable from the other side in class actions in the United States at both state and federal levels.

Like much civil litigation in the United States, class actions are often conducted on the basis of a percentage contingent fee, which is subject to judicial approval. Courts in considering applications for approval of attorneys' fees may utilise different methodologies in determining what they consider to be reasonable. This includes the so-called 'lodestar' method, whereby fees may be awarded as a multiplier of fees based on hourly rates. Moreover, in considering what may be considered to be a reasonable percentage fee, courts will often have regard to the time spent on the matter and the amount that would be payable if calculated on the basis of hourly billing rates.

Empirical data on the relationship between the fees in United States class actions and the amount recovered are of interest for present purposes. However, in some instances this information needs to be carefully considered as the nominal value of the proposed settlement amount may be, in some cases, be substantially less than the amount ultimately paid out. This has been the subject of legislative reform.[191]

There have been a number of studies which have examined the relationship between legal fees awarded and the quantum of recoveries in United States class actions. In the period 1993 to 2008 the average fee awarded in federal class actions was 23% of the amount of the class action settlement.[192] In the period 2009 to 2013 this increased to 27%.[193] Perhaps not surprisingly, in all of the empirical studies published to date, the percentage of the settlement judicially allowed as legal fees declined as the amount of the settlement increased.[194]

This data, to the effect that legal costs in United States class actions have been judicially allowed historically at around one quarter of the amount of the class action settlement amount, may be compared with the Australian data. As noted above, the Australian data showing that legal costs are around 15% of the gross settlement amount is favourable, from the perspective of class members. However, in funded cases, the additional 25% paid, on average, by way of commission to commercial funders takes the transaction costs in Australia to around 40% which is considerably less favourable.

Such comparative evaluations needs to be made cautiously. This is particularly given that in Australia legal costs may be recoverable from the losing party. Moreover, in a number of Australian settlements (including the recent settlement in the VW class action litigation) all of the legal costs incurred by the applicants were payable by the respondents on top of, rather than out of, the gross settlement amount payable to class members.

Before returning to this issue, it is of interest to examine the position in Canada which is arguably more analogous to Australia given that in some Canadian jurisdictions costs may be awarded in favour of the successful party.

Fees and costs in class actions in Canada

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[190] Peter Cashman and Amelia Simpson 'Class actions and litigation funding reform: the rhetoric and the reality' Research Paper #1 (16 July 2020) 16.
[191] *Class Action Fairness Act of 2005*, Pub L No 109-2, 119 Stat 4.
[192] Theodore Eisenberg & Geoffrey P Miller, 'Attorneys Fees in Class Action Settlements: An Empirical Study', (2004) 1 *Journal of Empirical Legal Studies* 27.
[193] Ibid; Brian T Fitzpatrick, 'An Empirical Study of Class Action Settlements and Their Fee Awards' (2010) 7 *Journal of Empirical Legal Studies* 811.
[194] The abovementioned empirical research is referred to in Deborah Hensler, Jasminka Kalajdzic, Peter Cashman, Manuel Gomez, Axel Halfmeier and Ianika Tzankova, *The Gobalization of Mass Civil Litigation: Lessons from the Volkswagen 'Clean Diesel' Case*, RAND Institute for Civil Justice (forthcoming).

Similar to the position in Australia and the United States, in Canada legal fees and costs in class actions must be approved by the court. There is a legislative requirement in most jurisdictions that fees approved must be 'reasonable'.[195]

Although the legislation in Ontario makes express provision for judges to apply only a 'lodestar' methodology,[196] as Kalajdzic notes, courts have affirmed that other methods of calculation, including a percentage of the settlement, are permissible.[197] Two empirical studies have been conducted to examine the range of fees in class actions in Ontario. A 2007 survey of 29 settled cases found that there was a wide range of fee awards, calculated on the basis of both lodestar and percentage methodologies. The average approved fee was around $CA 3 million; the average multiplier was 2.48 and the average percentage of settlement amount was 14.85% (which is almost the same as the abovementioned Australia data reveal, with fees calculated on the basis of hourly rates). An updated study in 2013 found that the average multiplier in the 109 decisions examined had decreased to 1.95 but that the average percentage of settlement had increased to 22.05%.

In considering class actions in Canada, particularly in those jurisdictions where costs may be awarded in favour of the successful litigant, it is necessary to have regard to the class action funds that operate in both Ontario and Quebec. The plaintiff in a class action may seek financial assistance from such funds. In Ontario, where a case assisted by the fund is successful, the fund is entitled to 10% of the net amount recovered[198] in consideration of providing an indemnity in respect of adverse costs and funding disbursements. The Fund does not finance legal fees for conducting class actions. In Quebec the Class Actions Assistance Fund is an independent agency financed by the Quebec Government which may provide assistance to Quebec plaintiff with legal fees and disbursements in consideration of a percentage of the amount recovered. The operation of the Ontario Fund has been examined in detail by Kalajdzic[199] and by Mulheron.[200] Such funds are relatively rarely utilised given that, as Mulheron notes, the dominant financing device has been and will continue to be the contingent fee.[201] Lawyers conducting class action regularly provide indemnities in respect of adverse costs in those Canadian jurisdictions where adverse costs may be awarded. However, it should also be borne in mind that the risk and quantum of adverse costs in class actions in Ontario is reduced by the 'ameliorating effect' of legislation.[202]

Legal costs and the fiduciary obligations of lawyers conducting class actions.

In most civil litigation there is an inherent tension, if not conflict, between the understandable commercial imperatives of lawyers to maximise their remuneration, the professional obligations of lawyers and the interests of clients in minimising the transaction costs for which they are to be responsible. In the context of funded class actions this is further complicated by the role and interests of commercial litigation funders. In cases conducted on a no win no fee basis, lawyers have an enhanced financial stake in the litigation. These thorny ethical issues are complicated by the fiduciary duty which lawyers owe to clients and (arguably) class members.

As noted by Kirk:

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[195] See e.g. *Class Proceedings Act, 1992*, SO 1992, c. 6, s. 33(8) CPA.
[196] That is, the application of a multiplier to the amount of the base fee (usually calculated on the basis of hourly rates): s 33 *Class Proceedings Act 1992*, SO 1992.
[197] Kalajdzic (n 181) 129-130.
[198] That is, after the deduction of any legal fees and costs.
[199] Ibid 21-22.
[200] Mulheron (n 187) 129-171.
[201] Ibid 146 citing Brown et al, *Defending Class Actions* (n 83) 350.
[202] Section 31(1) of the *Class Proceedings Act 1992* (Ont) provides that in exercising its discretion in relation to costs…the court may consider whether the class proceeding was a test case, raised a novel point if law or involved a matter of public interest. See Rachael Mulheron, 'Costs Shifting, Security for Costs and Class Actions: Lessons from Elsewhere' in D Dwyer (ed) *The Tenth Anniversary of the Civil Procedure Rules* (Oxford University Press, 2010) ch 10.

> There is good reason to think that the legal representatives of an applicant in a class action owe a fiduciary duty not only to the applicant but to all members of the class. There is room to argue that funders also owe such a duty. Yet these possible duties offer limited practical protection when it comes to settlements. Any such duty serves to emphasise, but does not answer, the problem of how to deal with conflicting interests. The usual answer to conflicts – obtaining fully informed consent – is not in practice adopted, and is likely impractical. That is particularly so in an open class action, where group members need not be identified.[203]

In this final section of the present paper we examine in further detail the nature of fiduciary duties of lawyers generally and those acting in class actions in particular.

Fiduciary relationships

The factual and legal context in which the law on fiduciary duties has been developed encompasses an array of cases arising out of commercial, contractual and professional disputes. This includes:

- a contractual dispute between manufacturers and distributors of products[204]
- a patient seeking access to medical records in the possession of her treating doctor[205]
- an accountant retained by a company to give an independent expert valuation report to be placed before shareholders[206]
- a mortgage by clients in favour of solicitors with whom they had a solicitor-client relationship[207]
- the diversion by a manager of part of an employer's business to his own company[208]
- solicitors retained by the directors of a group of companies to advise on the restructuring and refinancing of the group and to act of several companies within the group on specific transactions[209]
- claims against former company directors who knowingly participated in wrongdoing by others in commercial transactions in connection with a mining project[210]

In *Grimaldi v Chameleon Mining NL (No 2)* the Full Federal Court considered, inter alia: who is a fiduciary and the standards of conduct required of persons in fiduciary positions.

As to the former:

> '…while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest.'[211]

As to the latter:

> 'There are two discrete parts to modern Australian fiduciary law. The better known and understood part is concerned with the setting of standards of conduct for persons in fiduciary positions. Its burden, put shortly, is with exacting disinterested and undivided loyalty from a fiduciary – hence, for example, its focus on conflicts between duty and undisclosed personal

[203] Kirk (n 112) 717.
[204] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
[205] *Breen v Williams* (1996) 186 CLR 71.
[206] *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31.
[207] *Maguire v Makaronis* (1997) 118 CLR 449.
[208] *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557-558.
[209] *Beach Petroleum NL v Abbott Tout Russell Kennedy & Ors* [1999] NSWCA 408
[210] *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296.
[211] Ibid [177] citing: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97; *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 538-541; and Conaglen, *Fiduciary Loyalty*, Ch 9 (2010).

> interest, conflicts between duty and duty and misuse of a fiduciary position for personal gain or benefit. The other part serves a different function and is often overlooked in discussion of fiduciary law. Its essential concern is with judicial review of the exercise of powers, duties and discretions given to a fiduciary to be exercised in the interests of another ("the beneficiary") where the beneficiary does not have the right to dictate or to veto how the power, discretion, etc is exercised by the fiduciary. Here the law channels and directs how "fiduciary discretions" are exercised. Unsurprisingly, there is quite some similarity between the grounds of judicial review of the decisions and actions of fiduciaries entrusted with such powers etc – for example, trustees, company directors and executors – and the grounds of judicial review of administrative action.'[212]

A fiduciary relationship is characterised by trust and confidence, where the fiduciary undertakes or agrees to exercise a power or discretion on behalf of another person that will affect their interests in 'a legal or practical sense'.[213] The fiduciary is given a special opportunity to exercise this power or discretion to the detriment of the other person who is accordingly vulnerable to abuse by the fiduciary of their position.[214]

The Victorian Law Reform Commission has summarised the position as follows:[215]

> The obligations that arise from a fiduciary relationship include, among other things, an obligation to act honestly and in the client's best interests and to avoid conflicts of interest. A fiduciary must not promote their personal interests where they conflict, or where there is a real or substantial possibility that they will conflict, with the interests of the person to whom the obligation is owed, unless they have that person's informed consent. The person can give informed consent only if they know about the actual or potential conflict and understand the consequences of consenting.

Beyond the obligations not to obtain unauthorised benefits from the relationship and not to be in a position of conflict, 'the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed'.[216] The rule not to be in a position of conflict is an obligation 'not to enter upon conflicting engagements to several parties'.[217]

Equity intervenes when the fiduciary is a solicitor 'to hold the fiduciary to, and to vindicate, the high duty owed to the plaintiff.'[218] Given this fiduciary relationship, actions on behalf of clients must be 'open and fair, and free from all objection'.[219] The fiduciary duty can be characterised as an overriding duty of 'undivided loyalty'.[220]

In *Breen v Williams*, Dawson and Toohey JJ stated:[221]

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[212] Ibid [174].
[213] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J).
[214] Ibid.
[215] Victorian Law Reform Commission, 'Litigation Funding and Group Proceedings' (Consultation Paper, July 2017) 36 [3.4].
[216] *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), approved by the majority judgment in *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165, 198, cited in Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts Between Duties' (2014) 37(3) *UNSW Law Journal* 914.
[217] Ibid, 135.
[218] *Maguire v Makaronis* (1997) 118 CLR 449 [38]; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557-558.
[219] Lord St Leonards LC in *Lewis v Hillman* (1852) 3 HLC 607 at 630 [10 ER 239 at 249].
[220] *Beach Petroleum NL v Abbott Tout Russell Kennedy & Ors* [1999] NSWCA 408; see also Gaudron and McHugh JJ in *Breen v Williams* (1996) 186 CLR 71.
[221] (1996) 186 CLR 71, 92 (emphasis added). However, this etymological root of trust and confidence is apt to mislead, as '[i]t is well known that "fiduciary duties" can arise despite the absence of any relationship of trust or confidence. Even when a fiduciary duty is owed by a trustee, the duty does not arise because of the fiducia or

> [T]he law has not, as yet, been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another. There are accepted fiduciary relationships, such as trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners, which may be characterised as relations of trust and confidence.

Brennan CJ stated:

> Fiduciary duties arise from either of two sources, which may be distinguished one from the other but which frequently overlap (38). One source is agency (39); the other is a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other. Whichever be the source of the duty, it is necessary to identify "the subject matter over which the fiduciary obligations extend". It is erroneous to regard the duty owed by a fiduciary to his beneficiary as attaching to every aspect of the fiduciary's conduct, however irrelevant that conduct may be to the agency or relationship that is the source of fiduciary duty.

The scope of the duty is 'moulded according to the nature of the relationship and the facts of the case'[222]

Gaudron and McHugh JJ in *Breen v Williams* emphasised the representative character of the fiduciary in the exercise of their responsibility. Their list of non-exhaustive and potentially overlapping factors, which are not determinative but may point towards the existence of a fiduciary relationship, includes:[223]

> [T]he existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.

The existence of a fiduciary relationship will hinge on 'a manifest undertaking coupled with a reasonable expectation of loyalty.'[224]

> A person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest.[225]

Legg and Degeling identify three approaches to identifying the existence of a fiduciary relationship which falls outside the accepted categories; the essence approach in *Hospital Products*, the multifactorial approach in *Breen v Williams*, and the description of Finn J of reasonable entitlement to expect that the fiduciary will act in their interests or in their joint interest, to the exclusion of the fiduciary's own interest for a purpose, or some of, or all of the purposes of their relationship.[226]

"trust" which is sometimes said to inhere in that relationship. There need be no relationship of trust or confidence between a trustee and a beneficiary; the beneficiary might not know of the trust and the beneficiary might not even be born': Justice James Edelman, 'The Role of Status in the Law of Obligations' in Andrew Gold and Paul Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21, 25.

[222] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 102 (Mason J).

[223] *Breen v Williams* (1996) 186 CLR 71, 107.

[224] Edelman (n 221) 27.

[225] *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 [177].

[226] Simone Degeling and Michael Legg, 'Fiduciaries and Funders: Litigation Funders in Australian Class Actions' (2017) 36 *Civil Justice Quarterly* 244, 253. Professor Vince Morabito considered that the Court acts as

Fiduciary duties in class action litigation

Class actions give rise to vexed questions concerning the roles and responsibilities of representative applicants, solicitors acting for representative applicants, solicitors who have also entered into retainer agreements with some or all class members and counsel who may be briefed to advise or appear on behalf of the representative applicant and/or class members. In commercially funded cases further complications arise in respect of the obligations of funders to class members as a whole and funded class members in particular.

In relation to transaction costs, the implications of fiduciary and other obligations where legal representatives and funders have commercial interests which are not aligned with or are in conflict with the economic interests of clients and class members are somewhat murky.
The (accepted) existence of a fiduciary relationship between the solicitor and the representative applicant and class members who are clients is distinct from but related to the issues of whether the representative applicant and/or the lawyers acting for the representative applicant owe fiduciary duties to the class.

In a recent case the Full Federal Court dealt with an appeal in which questions of fiduciary duties arose in relation to the role and responsibilities of lawyers acting for applicants and group members in a proceeding where certain persons previously within the class were agreed between the parties and their lawyers as no longer class members without their knowledge or consent.[227]

Murphy and Colvin JJ held, inter alia, that:

> 'the applicant and class members are privies in interest of class members only in respect of the common questions of fact or law, not their individual claims. The applicant could not represent the interests of affected class members in relation to Preliminary Questions which concerned the merits of their individual claim… Her representative capacity was limited to the claims giving rise to the common claims the subject of the proceeding'.[228]

In relation to the conduct of the solicitor in that case, the Murphy and Colvin JJ commented:

> 'Breathtakingly, [the solicitor] still made no reference to nor apology for the fact that, on his own admission, he had brought the appellants' claim in a court which he subsequently concluded (after the limitation period had run) was not competent to hear the case, had repeatedly advised them that they were class members and could recover through the class action, and he had then conceded that they were not able to bring a claim in Australia, without obtaining their instructions to do so, and without even telling them. Nor was there any sign of an apology for the insult the appellants suffered by discovering through the media, rather than from their own lawyers, that their claim in relation to the death of their beloved daughter had been abandoned without instructions.'[229]

As the Murphy and Colvin JJ went on to note and explain: '…matters did not end there.'[230]

Although a settlement was approved by the trial judge, in circumstances where he had been informed that it purported to include all class members whereas the appellants were still registered class members, Murphy and Colvin JJ were of the view that the appellants had been 'sailed down the river' by the law firm and counsel in effectively abandoning their claims, when the applicant did not have any authority under *Part IVA* to do so, and when they had not sought or obtained instructions from the

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a fiduciary for class members in his article 'Judicial responses to class action settlements that provide no benefits to some class members' (2006) 32 *Monash University Law Review* 75, 86-7, 93, 113.
[227] *Dyczynski v Gibson [2020]* FCAFC 120.
[228] Ibid [96] citing *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44; (2016) 259 CLR 212 (*Timbercorp*) at [39], [49], [53]-[54] (French CJ, Kiefel, Keane and Nettle JJ), [122] and [141]-[142] (Gordon J).
[229] Ibid [122].
[230] Ibid [123 et seq].

appellants.[231]According to Murphy and Colvin JJ: 'the appellants were persons with a claim against [the respondent] and on whose behalf the applicant commenced the class action, and they remained class members during the currency of the class action.'

On the question of fiduciary duty, Murphy and Colvin JJ observed:

> 'LHD had been retained by the appellants and was in a solicitor-client relationship with them. It had a fiduciary duty to act in the appellants' interests, as well as common law duties and contractual obligations: *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449; at 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ). In the circumstances, LHD was obliged to inform the appellants of the contents of Mr Freeman's affidavit insofar as it related to them, to seek their instructions in that regard and to advise them as to the appropriate action, to represent their interests. Most unfortunately, LHD did not tell the appellants anything about the procedure for the determination of the Preliminary Questions, did not seek their instructions in relation to the concession, and did not even tell them about the concession until after the appeal was commenced.'[208]
>
> 'Even if LHD had not entered into a retainer with the appellants LHD would have had an obligation to give them notice of the procedure for determination of the Preliminary Questions. The scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of the class members and has fiduciary obligations to them: Tomlinson v Ramsey Food Processing Pty Ltd [2015] HCA 28; (2015) 256 CLR 507 at [40] (French CJ, Bell, Gageler and Keane JJ). The applicant's lawyers also owe obligations to class members but how far those obligations extend is not settled. As stated in *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 at [220] and [308] per Murphy J:
>
> …The applicant's lawyers owe fiduciary duties to class members who are their clients and they also owe duties to class members who are not their clients. These duties may or may not be fiduciary in nature, but the applicant's lawyers at least have a duty to act in the class members' interests: *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426 (Wilcox J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957 at [57] (Sackville J); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480; [2002] FCA 872 at [24], [27] (Moore J); *Bray v F. Hoffman-La Roche Ltd* [2003] FCA 1505 at [15] ("*Bray*") (Merkel J).
>
> …
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> Some authorities provide that the applicant's lawyers owe fiduciary duties to class members who are not clients, although the decisions tend to assume this rather than analyse the issue: see *McMullin*; *Courtney* at [57]. Associate Professor Legg argues that, by reference to the established criteria, a fiduciary relationship exists between an applicant's lawyers and class members: Legg M, "Class Action Settlements in Australia - the Need for Greater Scrutiny" (2014) 38(2) *Melbourne University Law Review* 590, 596. Other authorities describe the applicant lawyer's duty as being to conduct the representative proceeding on behalf of the applicant in a way that is consistent with the interests of class members including those who are not clients: *King* at [24] and [27]; *Bray* at [15]; *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 at [8] (Stone J).' [209]
>
> 'In acting for the representative applicant LHD was obliged to act consistently with the representative applicant's fiduciary obligations to class members. Thus it was necessary for LHD to notify affected class members of the procedure for determination of the Preliminary Questions so that affected class members could decide whether and if so how to best protect their interests, including by deciding to instruct LHD to represent their individual interests if they considered that appropriate.' [210]
>
> The predicament that the appellants experienced was referred to in the following terms:

[231] Ibid [190].

> 'In the present case the legal representatives of the applicant made a concession regarding the appellants' individual claim to fall within one or more categories of the Convention, without having authority under Part IVA to do so and without having the appellants' instructions. The parties proceeded on the basis that the concession was effective but they did not seek an order to amend the class description or to declare that the appellants are not class members. Then the parties reached a settlement which was limited to the applicant and identified registered class members. The settlement did not include the appellants presumably because the parties understood that they were not class members. Because no s 33ZB order was made which sufficiently described and identified the class members bound by the settlement approval and dismissal orders made the appellants' position was left unclear. An order under s 33ZB would have addressed that lack of clarity.'[232]

Murphy and Colvin JJ referred in some detail to the role and responsibilities of counsel with particular references to various authorities concerning duties: [233]

- to contribute to the expeditious trial of causes of action
- to confine the case to the real issues
- to present the case as quickly and simply as circumstances permit
- to ensure that the case is dealt with in a manner proportionate to the overall subject matter of the dispute
- to facilitate the speedy and efficient administration of justice
- to exercise independent judgment, in the interests of the court, so that the time of the court is not taken up unnecessarily
- to achieve simplification and concentration so as not to advance a multitude of ingenious arguments in the hope that one out of ten bad points may succeed
- to comply with the paramount duty to the court even if to do so may be contrary to the interests or wishes of the client
- to adopt a collaborative approach to refining issues by eliminating vagueness, imprecision, kitchen sinks, boilerplates and dross
- to refuse to present a case counsel regards as bound to fail.

Although the focus in that appeal was the forensic conduct of the solicitors and counsel for the applicant and class members who were clients, such duties are equally relevant to but seldom invoked in relation to the costs incurred in class actions.

In a separate judgment Lee J expressed concern that it was 'somewhat difficult to identify what is more disturbing: the conduct of LHD of the claims of the group members who had retained the solicitors; or the later insouciance of LHD and its counsel as to how those claims had been conducted.'[234] The responsibilities of those acting for representative applicants were referred to in the following terms:

> 'The role is not only defined by a retainer, but also by duties which reflect the representative nature of the role assumed by the lead applicant. Sometimes solicitors are only engaged contractually by a lead applicant. At other times, like the present case, they are also retained directly by some or all group members. Where a solicitor is retained by a group member, then the duties owed to the group member client will, of course, be regulated in both contract and tort, and will also take on a fiduciary character informed by the contract. Moreover, the solicitor will owe duties specified in the *Australian Solicitors' Conduct Rules 2015* (NSW) (ASCR) such as: a duty of confidentiality; (r 9); the duty to act in the client's best interests

[232] Ibid [248].
[233] Ibid [215]-[220].
[234] Ibid [377].

> (r 4.1.1); a duty of competence and diligence (r 4.1.3); a duty to avoid conflicts (rr 10, 11, and 12); and a duty to follow a client's lawful, proper and competent instructions (r 8.1).'
>
> 'In the absence of a retainer with a group members, then the duties of the solicitor acting for a representative applicant are, obviously enough, to perform the role consistently with the duty not to act contrary to the interests of those in respect of whom the lead applicant acts in a representative capacity, that is, not to take steps contrary to the interests of the group members.'
>
> 'The duties of counsel retained by the solicitor will, obviously enough, depend upon the nature of the brief and, in the present case, the norms of conduct contained in the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW). It is common for counsel appearing in a representative proceeding to be briefed only on behalf of the representative applicant, although, in small class actions or class actions where the solicitor is retained by group members, it is not uncommon for counsel to be briefed to represent the interests of persons beyond the representative applicant. Again, however, where counsel does not hold a brief to represent the interests of group members, in acting on behalf of a representative applicant, counsel is required to not act in such a way which is contrary to the interests of group members and, obviously enough, to act in a way consistent with a common law duty of care.'[235]

All members of the Full Court accepted that representative applicants owe a fiduciary duty to act in the interests of class members, as a result of the scheme in Part IVA in which the applicant has conduct of the proceedings on behalf of the class members in respect of common claims.[236]

As noted above, Murphy and Colvin JJ cited as authority for this statement a paragraph from the High Court case of *Tomlinson v Ramsey Food Processing Pty Ltd:*[237]

> Traditional forms of representation which bind those represented to estoppels include representation by an agent, representation by a trustee, representation by a tutor or a guardian, and representation by another person under rules of court which permit representation of numerous persons who have the same interest in a proceeding. To those traditional forms of representation can be added representation by a representative party in a modern class action. Each of those forms of representation is typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court (of which opt-in or opt-out procedures and approval of settlements in representative or class actions are examples), or of both, which guard against collateral risks of representation, including the risk to a represented person of the detriment of an estoppel operating in a subsequent proceeding outweighing the benefit to that person of participating in the current proceeding.

The meaning of the paragraph in *Tomlinson* is not clear.[238] French CJ, Bell, Gageler and Keane JJ state that a representative party in a modern class action is a form of representation which binds those

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[235] Ibid [378]-[380].
[236] Ibid [209]-[210] and [222].
[237] [2015] HCA 28; (2015) 256 CLR 507 at [40] (French CJ, Bell, Gageler and Keane JJ). The issue in the appeal in that case, which is somewhat distant from the present class action focus, was whether a claim by the Fair Work Ombudsman and the making by a court of a declaration and orders in civil penalty proceedings created an issue estoppel on which a respondent to that proceeding was entitled to rely in a subsequent common law proceeding brought against it by a worker (French CJ, Bell, Gageler and Keane JJ [1]).
[238] In a publication on the Norton Rose Fulbright website about the Full Court decision, Jack Pembroke-Birss and Leo Freckelton appear to express similar concerns: 'Unhelpfully, the case cited in support of the position – that a lead applicant is a fiduciary of group members – does not necessarily support that unequivocal conclusion' ('How not to conduct a class action: *Dyczynski v Gibson* [2020] FCAFC 120' (July 2010) <https://www.nortonrosefulbright.com/en-au/knowledge/publications/1c6a0693/how-not-to-conduct-a-class-action-dyczynski-v-gibson-2020-fcafc-120>).

represented to estoppels. This is one form of representation within a list which are 'typically the subject of fiduciary duties imposed on the representing party or of procedures overseen by the court' or of both. The representative party is not necessarily a fiduciary, but may be, instead, subject to procedures which lead to their being able to bind those represented to estoppels.

In a separate judgment, Nettle J stated:[239]

> And, for present purposes, the important characteristics of the established forms of representation which emerge from the decided cases appear to be that a principal is generally able to control the conduct of an agent, and that the imposition of fiduciary duties on certain kinds of representatives has the effect of guiding the representative's conduct and providing remedies to the principal on default.

The interpretation of the paragraph in *Tomlinson* that class actions are a form of representation which binds those represented (the class) because of representative action rules or statutory class action provisions, rather than a fiduciary element, is perhaps supported by the following judgment from the Victorian Court of Appeal:[240]

> There are traditional forms of representation that bind the represented party to an estoppel that binds the representative: (a) where the representative is the agent of the represented party; or (b) where the representative is a fiduciary of the represented party. In addition, courts have held that judgments in representative proceedings have the effect of creating estoppels that bind those that have been represented in those proceedings. In that context, Timbercorp Finance relied on the statement of Gaudron, Gummow and Hayne JJ in *Mobil Oil Australia Pty Ltd v Victoria* to the effect that, by actions under provisions such as pt IVA of the *Federal Court of Australia Act 1976* (Cth), 'the claims that are made, or could be made, against the defendant by all those in the "class" or "group" that is identified in the proceeding would be decided'. This observation appears to recognise the potential for Anshun estoppel to apply in group proceedings. But it is confined to claims that could be raised by 'all' in the class. Moreover, their Honours were clearly not purporting to displace the law governing the Anshun principle by enunciating any blanket rule in respect of group proceedings.
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> …It will be observed that a group member in a group proceeding has no opportunity to exercise any control over the way in which the plaintiff conducts the group proceeding; they cannot influence, let alone control, what evidence is adduced and what arguments are propounded. Further, unlike the cases where a fiduciary has proceeded on behalf of beneficiaries or an agent on behalf of a principal, the plaintiff in a group proceeding is under no duties towards group members that the latter are able to enforce.
>
> …the group members in the group proceeding were not privies of the plaintiff in respect of unpleaded claims and defences, and that *Tomlinson* does not hold otherwise. The plaintiff was not the agent of the group members; nor was he their fiduciary. The group members had no control over the conduct by the plaintiff of the group proceeding.[241]

This could support the inference that class actions are included because of the types of representative procedures involved, rather than because of a fiduciary nature of that representation.

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[239] *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28; (2015) 256 CLR 507 [98].
[240] *Timbercorp Finance Pty Ltd (In Liquidation) v Collins* [2016] VSCA 128 [155], [160], [213].
[241] The primary judge considered that the plaintiff was not subject to fiduciary duties owed to group members; *Timbercorp Finance Pty Ltd (In Liquidation) v Collins* [2015] VSC 461 [573]. On appeal, Timbercorp Finance submitted that the primary judge had misconstrued *Tomlinson* but agreed that 'a plaintiff in a group proceeding was not subject to fiduciary duties' in a footnote at [182]. It should be noted that this judgment was upheld on appeal, although the High Court did not comment on the fiduciary issue; [2016] HCA 44; 259 CLR 212.

However, the existence of a duty was accepted by Gleeson J in *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd (No 2)* [2020] FCA 1355 at [24]:

> As Murphy and Colvin JJ observed in *Dyczynski v Gibson* [2020] FCAFC 120 at [209]; (2020) 381 ALR 1 at 50 (*Dyczynski*), the scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of class members and has fiduciary obligations to them, citing *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28 at [40]; (2015) 256 CLR 507 at 524. Contrary to Mr Kirk SC's submission, the applicant has "skin in the game" in those circumstances and it is not necessary to appoint a sub-group representative to ensure that the initial trial is conducted by a party with an interest in sub-group issues.

Prior to *Dyczynski,* there was some uncertainty in the caselaw.

In 2006 Jessup J considered in relation to a representative proceeding that 'the claimants are not fiduciaries apropos the generality of group members'.[242]

In contrast, the existence of a fiduciary duty was assumed by Lee J in 2018:[243]

> The applicants have a fiduciary duty not to act contrary to the interests of group members. In the present case, it is not apparent to me why there should be resistance by the applicants to the Court taking steps to ensure that only reasonable costs are deducted from the sum otherwise available to group members.

Lee referred to the oral submissions made in the matter of *Ceramic Fuel Cells Limited (In Liq) v McGraw-Hill Financial, Inc (No 2)* [2016] FCA 1059, in which counsel for Ceramic had submitted: 'this is an important claim and it's a highly valuable claim and my instructing solicitors have, we submit, a fiduciary obligation to the group members to make sure that we do whatever is necessary to get this information to them'. Lee J stated that 'Counsel was correct to emphasise the importance of fulfilling Ceramic's duties to group members.'[244]

While the solicitors appear to recognise their own fiduciary obligation as solicitors for Ceramic, Lee J appeared to view the duties as attaching to the client, not its solicitor.

In the course of the *Banksia* class action, the lead plaintiff Mr Bolitho:[245]

> submitted that it was important to bear in mind that he has fiduciary duties to the group members. He offered an undertaking that in the event that a settlement offer is made, he will take independent advice concerning that settlement offer irrespective of whether or not it is subsequently the subject of an application for Court approval.

The ALRC in 1988 compared the duties of a representative applicant for a class member to duties of a tutor conducting proceedings for an infant or mentally disabled person, as both contain 'a fiduciary element, requiring one person to act in the interests of the other.'[246]

Ben Slade and Juliana Trang also suggest that the representative applicant is a fiduciary.[247]

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[242] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* [2006] FCA 1388; (2006) 236 ALR 322, 346 [75].
[243] *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 [69].
[244] Ibid [90]-[91].
[245] [2014] VSC 582 [42].
[246] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 77 [176].
[247] *Class Actions for Consumers and Investors* (November 2005) 8 <https://www.piac.asn.au/wp-content/uploads/Ben_Slade__Juliana_Tang-Class_Actions_for_Consumers_and_Investors.pdf>.

Writing in 2015, Professor Morabito reflected on the 'uncertainty' surrounding duties of class representatives towards class members in Australia, in contrast to the well-established fiduciary nature of the relationship recognised by Canadian and US courts.[248]

In North American class action jurisprudence the litmus test for evaluating the conduct of class representatives *and* lawyers representing the class, both at the initial certification stage and throughout, is the procedural requirement of *adequacy of representation*.[249] Class actions cannot be certified to proceed unless the court is satisfied that both the class representative and the legal representatives will adequately represent the interest of the class as a whole. They can be removed and substituted where this proves not to be the case during the conduct of the litigation. Moreover, settlement agreements may not be approved, or may be overturned on appeal if approved, where there is an absence of *adequate* representation.[250] As a number of United States cases amply demonstrate, the assumption that absent class members will be fully protected by class counsel is not supported by federal experience'.[251]

In Australia, the 'concept of adequacy of representation is inherent in the nature of the fiduciary duty arguably owed by the representative party to the group members whose interests are represented in the proceedings'[252]

Wilcox J stated in *Dingle v Ciba-Geiby Australia Ltd*:[253]

> However, I do have the view that it's really undesirable, when there are solicitors acting for the applicant who has fiduciary responsibilities towards group members, for there to be negotiations behind the solicitor's back. I think it's a similar sort of situation to what you get in ordinary litigation and if there are going to be discussions they ought to be between the representatives. I would prefer to take some sort of undertaking or assurances from the parties rather than make an order. … I'm all in favour of negotiations and settlement … but I think it's better for it to be done through the solicitors

In *McKenzie v Cash Converters International Ltd* (No 3) [2019] FCA 10, an application for the disqualification of a judge on the basis of apprehended bias, Lee J stated:

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[248] Vince Morabito, 'Replacing Inadequate Class Representatives in Federal Class Actions: Quo Vadis?' (2015) 38(1) *UNSW Law Journal* 146. Professor Morabito refers to the following cases:
Re US Bioscience Securities Litigation, 155 FRD 116, 120 (ED Pa, 1994), citing *Re Fine Paper Litigation*, [1980] USCA3 735; 632 F 2d 1081, 1086 (3rd Cir, 1980). See also *Eubank v Saltzman*, 753 F 3d 718, 723 (Posner J) (7th Cir, 2014); *Heron v Guidant Corp* [2007] OJ No 3823, [10]; *Hoffman v Monsanto Canada Inc* [2005] 7 WWR 665, [337]; *Monsanto Canada Inc v Hoffman* (2002) 220 DLR (4th) 542, [16]; *Schroeder v DJO Canada Inc* [2010] SJ No 220, [150]–[151]; *Lau v Bayview Landmark Inc* (2004) 50 CPC (5th) 113, [19]; *Lambert v Guidant Corp* [2009] OJ No 1910, [136]–[138]; *Brooks v Canadian Pacific Railway Ltd* [2007] SJ No 367, [192].
[249] See e.g. Rule 23(a)(4) of the United States *Federal Rules of Rules of Civil Procedure*.
[250] See e.g. *Amchem Products Inc v Windsor* 521 US 591 (1997) *and Ortiz v Fibreboard Corp*. 527 US 815 (1999) and the critique by John C Coffee Jr, *Entrepreneurial Litigation: Its Rise, Fall and Future* (Harvard University Press, 2015) 112-118. See also Morabito (n 248); Marcel Kahan and Linda Silberman, 'The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v MCA, Inc' (1998) 73 *New York University Law Review* 765; George M. Strickler Jr., 'Protecting the Class: The Search for the Adequate Representative in Class Action Litigation'(1984) 34 *DePaul Law Review* 73
[251] Howard M Downs, 'Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v Falcon' (1993) 54 *Ohio State Law Journal* 607, 610 n 5.
[252] Cashman (n 106) 329, cited in Morabito (n 248).
[253] Transcript of Proceedings (3 March 1999) 11-12, cited in Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: Second Report - Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* (September 2010) 35 <http://globalclassactions.stanford.edu/sites/default/files/documents/Vince%20Morabito%202nd%20Report.pdf >.

> It is notable that the applicant, the representative of the group members for the advancement of their claims in this proceeding, and the party owing fiduciary duties to group members to not act contrary to their interests, does not take the view that it is necessary that I disqualify myself.

In *Zantran Pty Limited v Crown Resorts Limited* [2019] FCA 641, Murphy J stated at [146]:

> The fact that the case is a class action is also relevant in another way. History teaches that settlement is the most likely outcome in the case (see *Perera v GetSwift Limited* (2018) 357 ALR 586; [2018] FCA 732 at [30] (Lee J)) and I note that Zantran acts in a representative capacity. It owes fiduciary obligations to class members and its legal representatives have fiduciary obligations to class members, or at least have *duties to act in their interests*: see *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* (2016) 335 ALR 439; [2016] FCA 323 (Murphy J) at [220] and the cases there cited. Before Zantran's legal representatives may recommend a settlement they must be satisfied that the settlement is fair and reasonable having regard to the interests of class members who will be bound by it: *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7]-[8] (Jacobson, Middleton and Gordon JJ).(emphasis added)

Legg writes that '[t]he group members may have the necessary vulnerability and expectation that the representative party …would act in the group members' interests. The representative party …in directing the class action will at least impliedly undertake to act in the group members' interests and have a power to affect group members' interests.'[254]

Do lawyers for the representative applicant have a fiduciary to class members who are not clients?

The question of whether *the lawyers acting for the representative applicant* owe non-client class members fiduciary duties has been comprehensively considered by Degeling and Legg. They highlight the 'difficult issues of principle' which arise in relation to this question, including the operation of fiduciary law within the statutory environment of the class actions regime and the extent to which this shapes the fiduciary obligations.[255] The mere possibility of conflict between the solicitor's duties to different clients will signify a breach of their fiduciary obligations, except where this can be discharged by properly informed consent.[256] This will not always be possible, as 'there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both'.[257]

Degeling and Legg note that the existence of such a fiduciary duty would provide class members with opportunities to pursue equitable compensation for breaches of fiduciary duty, as 'equity does not readily accommodate the notion of the plaintiff group member's contributory fault.'[258]

In their 2014 article, Degeling and Legg identify allusions to the existence of a fiduciary relationship between the legal representative for the representative party and the group members in the following matters:

- *McMullin v ICI Australia Operations Pty Ltd* (Unreported, Federal Court of Australia, Wilcox J, 27 November 1997) 3;
- *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 489 (Moore J);
- *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 184–5 (Sackville J);

[254] Michael Legg, 'Entrepreneurs and Figureheads – Addressing Multiple Class Actions and Conflicts of Interest' (2009) 32(3) *UNSW Law Journal* 909, 919 footnote 58.
[255] Degeling and Legg (n 216) 915.
[256] Ibid.
[257] *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 cited in ibid 916.
[258] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201–2 (McHugh, Gummow, Hayne and Callinan JJ), cited in ibid 915.

- *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [15] (Merkel J);
- *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [8] (Stone J).
- See also Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System, Report No 89* (2000) 546–7 [7.115]–[7.118].

For completeness, these allusions or assumptions in the judgments are set out below.

Wilcox J stated in an ex tempore judgment:[259]

> I propose to order the damages that have now been assessed be paid to the solicitors for the applicants. What happens after that is primarily a matter between the solicitors, their clients and the various group members, to all of whom the solicitors have a fiduciary duty.

Moore J referred to the dicta of Justice Wilcox, noted above,[260] as well as comments by Justice Finkelstein in *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR 41-678 at 42,670 [15]-[16]: The Court is heavily reliant on evidence from counsel for the applicant on the effect of the settlement on group members in making a determination under s 33V and, while the interests of the applicant and group members may not coincide and counsel may be put in a difficult position, this is merely a 'necessary consequence' of proceedings under Part IVA.

Moore J stated at [27]:

> Plainly MBC has an obligation to conduct the representative proceeding on behalf of Mr King in a way consistent with the interests of members of the representative group whether MBC clients or not. However, that firm does not have a solicitor client relationship with the unrepresented shareholders and, as a matter of principle, could not resist Ebsworth & Ebsworth communicating with members of that group for legitimate forensic reasons

He went on to emphasise that the Court should exercise some control over any communication as a matter of case management and to ensure that the interests of those class members who are not represented are not prejudiced by the conduct of the litigation; at [28].

Sackville J stated at [57] in *Courtney v Medtel Pty Ltd:*[261]

> It may be true, as Mr Burnside submitted, that MBC, as the applicant's solicitors, owe fiduciary duties to the unrepresented remaining Group Members. Doubtless MBC could not, for example, legitimately seek to narrow the definition of the represented group so as to exclude unrepresented remaining Group Members from a settlement, if the object was to prefer the firm's own interests to those of the unrepresented remaining Group Members: cf *Williams v FAI Home Security Pty Ltd* (No 4) (2000) 180 ALR 459 at 466 [22] (the example is hypothetical only). But the fact that MBC may owe some fiduciary duties to the unrepresented remaining Group Members does not mean that the firm has become the de facto solicitors for those Group Members. Much less does it mean that MBC should be able to determine what offers the respondents should be permitted to put to the unrepresented remaining Group Members.

Merkel J stated:[262]

> However, special problems arise when an amendment is sought to be made on behalf of an applicant in a representative proceeding under Pt IVA of the Act which will adversely affect the interests of some group members. In the present case the applicant has been placed in a

[259] *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426; BC9707043, 3.
[260] *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 488-9 [24]-[25].
[261] (2002) 122 FCR 168, 184–5.
[262] *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505, [15]-[16].

> situation of potential conflict between her interest in procuring the amendment and her duty to the group members whose interests may be adversely affected by it. A similar problem arises for the legal representatives of the applicant who have an obligation to conduct the representative proceeding on behalf of the applicant in a way that is consistent with the interests of group members, irrespective of whether those persons are clients of the solicitors: see *King v AG Australia Holdings Ltd* (2002) 121 FCR 480 ("King v GIO") at 489 [27] per Moore J.
>
> In *Williams v FAI Home Security Pty Ltd (No 4)* (2001) 180 ALR 459 ("Williams") at 466–467 [22]-[23] and 472 [41], Goldberg J considered the potential conflict of interest that arises where a representative party in a representative proceeding seeks to settle a proceeding by agreeing to limit or narrow the definition of the group so as to exclude some group members from the settlement. His Honour observed at 467 [23] and 472 [41] that it was inappropriate for the Court to approve such a settlement under s 33V of the Act without giving the opportunity to group members, who would be excluded from the group by reason of the settlement, to be heard in relation to the settlement.

Stone J referred to the comments of Moore J:[263]

> It was obviously an important factor in favour of my hearing the application that the legal representatives of both parties submitted that I should do so. Maurice Blackburn, however, do not act for all group members but only the "funded group members". These are the group members who have retained Maurice Blackburn and who, in addition, have entered into litigation funding agreements with IMF (Australia) Ltd Those group members who have neither retained Maurice Blackburn nor entered into an agreement with IMF are referred to as "non-funded group members". Maurice Blackburn have a duty to the non-funded group members to conduct the proceeding in a manner consistent with their interests; *King v AG Australia Holdings Ltd* (2002) 121 FCR 480 per Moore J at 489. I accept the assurance of the applicant's solicitors, given both in writing and orally at the hearing of the application, that they are aware of this duty and, in submitting that I should hear the application, and in waiving their right to object to my delivering judgment, should that be necessary, they have taken the interests of the non-funded group members into consideration.

In addition to those comments identified, the following are of some interest:

Chief Justice James Allsop, speaking extrajudicially on the Part IVA regime, spoke of 'the centrality of the litigants' interests reflected in the fiduciary responsibilities of lawyers.'[264] The system itself works in a 'strict fiduciary capacity… such that every decision concerning the litigation and its running can be seen as taken in the interests of the litigants.'[265]

In their submission to the ALRC, Norton Rose Fulbright wrote that 'class members have access to the lawyer on the record for the class and that lawyer owes fiduciary duties to the class members'.[266]

Lee J stated in *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited*:[267]

> Legal representatives acting for an applicant have professional, contractual and fiduciary duties. Those duties involve advising and assisting the applicant to discharge the obligation to represent the claims of the group members they represent in accordance with

[263] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [8]
[264] Chief Justice James Allsop, 'Class Actions' (FCA) [2016] FedJSchol 14 (Keynote address at Law Council of Australia Forum, 13 October 2016).
[265] Ibid.
[266] Cited in ALRC (n 89) [6.26].
[267] [2019] FCAFC 107 [85].

> Pt IVA and Pt VB of the Act. The Court is entitled to expect that the applicant and the lawyers will not act contrary to the interests of group members as a whole in advancing and dealing with the common aspects of their s 33C claims. It is to be expected that differently represented applicants may responsibly and in good faith come to disparate views about pleadings, claim periods, forensic decisions and case theories in complex litigation. Leaving aside manifest deficiencies in a way a case is pleaded or conducted, often it will be difficult to tell whether a particular decision was sound until the end of the litigation. Having said that, provided there is no reason to think otherwise, the Court should assume that a relevant legal team will reflect regularly upon the conduct of the case and give thought to amendments including refining or including further causes of action and, if appropriate, bringing s 33K applications to augment or restrict the class.

Sackville J stated in *Petrusevski v Bulldogs Rugby League Club Limited* [2003] FCA 1056 at [7]:

> There is, in my view, a potential for a conflict of interest and duty should a group member approach the solicitors acting for the applicants in representative proceedings in order to obtain advice about his or her situation. … But if a group member seeks advice as to whether he or she should opt out, it could hardly be doubted that the solicitor would owe a fiduciary duty to that group member in relation to any advice given: cf *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480, at 488 [24], 489 [27] per Moore J; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, at 182 [49], 184-185 [57], per Sackville J.

Austin J stated in *Arakella Pty Ltd v Paton* [2004] NSWSC 13; 60 NSWLR 334 at [61] that the observation that plaintiff lawyers in Federal Court Part IVA proceedings have an obligation to conduct the proceedings in a way that is consistent with the interests of group members, as stated by Moore J, and lawyers must put before the Court all relevant matters where those interests are divergent, per Finkelstein J, is applicable to representative proceedings under the NSW Supreme Court rules.

The contention that there may be a fiduciary duty in this context was noted by Murphy J in *Kelly v Willmott Forests Ltd (in liquidation)* (No 4) [2016] FCA 323 in relation to a settlement approval under s 33V. However, Justice Murphy did not express his view on this issue, as this was not required in relation to the case before him. The settlements were not approved partly because the opt-out notices 'did not unambiguously inform class members that if they did not opt out they would or might be precluded from defending loan enforcement proceedings on any basis, including by relying on claims or defences which are not pleaded in the class actions.'[268] This was at least contrary to the lawyers' duty to act consistently with the interests of class members who had not signed a retainer:[269]

> The scheme of Part IVA is that the applicant has the conduct of proceedings on behalf of the class members. The applicant's lawyers owe fiduciary duties to class members who are their clients and they also owe duties to class members who are not their clients. These duties may or may not be fiduciary in nature, but the applicant's lawyers at least have a duty to act in the class members' interests: *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426 ("*McMullin*") (Wilcox J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168; [2002] FCA 957 at [57] ("*Courtney*") (Sackville J); *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* (2002) 121 FCR 480; [2002] FCA 872 at [24], [27] ("*King*") (Moore J); *Bray v F. Hoffman-La Roche Ltd* [2003] FCA 1505 at [15] ("*Bray*") (Merkel J).
>
> … Some authorities provide that the applicant's lawyers owe fiduciary duties to class members who are not clients, although the decisions tend to assume this rather than analyse the issue: see *McMullin*; *Courtney* at [57]. Associate Professor Legg argues that, by reference to the established criteria, a fiduciary relationship exists between an applicant's lawyers and

[268] At [126].
[269] At [220], [308]-[309].

> class members: Legg M, "Class Action Settlements in Australia - the Need for Greater Scrutiny" (2014) 38(2) *Melbourne University Law Review* 590, 596. Other authorities describe the applicant lawyer's duty as being to conduct the representative proceeding on behalf of the applicant in a way that is consistent with the interests of class members including those who are not clients

While Murphy J stated that the fiduciary nature of this relationship was not necessarily settled, Foster J in *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited; In the Matter of Treasury Wine Estates Limited* [2016] FCA 787 at [151] stated:

> 'It is now also well accepted that the lawyers who represent the lead claimant in a class action owe a fiduciary duty to the members of the class in that proceeding, even where those lawyers have not been retained by some members of the class', citing Moore J as authority for this point.

Sackar J referred to the existence of a 'duty' in the *Takata Air Bag* class action, referring to Murphy J's comments above, regarding the unsettled question of whether this duty is fiduciary.[270]

In *Zantran Pty Limited v Crown Resorts Limited* [2019] FCA 641, Murphy J at [146] stated:

> The fact that the case is a class action is also relevant in another way. History teaches that settlement is the most likely outcome in the case (see *Perera v GetSwift Limited* (2018) 357 ALR 586; [2018] FCA 732 at [30] (Lee J)) and I note that Zantran acts in a representative capacity. It owes fiduciary obligations to class members and its legal representatives have fiduciary obligations to class members, or at least have duties to act in their interests: see *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* (2016) 335 ALR 439; [2016] FCA 323 (Murphy J) at [220] and the cases there cited. Before Zantran's legal representatives may recommend a settlement they must be satisfied that the settlement is fair and reasonable having regard to the interests of class members who will be bound by it: *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7]-[8] (Jacobson, Middleton and Gordon JJ).

In *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited* (No 3) [2018] FCA 1842 at [120] correspondence between legal practitioners involved in the class action was mentioned by the Court:

> On 21 March 2018 Mr Scattini wrote to Baker McKenzie, Vannin's solicitors. He said that Quinn Emanuel was required to cease acting because the Costs Reference put the firm in a position of conflict, and that the Costs Reference meant that:
>
> > …QE would be *required* to make submissions that are directly opposed to the interests of the Applicant's [sic] and Group Members. QE's ethical and fiduciary duties proclaim that such a circumstance puts us in a position of conflict. Even if informed consent by the Applicant could be used to militate [sic] against that conflict, there is no practicable means of obtaining that consent from Group Members, whose interests at this point may well diverge from the Applicant. Perhaps even more significantly, it is unclear to us whether the giving of consent for QE to act against the interests of Group Members would expose the Applicant to a claim for breach of its duties to Group Members, however those duties are formulated.

As noted above, the issue of obligations to class members was recently considered in *Dyczynski v Gibson*[271] although in that case the class members were all clients of the firm acting in the class action.

[270] [2019] NSWSC 1493 [14].
[271] *Dyczynski v Gibson* [2020] FCAFC 120.

In the aftermath of the *Banksia* class action, counsel for the plaintiff 'breached their fiduciary and professional duties to Mr Bolitho and/or other group members by, *inter alia*, promoting their own interests and the interests of AFPL above the interests of their client/s, failing to act in their best interests, and by knowingly making a false statement to an opponent in relation to the case…[and] each of the non-parties and AFPL/Mr Elliott breached their fiduciary and professional duties to Mr Bolitho and/or other group members to act in their best interests'[272]

The Court considered that:[273]

> Such conduct and the degree to which that conduct departed from the legal duties, norms and standards of behaviour was, it submitted, a relevant consideration in the court's assessment of whether AFPL's claims for costs and commission were fair and reasonable in all the circumstances. This notion can be fully developed at trial, provided the foundational allegations, particularly that fiduciary duties were owed, are proved.

In another hearing in the *Banksia* matter, Associate Justice Daly stated at [104]:[274]

> I accept that there is a live issue as to whether the fiduciary duty owed by the lawyers for a lead plaintiff in a class extends to all group members. Nevertheless, I accept that if there is a prima facie case that members of Mr Bolitho's legal team engaged in serious contravention of their professional and fiduciary duties, and their duties to the Court, as described by the managing judge, then such conduct would amount to 'fraud' within the meaning of s 125 of the Evidence Act.

In a 2018 article, Waye stated that 'whenever the law firm interacts with the funder, it must ensure that its own commercial interests and the interests of the alliance are sublimated in favour of class members' interests. In Australia, this obligation springs from the class law firm's fiduciary obligations to class members' among other sources.[275]

Degeling and Legg argue 'that in a class action environment, fiduciary obligations are owed by the representative party's solicitor to group members, and it is virtually impossible for that solicitor to obtain informed consent from each group member to any conflict of duty and duty. The only strategy therefore to employ in attempting to discharge the fiduciary obligation in relation to conflicts of duty is to narrowly construct the represented group, thus attempting to minimise potential conflicts of duty. In doing so, the very object of the legislation may be undermined.'[276] They note that class members are not necessarily identified but are identifiable.

While the solicitor-client relationship is a well-established category of fiduciary relationship, this derives from the actions undertaken by the solicitor, rather than the status of the relationship itself, and not every aspect of the relationship will be fiduciary.[277] Justice Edelman suggests that status is important as it informs the content and scope of the duties that the fiduciary may reasonably be held to have undertaken.[278] This undertaking is objective and voluntary, 'construed from manifest words,

[272] [2019] VSC 653 [135], [144].
[273] [2019] VSC 653 [173].
[274] [2020] VSC 174.
[275] Vicki Waye, 'The initiation and operations phase of the litigation funder - class action law firm relationship: an Australian perspective' (2018) 60(2) *International Journal of Law and Management* 595, 597.
[276] Degeling and Legg (n 216) 917.
[277] *Beach Petroleum NL v Abbott Tout Russell Kennedy (*1999) 48 NSWLR 1, 45, 48. Writing extrajudicially, Justice Edelman has noted that an objective undertaking cannot involve a 'deemed' undertaking, and that such an undertaking is a precondition for a fiduciary obligation to arise, see Edelman (n 221) 21 and Justice James Edelman, 'When Do Fiduciary Duties Arise?' 126 LQR 302 (2010).
[278] Edelman (n 221) 21.

conduct, and circumstances' and without reference to the subjective knowledge and intentions of the fiduciary.[279]

Fiduciary relationships do not require the formalities of retainers, but arise from the 'course of dealing' under the Federal Court procedures for opt-out class actions and class closure mechanisms.[280] They assert that the activities undertaken by a plaintiff solicitor on behalf of the class members, and their position of vulnerability, is consistent with the elements of a fiduciary relationship set out in *Hospital Products*.[281] However, it is clarified that 'it cannot be assumed that in every class action the representative party's lawyer is a fiduciary for class members. Different courses of dealing may attract the fiduciary norm at different stages, to different intensities or within distinct scopes of dealing.'[282]

The course of conduct of plaintiff lawyers acting in an opt-out class action includes the drafting of the application and statement of claim and the conduct of the proceedings, including making strategic decisions on the way the litigation will run, 'all of which suggest that the solicitor has undertaken to act for, or assumed responsibility for, all members of the class as would entitle class members to expect loyalty.'[283]

Fiduciary obligations may arise according to agency, per the terms of the class closure notices, for those who have registered as class members but who have not retained the lawyer. The agency of the lawyer comprehends their authority to settle the class action. There may be a fiduciary relationship arising through principles of trust as a result of a class member's commitment to contribute to security for costs, and there are 'sound reasons' for the duty to be recognised by the Court because of information asymmetries and vulnerabilities that may apply. There is scope for a more limited fiduciary duty for unregistered group members who have not expressly opted-out.[284] There is a risk of conflict between duties or between duty and interest arising in these circumstances. Fully informed consent may be difficult for solicitors acting in an opt-out class action to demonstrate, as the class members are not all identified and not enough will be known about the non-client class member claims to determine the extent to which their interests may conflict with those of client class members.[285] Class closure notices and opt-out notices through broader public dissemination in the media are inadequate to discharge any such fiduciary duty.[286]

Thus, it appears that the duty of solicitors extends to an obligation to act consistently with the representative applicant's obligations, but it does not appear to have been unequivocally established by the courts that the duty is necessarily fiduciary in nature.

Fiduciary duties of litigation funders

Finally, we consider whether funders may be subject to fiduciary duties to registered and unregistered group members. In addition to providing funds, 'litigation funders typically engage in a whole range of other conduct including advising, acting as agent and perhaps even as participants in a joint enterprise of some type with group members of varying degrees of sophistication and ability to be

[279] Ibid 23-4. Note, however, that fiduciary's consent or agreement, and its voluntary nature, is not necessarily required in the founding of all fiduciary relationships (see, e.g., Gregory Klass, 'What if Fiduciary Obligations are like Contractual Ones?' in Andrew Gold and Paul Miller (eds) *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 93, 101).
[280] Degeling and Legg (n 216) 914, citing Dixon J in *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408; *Beach Petroleum NL v Abbott Tout Russell Kennedy (*1999) 48 NSWLR 1, 46; Simone Degeling and Michael Legg, 'Class Action Settlements, Opt-out and Class Closure: Fiduciary Conflicts' (2017) 11 *Journal of Equity* 319, 320.
[281] Degeling and Legg (n 216) 924-5.
[282] Degeling and Legg (n 280) 320.
[283] Ibid 331.
[284] Ibid 332-336.
[285] Ibid 339-40.
[286] Ibid 341.

self-regarding. Additionally, group members are not homogenous. Litigation funders are therefore exposed to the risk that equity will constitute them fiduciaries for group members.'[287]

The recognition of such a duty would have significant implications for the roles of funders, particularly in relation to settlement, and especially in relation to open class actions, where informed consent may be difficult or impractical to obtain. Fiduciaries are obliged, 'without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is "a conflict or a real or substantial possibility of a conflict" between personal interests of the fiduciary and those to whom the duty is owed.'[288] The duty would potentially give rise to equitable remedies, such as an account of profits.[289]

The course of dealing between a funder and class member may include:[290]

- advertising seeking potential group members and a role in selecting those eligible for inclusion in the class and/or the representative applicant before the litigation starts, including the possible provision of informal advice that may impact on the putative class member's decision to opt-out or register;
- contact with potential group members to obtain their signature on a funding agreement, and possibly to dissuade them from joining other competing actions, conversations which will usually entail a significant asymmetry of information held by the funder and putative class member;
- input into litigation strategy and settlement decisions; and
- due diligence, including monitoring the work of the law firm.

At the initial stages, the funder may not properly disclose its interest in the litigation to potential class members. Where the funder has provided some informal advice as described above, Degeling and Legg consider that a fact-based fiduciary relationship is likely to have arisen prior to any attempt to exclude a fiduciary relationship through the funding agreement. Alternatively, it may arise through a relationship of agency. They emphasise the normative reasoning for this to be recognised as a fiduciary relationship, where class members have an economic interest and the funder has a great deal of information about the claim and group that the individual class member does not.

> '[A] fiduciary can be forced to surrender personal gains, or to rescind inconsistent contracts or conveyances, when there is no loss whatsoever and no breach of any promise or harm to any vested interest. What is being sought from the fiduciary is a decent process of decision making rather than a defined or prescribed result.'[291]

However, it should be noted that the fact-based fiduciary relationship outlined above would apply only to those class members or potential class members who have interacted with the funder and would not necessarily apply to unfunded group members who had no interaction with the funder.

Further, the fiduciary obligations of a funder, appear to be less than those required of a solicitor, if they exist at all.[292]

Callinan and Heydon JJ stated in *Fostif*, concerning representative proceedings:[293]

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[287] Degeling and Legg (n 226) 245.
[288] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78].
[289] Degeling and Legg (n 226) 263.
[290] Ibid 249-51.
[291] Ibid 252, citing Professor Getzler.
[292] Professor Vicki Waye has noted that: 'Although there is no fiduciary obligation owed to class members by the funder, funders have been checked, to a more limited degree than that applicable to the class law firm, by court scrutiny during the settlement approval process': Waye (n 275) 597.
[293] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 CLR 386[266].

> Normal litigation is fought between parties represented by solicitors and counsel. Solicitors and counsel owe duties of care and to some extent fiduciary duties to their clients, and they owe ethical duties to the courts. They can readily be controlled, not only by professional associations but by the court. The court is in a position to deploy, speedily and decisively, condign and heavy sanctions against practitioners in breach of ethical rules. The appearance of solicitors is recorded on the court file. Institutions like Firmstone & Feil, which are not solicitors and employ no lawyers with a practising certificate, do not owe the same ethical duties. No solicitor could ethically have conducted the advertising campaign which Firmstone & Feil got Horwath to conduct. The basis on which Firmstone & Feil are proposing to charge is not lawfully available to solicitors. Further, organisations like Firmstone & Feil play more shadowy roles than lawyers. Their role is not revealed on the court file. Their appearance is not announced in open court. No doubt sanctions for contempt of court and abuse of process are available against them in the long run, but with much less speed and facility than is the case with legal practitioners. In short, the court is in a position to supervise litigation conducted by persons who are parties to it; it is less easy to supervise litigation, one side of which is conducted by a party, while on the other side there are only nominal parties, the true controller of that side of the case being beyond the court's direct control.

In the Court of Appeal decision, Mason P had remarked at [114]:[294]

> The court is not concerned with balancing the interests of the funder and its clients. Indeed, it is not concerned with the arrangements, fiduciary or otherwise, between the plaintiff and the funder except so far as they have corrupted or have a tendency to corrupt the processes of the court in the particular litigation.

According to the Australian Law Reform Commission: '[t]here may … be specific obligations that apply as a matter of equity including fiduciary duties.'[295]

The Victorian Law Reform Commission noted that:

> The relationship between lawyers and their clients has long been recognised as a fiduciary relationship. Litigation funders can also have fiduciary obligations to their clients in some circumstances.[296]

Those circumstances may be limited, depending on the extent to which funders have any pre-contractual interactions with a class member giving rise to a duty, where there is a contract, whether this gives rise to a fiduciary relationship, and the effectiveness of any clause purporting to exclude agency or fiduciary elements.

Legg has stated that:[297]

> Litigation funders are subject to significantly less oversight as they do not have ethical or professional obligations and can exclude any fiduciary duty or duty of good faith by contract.

Funding agreements often contain clauses which purport to exclude the operation of fiduciary law. However, as Legg and Degeling point out, regardless of their enforceability as a matter of contract law, 'the ability of the funder by contract to exclude the operation of fiduciary law turns on whether the attempted contract is itself an exercise of fiduciary power. To the extent that a fiduciary

[294] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83.
[295] ALRC (n 89) 63 [2.54].
[296] VLRC (n 215) [3.3].
[297] Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, Footnote 7.

relationship is found to exist prior to the entry into the funding agreement, and to encompass that agreement within its scope, equity will likely find the funder in breach of fiduciary duty.'[298]

As Legg and Degeling argue,[299] the initial interactions between the funder and putative class member may involve an undertaking to provide advice on the class action or an undertaking to act in the putative group member's interests as their adviser. There is a conflict of interest which may arise in relation to the economic interests of both parties. The funder is able to affect the class member in a legal or practical sense, through its impact on the course of the litigation to settlement. The class member is often vulnerable and does not have access to independent advice. There is a risk that an opportunistic actor may exploit this vulnerability. This early informal advice may also mean that the class member has the reasonable entitlement to expect, as identified by Justice Finn. It also appears to meet the multifactorial test in *Breen v Williams.*

They also argue that it may arise in the terms of the contract between the parties, or through dealing outside the scope of the contract (although this is suggested to be harder to establish and unlikely to arise in the common pattern of conduct between litigation funders and class members).

They also note that fiduciary relationships can exist by 'virtue of status'.[300] The status contemplated is one of agency after the contractual funding agreement is signed, giving rise to a fiduciary relationship (even where the agreement may specifically provide that the funder is not the agent of fiduciary of the class member signatory). This is a matter of construction for a court according to the terms of the contract and the course of conduct involved, however, and would involve the court implying a term into the contract, or construing the contract to draw out that which is implied in the language of the contract, according to the requirements of contract law.[301]

Within a closed class, funders would be able to obtain fully informed consent to any conflict. However, this is not possible in an open class where class members are not identified. The article by Degeling and Legg focuses mainly on those who have signed the funding agreement, not unfunded members.

Duffy writes:[302]

> Where some decision-making in the litigation is delegated to the funder, the funder may have some of the elements of an economic agent of the litigant. This delegation may be slight or substantial. Litigation agreements may provide that the litigation funder is providing 'project investigation' and 'project management' services which have some agency aspects, and the funder or persons from the funder may be specifically appointed attorneys for certain purposes (such as signing documents). An agreement may specifically provide that the funder is not the litigant's legal agent. Yet conversely, it has been suggested that a fiduciary duty to the litigant may exist (depending upon the circumstances) or should be imposed on funders or that that funders ought to be subject to an implied duty of good faith in the same manner as insurers… Given the ability of contracts between the insurer and the litigant to modify or negate duties (including the lawyer's duty to the insured) it is not clear that the insurance analogy currently provides great comfort as to protection of the litigant's interests in the TPLF context. It is arguable therefore that some overriding statutory duty (a fiduciary duty or at least a duty of utmost good faith and fair dealing) should be created as between litigants and funders. This may assist the lawyer's dealings with the funder as the lawyer would be comfortable that, in fearlessly representing the litigant, the lawyer is also helping the funder

[298] Degeling and Legg (n 226) 250.
[299] Ibid 253-4.
[300] Ibid 255.
[301] See, e.g., *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 347.
[302] Michael Duffy, 'Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory' (2016) 39(1) UNSW Law Journal 165.

> meet the funder's duties to the litigant. In agency terms, this would be a move towards harmonising the position of the funder and the lawyer.

The existence of a possible fiduciary duty on the funder to unfunded class members was raised by McDougall J:[303]

> In the present case, it may be – I express no concluded view – that the settlement offer breached some fiduciary duty that Firmstones[304] may have owed to the members of the class of represented person who had not "signed up" – ie, elected to participate as represented persons – at the time the offer was made.

The decision of McDougall J was unsuccessfully appealed to the High Court. The defendant in that appeal contended that the McDougall J had rejected evidence of:[305]

> the content of a without prejudice offer made by Firmstones to compromise all claims that petroleum retailers may have had against Mobil for sums allegedly due to them in respect of fees paid under the impugned legislation. Mobil further contended that the primary judge should have found that by making this offer Firmstones breached a fiduciary duty owed to those retailers whom it represented. In this connection, Mobil pointed to some other compromises that Firmstones had reached with other suppliers of petroleum products which, so Mobil contended, revealed other breaches of fiduciary duty and thus revealed that Firmstones and Trendlen were inappropriate persons to have control of the proceedings.

However, the High Court did not consider these arguments, finding that the appeal should be allowed on the grounds that the proceedings did not meet the requirements for representative proceedings.[306]

It can be argued that the funder is expected to exercise a degree of care and loyalty.[307] However, funders can also be viewed as self-interested actors seeking profit, with regard to obtaining the best return that the Court and plaintiff counsel will accept as 'fair and reasonable'. For Penner, loyalty is a concept of limited usefulness to describe fiduciary obligations, as fiduciaries must be objective and exclusively consider the interests of those to whom they owe duties, rather than merely prioritising those interests.[308] Moreover, the imposition of a fiduciary duty requires something more than the funded client trusting or relying on the funder acting in their interests: 'high expectations do not necessarily lead to equitable remedies.'[309]

Written submissions in an English Supreme Court case included the assertion that 'there is no recognised fiduciary relationship involving a funder'.[310]

According to Legg, where a funding equalisation order is made in 'Australia the unfunded group members are saddled with whatever percentage the funded group members agree to without any judicial oversight. This is in a context where the litigation funder lacks the ethical, professional and

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[303] *Trendlen v Mobil Oil* [2005] NSWSC 741 [83].
[304] (A litigation funding firm).
[305] *Mobil Oil Australia Pty Limited v Trendlen Pty Limited* [2006] HCA 42; (2006) 229 ALR 51 [11].
[306] Ibid [12].
[307] Gregory Klass defines this as the 'right sort of content' of a fiduciary duty: 'What if Fiduciary Obligations are like Contractual Ones?' in Andrew Gold and Paul Miller (eds) *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 93, 94.
[308] JE Penner, 'Is loyalty a virtue, and even if it is, does it really help explain fiduciary liability?' in Andrew Gold and Paul Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014)
[309] *Hall v Saunders Law Ltd & Ors [2020] EWHC 404* (Comm) (27 February 2020) [55] (a recent decision from England in which a solicitor was found not to have fiduciary obligations to a litigation funder); *In re Goldcorp Exchange* [1995] 1 AC 74 at 98
[310] *Persona Digital Telephony Limited & Sigma Wireless Networks Limited and The Minister for Public Enterprise, Ireland and the Attorney General, and, by order, Denis O'Brien and Michael Lowry* [2017] IESC 27 [17].

fiduciary obligations that apply to a lawyer.'[311] However, funding equalisation orders are of course made by the court.

Steve Mark has argued:[312]

> [T]hird party litigation funding should be classified as a legal service, and one which constitutes a fiduciary relationship between the funders and their clients, particularly where the funder maintains control over the litigation.
>
> Litigation funders can play a role that largely mirrors that of a law firm. Litigation funders, for example, choose which cases to fund, which lawyers to engage with, which clients to support and what litigation tactics should be followed. From a commercial perspective, this may make sense, but it seems to interfere with an individual's right as to their choice of lawyer and with a lawyer's duty to a client of confidence, full disclosure and confidentiality. Indeed, it would be surprising if litigation funders were not primarily staffed by people with at least legal knowledge as they would require this to be able to make these decisions. Regulating such litigation funders in the same manner as legal practices should thus not be a fundamental change.
>
> In this regard, a litigation funder could be said to be performing legal work. If that is the case, then like all other legal practitioners, the primary duty of a litigation funder should be to the Court with the ethical responsibilities and duties that that entails, and secondly to the client.

In 2006, the existence fiduciary duties owed to the plaintiff by the litigation funding company was assumed as an existing protection for vulnerable litigants.[313] The Law Council briefly considered the merits of the imposition of a fiduciary duty more broadly on funders in 2011.[314]

In 2007, Professor Waye suggested that if the relationship between the 'claim holder' and funder is seen as analogous to that of a joint venturer, this would indicate that funders are not fiduciaries to class members who have signed funding agreements.[315] In its standard form contracts, IMF (Australia) Ltd has previously specifically disavowed that the relationship it has with the claim holder is a joint venture.[316] However, fiduciary obligations may arise in the context of a joint venture.[317] In a contractual setting, '[w]here the relationship between contracting parties is one of mutual trust and confidence, it may be appropriate to infer that the relationship is fiduciary'.[318] Vulnerability is key to the implication of a fiduciary obligation, and it is certainly arguable in the relationship of third party litigation funding and funded class members.[319] The mutuality in the third party litigation funding context is also significant:

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[311] Legg (n 297) 605.
[312] 'The Regulation of Third Party Litigation Funding in Australia' *UNSW Centre for Law Markets and Regulation* <https://clmr.unsw.edu.au/article/market-conduct-regulation/capital-markets/the-regulation-of-third-party-litigation-funding-in-australia>.
[313] Standing Committee of Attorneys-General, 'Litigation funding in Australia' (Discussion Paper, May 2006) 8.
[314] Law Council of Australia, 'Regulation of third party litigation funding in Australia' (position paper, June 2011) [81].
[315] Vicki Waye, 'Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs' (2007) 19(1) *Bond Law Review* 225, 249 citing *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 10 (Mason, Brennan and Deane JJ). Professor Waye has argued that the imposition of fiduciary-type obligations on funders is inappropriate, such as might arise under the responsible entity requirements of the MIS regime (Submission 5 to the Joint Committee inquiry into Litigation funding and the regulation of the class action industry, 4).
[316] Ibid.
[317] Degeling and Legg (n 226) 263.
[318] *Management Service Australia Pty Ltd v PM Works Pty Ltd* [2017] NSWSC 1743 [185].
[319] Ibid [184].

> [W]here parties enter into a contract to pursue a mutual aim – one in which each of them has an interest – the situation is likely to be very different. Each of them will depend on the other – place trust and confidence in the other – to cooperate to achieve the outcome to which their contract is directed, and to do so for the benefit of each. Although, no doubt, each party has its own individual and legitimate interest in entering into the bargain, the bargain is one not merely for the achievement of that interest, but also for the achievement of the joint interest. That, I think, is one reason why parties to a contract that may properly be described as one of 'joint venture' have been found to owe fiduciary obligations to each other.[320]

The issue of fiduciary duties continues to loom large in class actions. In the present *Surfstitch* litigation, the contradictor for unfunded group members in the class actions run by Gadens and Johnson Winter & Slattery and funded by International Litigation Partners and Vannin has contended in the NSW Supreme Court that the solicitors and funders had engaged in 'disentitling conduct'.[321] It is alleged that there was a failure to correct a notice to group members following revised settlement figures provided to the court in an affidavit by a Gadens solicitor which showed 'negative net returns'.[322] Subsequent attempts by class action lawyers to sign up group members to the settlement was only to the benefit of funders and actually was contrary to the interests of the group members who would lose their right to claim for convertible notes under the deeds of company arrangements. The contradictor has noted that none of the alleged breaches of duty in the matter are knowing breaches, the solicitor who affirmed the affidavit was described as 'very honest', and disclosure of the revised figures was made to the Court and contradictor.[323] However, this matter illustrates the paramount importance of awareness of potential conflicts in class action litigation and the need to ensure that the interests of class members are protected.

Although conflicts of interest manifest themselves in various ways in class action litigation, the notion of a fiduciary duty does not always provide guidance on how these should be resolved. This is particularly the case in relation to costs generally and fee arrangements, funding commissions, common fund orders and funding equalisation applications in particular. In these contexts, the economic interests of those ultimately sought to be burdened with payment are in conflict with the commercial interests of lawyers, funders and often other class members. Moreover, class members generally have little if any knowledge of the transaction costs, either at the inception or in the course of the litigation, and limited information or scope for objection at the end.

As illustrated by the above-mentioned recent Full Federal Court decision in *Dyczynski v Gibson*, particular problems also arise where applications are made to expand or contract the ambit of the class. Where it is sought to exclude from the class either large categories of claimants[324] or individual class members,[325] it is difficult to conceptualise how this can be accommodated within the traditional notions of fiduciary duty if they are applicable to the conduct of the applicants and legal representatives who make such applications and extend to the class as a whole. For present purposes, we are content to leave these issues for others to grapple with.

Given our present focus on costs and funding commissions, in practical economic terms it is not clear to us that the existence of fiduciary duties in respect of the roles, responsibilities and conduct of

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[320] Ibid [188].
[321] Christine Caulfield, 'Surfstitch class action lawyers accused of breaching duties to shareholders' *Lawyerly* (online, 22 October 2020) <https://www.lawyerly.com.au/surfstitch-class-action-lawyers-accused-of-breaching-duties-to-shareholders/>.
[322] Ibid.
[323] Ibid.
[324] As, for example, in the vitamins price fixing class action. The proceedings were commenced on behalf of a very large class of persons allegedly impacted by the price fixing arrangements, including consumers, but the ambit of the class was narrowed to only include various manufacturers, distributors and suppliers and who expended at least $2,000 on various products within a defined period: *Darwalla Milling Co Pty Ltd v F Hoffmann-La Roche Ltd* [2006] FCA 915 (settlement approval judgment).
[325] As, for example, in the class action on behalf of detainees in juvenile detention facilities in the Northern Territory: *Jenkings v Northern Territory of Australia* [2017] FCA 1263 (White J).

applicants, lawyers and funders has served to meaningfully minimise legal fees, funding commissions or transaction costs generally in the conduct of class action litigation in Australia.

In many if not most class actions the professional intermediaries and funders have an understandable commercial interest in maximising their financial return. However, without their involvement and investment of human and financial resources most class members would be left without a remedy. Although economic incentives are constrained by ethical, fiduciary and other obligations, there is an inherent conflict with the interests of class members in minimising the costs that they will bear. Information asymmetries, inadequate disclosure, limited opportunities to object and limited judicial insight into costs incurred *during the course* of the litigation constrain any degree of influence or control *by class members* over costs incurred which are to come out of their compensation or other entitlements. It is often only in cases of manifest abuse, grossly disproportionate fees or funding commissions or where *post hoc* remedies are sought, that an alleged breach of fiduciary duties looms large. This is not to suggest that judicial oversight and control over costs and funding commissions at the end of the litigation is not important. It is necessary but not sufficient to deal with the excessive transaction costs incurred in many cases.

Some concluding comments and proposals

The abovementioned legal principles in relation to fiduciary duties generally, and in class actions in particular, serve as a useful normative, albeit nebulous, framework for the conduct of those engaged in class action litigation.

However, in our view there is a need for the imposition of more focused and specific *affirmative statutory obligations* on all participants in the conduct of class actions with broad ranging *sanctions and penalties* for noncompliance. This is not novel. Similar obligations are presently incorporated in the *Civil Procedure Act 2010* in Victoria. They apply not only to lawyers and parties conducting class actions, but also to those who have financial influence over the conduct of cases, such as *commercial litigation funders* and insurers. This has been proposed to the current Parliamentary Join Committee by both the first author[326] and in submissions by others, including the Law Council of Australia.[327] In the conduct of many class actions at present, parties and lawyers often pay little more than lip service to existing relatively amorphous statutory or procedural overriding objectives seeking to achieve the economical and expeditious resolution of disputes. To use the abovementioned terminology of Lee J,[328] in our view the class action 'battleship' is steaming full speed ahead and is yet to turn and navigate a more efficient, expeditious and economical route. To adopt the terminology of the Canadian judge quoted at the beginning of this Research Paper, it would appear to in fact be the case that in many instances '*costs in class proceedings have gotten out of control.'* The same could be said about funding commissions. Although in recent years competition appears to have driven down the price it has simultaneously increased the legal costs and delays arising out of multiple competing class actions.

In relation to the funding of class actions, in our view there is a need to re-visit the recommendations of the numerous expert and independent law reform bodies that have proposed the establishment to an independent *statutory fund* on multiple occasions over the past 43 years, starting with the Law Reform Commission of South Australia in 1977 and including the Australian Law Reform Commission and more recently the Victorian Law Reform Commission.[329] As noted above, in Canada class action funds have been established in Ontario and Quebec, where these funds charge a commission of 10% compared with what appears to be the average in Australia of not less than 25%. Such bodies are exclusively driven by *access to justice* considerations and not *commercial profit*.

[326] Peter Cashman, Submission 55 to the Parliamentary Joint Committee on Corporations and Financial Services [2]. See also Cashman (n 178); VLRC (n 59) chapter 3.
[327] Law Council of Australia, submission 67 to the Parliamentary Joint Committee on Corporations and Financial Services [21(a)].
[328] *Dyczynski v Gibson* [2020] FCAFC 120 [408].
[329] These are summarised in Cashman and Simpson (n 190).

The question of whether courts have power, at the conclusion of the proceedings, to make common fund orders clearly needs to be resolved one way or the other. There are divided judicial views at the moment. This division and uncertainly was a recipe for the present further appeals in the Full Federal Court[330] and the NSW Court of Appeal and may result in yet another appeal to the High Court.[331] In our view, the matter is susceptible to a simple legislative solution. As the ALRC has recommended in its most recent report, courts should be given an *express statutory power* to make a common fund order *at any stage* of the proceeding. The absence of such a power is likely to drive us back to the old dark ages of opt-in classes, limited to those who agree to litigation funding arrangements with commercial funders; lead to additional book building expenses being incurred and result in a scramble among litigation funders to sign up class members. Alternatively, it will result in forum shopping whereby Victoria will become a preferred jurisdiction in light of the recent introduction of percentage contingency fees.

The seemingly intractable problems of excessive costs and protracted delays in class actions are not susceptible to simple solutions and involve a multitude of complex issues which are outside the current Parliamentary Joint Committee's terms of reference. However, the inquiry presents an opportunity for legislators to tackle some of these issues and to implement necessary reform.

We welcome any comments or criticisms of this Research Paper, which we will take into account in revising it for future publication.

[330] It is of interest that the contradictor appointed in connection with the pending Full Federal Court appeal (before Middleton, Moshinsky and Lee JJ) is contending that the Federal Court *is* empowered to make a common fund order, to enforce a funders equitable right or under sections 33V, 33Z or 33ZJ of the *Federal Court of Australia Act 1976* (Cth): *Davaria Pty Limited v 7-Eleven Stores Pty Ltd; Pareshkumar Davaria & Anor v 7-Eleven Stores Pty Ltd & Anor*. (VID180 of 2018 and VID182 of 2018).

[331] *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd & Ors and Pareshkumar Davaria & Anor v 7-Eleven Stores Pty Limited & Anor* (VID180 of 2018 and VID182 of 2018) and *Owen Brewster v BMW Australia Ltd* (NSW Supreme Court Case No. 2018/9555).

Annexure A[332]

Case	Type of class action	Settlement amount	Legal fees (% of settlement)	Litigation funding fees (% of settlement)
Johnson Tiles Pty Ltd v Esso Australia Ltd **[2001] FCA 458**	Gas explosion	$32.5m	$6m (18.5%)	No funder
King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd) **[2003] FCA 980**	Shareholder	$112m	$15.8m (14%)	No funder
Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd **[2006] FCA 915**	Price fixing cartel	$41.1m	$11.1m (27%)	No funder
Guglielmin v Trescowthick (No 5) **[2006] FCA 1385**	Shareholder	$3m	$1.55m (52%)	No funder
Taylor v Telstra Corporation Ltd **[2007] FCA 2008**	Shareholder	$5m	$1.25m (25%)	No funder
Dorajay Pty Ltd v Aristocrat Leisure Ltd **[2009] FCA 19**	Shareholder	$144.5m	$8.5m (6%)	$35m (24%)
P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4) **[2010] FCA 1029**	Shareholder	$110m	$11m (10%)	38.5m (35%)
Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd **[2011] FCA 801**	Shareholder	$60m	$4.9m (8%)	$15m (25%)
Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd **[2011] FCA 671**	Price fixing cartel	$120m	$25m (21%)	No funder
Kirby v Centro Properties Ltd **(No 6) [2012] FCA 650**	Shareholder	$200m	$31.1m (16%)	$60m (40%)
Casey v DePuy International Ltd (No 2) **[2012] FCA 1370**	Product liability – hip implants	$20m	$1.12m (5.6%)	No funder

[332] This annexure was compiled by the Law Council of Australia and incorporated in the Law Council Submission *Litigation funding and the regulation of the class action industry* (16 June 2020) (Attachment A).

Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3) **[2012] VSC 625**	Shareholder	$115m	$11.8m (10%)	34.5 (30%)
Hadchiti v Nufarm Ltd **[2012] FCA 1524**	Shareholder	$46.6m	$4.5m (10%)	$2.2m (5%)
Earglow Pty Ltd v Sigma Pharmaceuticals Ltd **[2012] FCA 1496**	Shareholder	$57.5m	Unknown	Unknown
Konneh v State of NSW (No.3) **[2013] NSWSC 1424**	Human Rights	$4m	$2m (50%)	No funder
Wheelahan v City of Casey & Ors **(No 3) [2013] VSC 316**	Gas migration	$23.5m	$6.25m (27%)	No funder
Modtech Engineering Pty Ltd v GPT Management Holdings Ltd **(No. 3) [2014] FCA 680**	Shareholder	$75m	$8.5m (11%)	18.75m (25%)
Wepar Nominees Pty Ltd v Schofield (No 2) **[2014] FCA 225**	Disclosure to market and in a prospectus	$3.25m	$1.04m (32%)	$1.08m (33%)
Inabu Pty Ltd v Leighton Holdings Ltd **[2014] FCA 622**	Shareholder	$69.45m	$3.9m (6%)	$19.5m (28%)
Matthews v AusNet Electricity Services Pty Ltd **[2014] VSC 663**	Personal injury and property damage - bushfire	$494m	$60m (12%)	No funder
A v Dr Mark Schulberg (No 2) **[2014] VSC 258**	Personal injury	$13.75m	Unknown	No funder
Giles v Commonwealth of Australia **[2014] NSWSC 83**	Human Rights	$24m	$4.1m (17.3%)	No funder
Downie v Spiral Foods Pty Ltd **[2015] VSC 190**	Product liability	$69.45m	$3.9m (5.6%)	No funder
Camilleri v The Trust Co (Nominees) Ltd **[2015] FCA 1468**	Shareholder	$25m	$4.9m	No funder

***Rowe v AusNet Electricity Services Pty Ltd* [2015] VSC 232**	Personal injury and property damage - bushfire	$300m	$20m (7%)	No funder
***Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194**	Shareholder	$45m	$6.2m (14%)	Not disclosed
***Hopkins v AECOM Australia Pty Ltd (No 8)* [2016] FCA 1096**	Investors in tunnel	$121m	$19m (16%)	$31.8m (26%)
***Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433**	Shareholder	$36m	$10.3m (29%)	$6.78m (19%)
***Clasul Pty Ltd v Commonwealth* [2016] FCA 1119**	Equine influenza outbreak	No compensation	Each party bore its own costs	Funded at commencement but funder withdrew
***Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452**	Product liability - hip implants	$250m	$36m (14%)	No funder
***Blairgowrie Trading Ltd v Allco Finance Group Ltd (recs & mgrs apptd) (in liq) (No 3)* [2017] FCA 330**	Shareholder	$40m	$10.5m (26%)	$8.85m (22%)
***Kelly v Willmott Forests Ltd (in liq) (No 5)* [2017] FCA 689**	Financial product	No compensation but contribution towards legal costs and for some group members a 30%–50% reduction in outstanding loans, depending on the speed of loan repayments	$8.6 m	No funder
***McAlister v New South Wales (No 2)* [2017] FCA 93; *McAlister v New South Wales (No 3)* [2018] FCA 636**	Human rights	$11m	$6.95m (63%) (Costs agreed to be paid by State separate to compensation and after $4.05m compensation distributed to 50 class members)	No funder
***Muswellbrook Shire Council v The Royal Bank of Scotland NV* [2017] FCA 414**	Financial product	Not available	Not available	Not available
***Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409**	Shareholder	$32.5m	$12.6m (39%)	$8.9m (27%)

***HFPS Pty Ltd (Trustee) v Tamaya Resources ltd (in Liq) (No 3)* [2017] FCA 650**	Shareholder	$6.75m	$3.42m (51%)	$1.2m (17%)
***Hardy v Reckitt Benckiser (Australia) Pty Ltd (No 3)* [2017] FCA 1165**	Consumer	$5.5m	$1.5m (27%) (Costs agreed to be paid separate to compensation)	No funder
***Lee v Westpac Banking Corporation* [2017] FCA 1553**	Financial product	$7.5m	$2.5m (33%)	No funder
***Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296**	Shareholder	$49m	$11.5m (24%)	$11.7m (24%)
***Kamasaee v Commonwealth* [2017] VSC 537; *Kamasaee v Commonwealth* [2018] VSC 138**	Human rights – asylum seekers	$90m	$20m (22%)	No funder
***Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379**	Financial product	Confidential due to related class actions	$4.9m	No funder
***Dillon v RBS Group (Australia) Pty Ltd (No 2)* [2018] FCA 395**	Financial product	$12.58m	$4.5m (36%)	No funder
***Clarke v Sandhurst Trustees Ltd (No 2)* [2018] FCA 511**	Financial product	$16.85m	$5m (30%)	$5.055m (30%)
***Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527**	Shareholder	$19.25m	$7.5m (39%)	5.75m (30%)
***Wotton v State of Queensland (No 10)* [2018] FCA 915**	Human rights	$30m	$7.1m (23%)	No funder
***Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030**	Shareholder	$132.5m	$21.8m (16.5%)	$30.75m (23.2%)
***Hodges v Sandhurst Trustees Ltd [2018]* FCA 1346**	Financial product	$78.16m	$11.23m (14%)	$22.4m (29%)

Liverpool City Council v McGraw-Hill Financial Inc (now known as S&P Global Inc) **[2018] FCA 1289**	Financial product	$215m	$20m (9%)	$92m (43%)
Santa Trade Concerns Pty Ltd v Robinson (No 2) **[2018] FCA 1491**	Shareholder	$3m	$1.5m (50%)	$500,000 (16%)
Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3) **[2018] FCA 1842**	Financial product	$12m	$1.75m (14.5%)	$5.98m (50%)
Hopkins as Trustee of the David Hopkins Super Fund v Macmahon Holdings Ltd **[2018] FCA 2061**	Shareholder	$6.7m	$3m (45%)	$1.295m (19%)
Hall v Slater & Gordon Ltd **[2018] FCA 2071**	Shareholder	$36.5m	$5.4m (15%)	$8m (22%)
Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4) **[2018] NSWSC 1584**	Financial product	$28.5m	$12.8m (45%)	$4.3m (15%)
McKenzie v Cash Converters International Ltd (No 4) **[2019] FCA 166**	Consumer claims arising out of 'pay-day' loan agreements	$16.5m	$5.8m (35%)	No funder
Bradgate (Trustee) v Ashley Services Ltd (No 2) **[2019] FCA 1210**	Group Shareholder	$14.6m	$3.57m (24%)	$4.84m (33%)
Gibson v Malaysian Airline System Berhad (Settlement Approval) **[2019] FCA**	1007 Malaysian Airlines flight MH17 disaster	Settlement is confidential	Not specified	No funder
Mid-Coast Council v Fitch Ratings Inc **[2019] FCA 1261**	CDO	$27m	Not available	Not available
Adams v Navra Group Pty Ltd **[2019] FCA 1157**	Margin loans	Each side to bear its own costs, no compensation	Not applicable	Not applicable

***Hawker v Powercor Australia Ltd* [2019] VSC 521**	Terang bushfire	Each side to bear its own costs, no compensation	Not applicable	Not applicable
***Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374**	Shareholder	$40m	$9.3m (23%)	$10.2m (25%)
***Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653**	Investor class action	$64m	$5m (8%)	$13.3m (21%) ($22m is being held in pending resolution of ongoing dispute as to costs and commission)
***Murillo v SKM Services Pty Ltd* [2019] VSC 663**	Fire at a recycling plant	$1.2m	$725,000 (60%)	No funder
***Perazzoli v Bank SA, a division of Westpac Banking Corporation Ltd* [2019] FCA 1707**	Ponzi scheme	$13.25m	$4m (30%)	$4m (30%)
***Endeavour River Pty Ltd v MG Responsible Entity Ltd* [2019] FCA 1719**	Investors in Unit Trusts	$42m	$2.66m (6%)	$13.47m (32%)
***AUB19 v Commonwealth of Australia* [2019] FCA 1722**	Offshore detention	Discontinuance of proceedings with no order as to costs	Not applicable	Not applicable
***Andrews v Australia & New Zealand Banking Group Ltd* [2019] FCA 2216**	Exception fees	$763,901	$3.7m (Costs on top)	$500,000 (66%)
***Rushleigh Services Pty Ltd v Forge Group Ltd (in liq)* [2019] FCA 2113**	Shareholder	$16.5m	$4.2 million (25%)	$3.95m (24%)
***Calinoiu v Qld Law Group – A New Direction Pty Ltd* [2019] FCA 2019**	Unlawful costs agreements in personal injury actions	Settled for undertaking	Unknown	No funder
***Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 5)* [2019] FCA 2196**	Consumer	$29m	$9.16m (32%)	No funder
***Pearson v State of Queensland (No 2)* [2020] FCA 619**	Stolen wages for Aboriginal and Torres Strait islanders	$190m	$13.6 (7%)	$38m (20%)
***Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66**	Shareholder	$18m	$5.95m (33%)	$4.05m (23%)
Sister Marie Brigid Arthur (Litigation Representative) v Northern Territory	Juveniles in NT youth detention centres	Resolved on the basis of NT promise of various initiatives and	Not applicable	No funder

of Australia (No 2) **[2020] FCA 215**		policy revisions, with no order as to costs		
Lenehan v Powercor Australia Ltd **[2020] VSC 82**	Bushfire	$17.5 m	$3.68 (21%)	No funder
McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3) **[2020] FCA 461**	Shareholder	$49.7m	$7.5m (15%)	$14.4m (29%)
Lynch v Cash Converters Personal Finance Pty Ltd (No 5) **[2020] FCA 389**	Consumer claims arising out of 'pay-day' loan agreements	$67.4m	$12.44m (19%)	No funder
Banksia Securities Ltd v Insurance House Pty Ltd (Settlement Approval) **[2020] VSC 123**	Claim by debenture holders	$5.5 million	Not available	Not available
Cantor v Audi Australia Pty Ltd (No 5) **[2020] FCA 637**	Consumer *dieselgate* claims	$171m	$51m (30%) (Costs determined after agreement on compensation amount)	No funder (Application for a common fund order by funder of 2 small claims rejected; funder only entitled to recover from the relatively small number of class members who signed funding agreements. The remaining 3 claims on a no win no fee basis without a funder)
Lenehan v Powercor Australia Ltd (No 2) **[2020] VSC 159**	Bushfire	$17.5	Not available	Not available
Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd **[2020] FCA 510**	Shareholder	$32.4m	$10.8m (33.3%)	$8.4 (25.8%)
Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Ltd (No 2) **[2020] FCA 579**	Shareholder	$35m	$2.4m (6.8%)	$3.9 (11.1%)
Clark v National Australia Bank Ltd (No 2) [2020] **FCA 652**	Consumer credit insurance	$49.5 million	$3.8m (7.6%)	No funder

***Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647**	Investor MIS	$3m	$950,000 (32%)	$750,000 (25%)
RK Doudney Pty Ltd, as Trustee for the RK Doudney Superannuation Fund v IOOF Holdings Ltd	Shareholder class action	Discontinued	No payment	Each party to bear its own costs
***Bartlett v Commonwealth* (NSD1388/2018); *Hudson v Commonwealth* (NSD1155/2017); *Smith v Commonwealth* (Department of Defence) (NSD1908/2016)**	Toxic foam property damage	$92.5m	$12.4m (13%)	$23.13m (25%)
		$34m	$7.93m (23%)	$8.45m (24%)
		$86m	$9.04m (11%)	$21.5m (25%)