Maurice Blackburn Lawyers
Since 1919

SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION

Access to Justice – Litigation Funding and Group Proceedings

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INTRODUCTION

Maurice Blackburn is a plaintiff litigation firm with 32 permanent offices and 29 visiting offices throughout all mainland states and territories. We employ more than 1,000 staff nationally, including approximately 330 lawyers who provide advice and legal assistance to thousands of clients each year.

In addition to specialised practice areas in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation and financial advice disputes, Maurice Blackburn has the largest and most experienced class actions practice in Australia. We currently act in more than a dozen class actions that are active and ongoing at various procedural stages, including several cases that are ongoing in the Supreme Court of Victoria as well as the Federal Court of Australia and the Supreme Court of NSW.

Since the establishment of our class actions practice in 1998, we have acted in more class actions than any other plaintiff law firm,[1] and we have obtained more than $2.5 billion in compensation for claimants in a range of different class actions including shareholder and investor cases, product liability claims, consumer actions, cartel cases and mass tort claims. We have acted in a significant number of class actions involving commercial litigation funders, and in doing so we have worked with numerous domestic and international litigation funders. Our track record in achieving compensation accounts for approximately 70% of all monetary compensation that has been achieved for class action claimants in Australia.

As a firm that has a long history of seeking justice on behalf of the victims of corporate wrongdoing, Maurice Blackburn welcomes the Commission's review of procedural and other legal issues that may improve access to justice, and we look forward to the Commission's report and any recommendations that are intended to achieve that purpose.

GENERAL COMMENTS AND SUMMARY

Based on our experience and the published empirical evidence, the class actions regime in Part 4A of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**) is functioning well and to a significant extent it has met its intended purpose of providing access to justice. To date, hundreds of thousands of individuals and companies who have suffered injury or loss as a result of mass wrongs in a wide variety of circumstances have been able to take advantage of the Part 4A regime and the analogous provisions in the Federal Court of Australia and the Supreme Court of NSW. Total recoveries on behalf of class members were recently estimated to have reached more than $3.5 billion in total since the Federal Court's Part IVA regime was introduced 25 years ago.

There can be no doubt that the advent of third party litigation funding – commencing in the class actions area in 2001 and becoming increasingly prevalent over the last decade, particularly in shareholder and investor class actions[2] – has made it possible for meritorious claims to be pursued and successfully concluded for the benefit of many thousands of

[1] Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia' *Fifth Report: An Empirical Study of Australia's Class Action Regimes* (2017) 35.
[2] Ibid 13-14, 33-34.

claimants. This has occurred in circumstances where many of these claims would not otherwise have been brought.

Nevertheless, it has become apparent that not all types of class action claims are attractive to litigation funders and that there is a gap left by the investment policies of funders and the preparedness (or otherwise) of individual litigants to assume substantial adverse costs risks in cases involving conditional fee arrangements. In particular, it is clear that many 'smaller' potential class actions (with aggregate claim sizes of less than $30 million to $50 million) are falling through the cracks, and that the opportunity for justice is therefore denied to many victims of wrongdoing. Consistently with the recommendations of the Productivity Commission in 2014 and the Victorian Law Reform Commission in its own review of the civil justice system in 2008, in our submission there are compelling reasons why contingency fees should be introduced in order that the central aims of the class actions regime can be further realised.

Having recently been described by a Federal Court judge as 'pro-competitive',[3] contingency fees will not only enable these smaller class actions to be pursued; they will also put downward pressure on litigation funders' fees and will result in better returns to litigants. In these ways contingency fees will promote access to justice, while at the same time the rights of consumers can be adequately protected through appropriately designed safeguards.

Putting to one side the potential for positive, systemic reform through the introduction of contingency fees, at a general level one of the recurring themes that emerges from the Consultation Paper[4] is the possibility of further regulation (including by means of prescriptive guidelines) across a broad array of issues. This includes litigation funding, legal costs, disclosure, conflicts of interest, competing class actions, the possibility of certification, communications with class members as well as various aspects of settlement approval applications and settlement administrations.

While on one hand it is beneficial to take stock and review the adequacy of existing procedures, on the other hand we have reservations about the perceived need for additional, wide-ranging and detailed regulation and guidelines.

It is true that there have been isolated instances where class actions appear to have been prosecuted purely for the purpose of enriching the litigation funder and/or plaintiff lawyer.[5] However in our submission the case for reform needs to be evaluated on the basis of empirical need, and in our view these anecdotal examples are not indicative of how the system is functioning in the overwhelming majority of cases. It is also self-evident that where abuses or irregularities prevail, the courts are empowered to take appropriate action and have done so in order to protect the rights and interests of class members.

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[3] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers Appointed) (In Liq) (No 3)* (2017) 343 ALR 476 [142].

[4] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings*, Consultation Paper (2017) (**Consultation Paper**).

[5] See *Bolitho v Banksia Securities Ltd (No 4)* [2014] VSC 582 (26 November 2014); *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 3)* [2014] VSC 340 (23 July 2014), both cited in Victorian Law Reform Commission, above n 1, 118. See also *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187 (20 July 2017).

The Consultation Paper also refers in several parts to the media 'controversy' surrounding the Black Saturday bushfires class actions. Again, the selective reporting and commentary in one particular newspaper is not evidence of systemic dysfunction or deficiency in the class actions regime, particularly when considered in light of the facts of those cases, including the published comments made by judicial officers in their supervision of the settlement administrations. Contrary to the media reporting of these cases, the supervising judges concluded that these settlement administrations were carried out efficiently and reasonably in terms of time and cost. The judges also expressed their satisfaction at the efforts made by the scheme administrators to minimise cost and delay in the context of settlements that were truly unique in their size and scale. Indeed, in a media release published by the Supreme Court of Victoria on 7 December 2016, Forrest J commented on the Court's management of these highly complex and multifaceted class actions as follows:

> This demonstrates that the class action process works… It shows that when it is properly managed, many substantially disadvantaged and affected people can recover compensation that they would otherwise not have been able to obtain.

One of the benefits of the existing regime is its flexibility in being able to grapple with the plenitude of procedural issues that can arise in different class actions. An example is the current trend of competing class actions, with different judges taking different approaches that are tailored to meet the circumstances of individual cases,[6] rather than being bound to follow a predetermined path that is paved by regulation. In our respectful submission, the courts have also demonstrated an aptitude to deal with novel issues as they have emerged in practice, and in this sense class actions practice and procedure has evolved and matured over time.

Despite these comments, we would not oppose procedural refinements that could be made in a number of areas that we discuss below, including:

1. the requirement that costs agreements and funding agreements include provisions for managing conflicts of interest and that plaintiff lawyers have a continuing obligation to manage potential conflicts of interest (as discussed at [5.2]);

2. an obligation to disclose litigation funding charges to class members who enter into a litigation funding agreement (as discussed at [6.6]);

3. the development of a sample opt out notice (as discussed at [8.8]);

4. expansion of the guidelines for communications between a defendant and class members (as discussed at [8.11]);

5. consistently with the recently introduced requirements in the Federal Court of Australia's *Class Actions Practice Note*, procedures for disclosure of litigation funding agreements to the Court (as discussed at [10.1]).

The remainder of this submission addresses each of the specific questions in the Consultation Paper.

[6] See, eg, the contrasting approaches taken in the cases mentioned below [15.1]-[15.9].

CHAPTER 3: CURRENT REGULATION OF LITIGATION FUNDERS AND LAWYERS

We note the Commission's comment (at [3.55] of the Consultation Paper) to the effect that other chapters of the Consultation Paper address specific areas of possible reform, and that Chapter 3 is intended to invite a broader approach beyond the specific issues discussed in later chapters. Most of our submissions in relation to the issues raised in Chapter 3 are dealt with elsewhere in our submission.

1. What changes, if any, need to be made to the class actions regime in Victoria to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?

1.1 Except as discussed in relation to specific issues in our submissions below, we do not have any additional comments in response to this question.

2. What changes, if any, need to be made to the regulation of proceedings in Victoria that are funded by litigation funders to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens?

2.1 Except as discussed in our response to the questions in Chapters 4 and 5 of the Consultation Paper, in our submission there is no need for changes to be made to the regulation of Victorian proceedings that are funded by third party litigation funders so as to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens. We also refer to our submissions below in relation to the questions in Chapter 7 of the Consultation Paper.

2.2 In the Consultation Paper (at [3.10]-[3.25]), the Commission identifies an array of regulatory requirements that already apply to litigation funders under Commonwealth law. As is acknowledged in the Consultation Paper (at [3.7]), the Victorian parliament has limited scope to directly regulate the litigation funding industry due to constitutional constraints.

2.3 Insofar as the Commission is considering new powers enabling case-by-case regulation of proceedings in Victorian courts, in our submission the existing supervisory and other powers of the Supreme Court of Victoria are adequate to ensure that litigants are not exposed to unfair risks or disproportionate cost burdens. For example, the most common circumstance in which the Court would need to consider whether litigants are exposed to unreasonable risks or cost burdens is in the context of settlement approval, and it is clear that Part 4A of the Supreme Court Act and other existing statutory provisions are sufficiently broad to enable the Court to safeguard the interests of individual litigants.

3. Should different procedures apply to the supervision and management of class actions financed by litigation funders compared to those that are not?

3.1 Except as discussed in our response to the questions regarding disclosure in Chapters 4 and 5 of the Consultation Paper, in our submission there is no need for different procedures regarding the supervision and management of class actions

financed by litigation funders compared to class actions that are not supported by funders.

3.2 One of the benefits of the existing supervisory and case management procedures is their breadth and adaptability to the different circumstances that prevail in different cases, including those financed by litigation funders and those that are not. These existing powers include section 33ZF of the Supreme Court Act, which enables the Court to 'make any order the court thinks appropriate or necessary to ensure that justice is done in the proceeding'.

3.3 Rather than there being a need to prescribe an additional layer of procedural requirements dealing specifically with class actions involving litigation funders, in our submission the existing and well-functioning powers of the Court are apt to deal with the variety of procedural issues that might arise both in relation to funded and unfunded class actions.

4. How can the Supreme Court be better supported in its role in supervising and managing class actions?

4.1 Except as discussed in relation to specific issues in our submissions below, we do not have any additional comments in response to this question.

5. Is there a need for guidelines for lawyers on their responsibilities to multiple class members in class actions? If so, what form should they take?

5.1 We note the Commission's conclusion (at [3.79] of the Consultation Paper) that it 'has not identified any need or scope under Victorian law to augment the conflict of interest guidelines'. We agree, and we refer to our submission below at paragraph 6.8, which addresses the adequacy of ASIC's *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest.* [7]

5.2 Nevertheless, to the extent that the Commission proposes to consider reform options in Victoria, we do not oppose the replication of the requirement under the Federal Court's *Class Actions Practice Note* (at [5.9]-[5.10]) that costs agreements and litigation funding agreements include provisions for managing conflicts of interest and that the plaintiff's lawyer has a continuing obligation to recognise and manage any such conflicts throughout the course of class action proceedings. [8]

[7] Australian Securities and Investments Commission, *Regulatory Guide 248: Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest* (at April 2013).
[8] Federal Court of Australia, *Class Actions Practice Note (GPN-CA) – General Practice Note,* 25 October 2016, [5.9]-[5.10].

CHAPTER 4: DISCLOSURE TO PLAINTIFFS

6. In funded class actions, should lawyers be expressly required to inform class members, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?

6.1 The legal basis on which litigation funders are entitled be paid a funding charge is contract law: the litigation funder enters into a contract with an individual plaintiff in which the essential nature of the bargain is that the funder agrees to pay legal costs,[9] in exchange for an identified litigation funding charge.

6.2 In the course of entering into a contract with an individual plaintiff, the nature of the litigation funding charge will be disclosed by the funder. Typically, the litigation funding charge is charged or calculated on the basis of a percentage of the damages that are paid to the plaintiff. In some instances, the litigation funding charge varies according to defined criteria such as the duration of the proceeding or the size of the individual's claim (for example, in a shareholder class action the litigation funding charge may vary according to the number of shares purchased by the plaintiff during the period that is the subject of the claim).

6.3 Strictly speaking it may be correct (as is noted in the Consultation Paper at [4.15]) that litigation funders 'are not under any *additional* disclosure obligations in relation to these [funding] fees, such as disclosure of the basis upon which these fees are charged, or estimated total amounts of charges', we make the following observations:

(a) we are not aware of any instances in which the litigation funding agreement failed to specify the basis on which the litigation funding fee is charged or calculated. It would be difficult to conceive of a funding agreement that had any practical operation or effect if it did not disclose the basis on which the funding fee is charged, which as noted above is ordinarily a percentage of the damages awarded to a plaintiff;

(b) on the other hand, it is impractical for a funder to provide disclosure of the estimated total amounts of funding charges because these charges ordinarily vary according to the total damages that are awarded to a plaintiff, which will not be known at the time of commencing a class action or at any stage until settlement or judgment. Although the plaintiff's lawyers will usually develop damages estimates during the course of a class action and these estimates are usually based on expert evidence that is filed in the proceeding, these estimates are usually not available until a relatively late stage of the proceeding, and constitute sensitive and privileged information that would not ordinarily be disclosed to all group members or a defendant because of potential risks to settlement prospects and outcomes. In any event, as a

[9] In most cases the legal costs paid by the funder include the lead plaintiff's costs as well as adverse costs and any security for costs, however in some cases the funder will only agree to pay adverse costs and any security for costs. Typically, the nature of the costs paid by the funder will impact the level of the funding charge.

practical matter, the ultimate outcome of a class action in terms of settlement or judgment may not reflect the range of estimates that are prepared by the plaintiff's lawyers.

6.4 As is acknowledged in the Consultation Paper (at [4.15]), contract law requires disclosure of the material terms in a litigation funding agreement, and this obligation undoubtedly includes disclosure of the nature of any funding charge and the basis on which it is calculated.

6.5 For these reasons, we consider that it is unnecessary to impose any additional disclosure obligation on litigation funders at the time of commencing proceedings in relation to funding fees and charges. Nevertheless, we acknowledge that the Federal Court of Australia's *Class Actions Practice Note* in effect requires disclosure of litigation funding charges to class members in a class action.[10] We note, however, that the obligation on the *plaintiff's lawyer* to provide this disclosure 'is satisfied if class members have been provided a document that properly discloses those [litigation funding] charges'.[11] Suffice to say, in most or all cases the document that discloses the litigation funding charges will be the funding agreement itself. Given that the funder's legal right to be paid a funding charge derives from a bargain between the funder and the plaintiff, in our submission it is appropriate that the plaintiff lawyer's obligation is satisfied if the funder provides disclosure to the plaintiff.

6.6 To the extent that the Commission proposes to make recommendations regarding additional disclosure obligations for litigation funding charges, in our submission these obligations should be modelled on those in paragraphs 5.2 to 5.5 of the Federal Court of Australia's *Class Actions Practice Note*. Consistency with the Federal Court's *Class Actions Practice Note* will also promote harmonisation and standardisation of practice across the various jurisdictions that have adopted class actions procedures such as those in Part 4A of the Supreme Court Act.

6.7 We note that the obligation under the *Class Actions Practice Note* to disclose funding charges is 'an *ongoing obligation* and applies to any material changes to the… litigation funding charges'.[12] Although any material changes to a funding agreement (including in relation to the nature of funding charges and basis on which they are calculated) would need to be agreed between the funder and the individual plaintiff and in this sense any changes are 'disclosed' to the plaintiff, we consider that the incorporation of an additional obligation on funders to disclose material changes to litigation funding charges would satisfy any perceived need to 'keep [plaintiffs] informed' about litigation funding charges during the course of class action proceedings.

6.8 Lastly, in relation to the issues raised in paragraphs 4.24 to 4.26 of the Consultation Paper, we note that disclosure and management of conflicts of interest in the 'tripartite relationship' between lawyers, funders and plaintiffs is already the subject

[10] Federal Court of Australia, above n 8.
[11] Ibid [5.5].
[12] Ibid [5.3].

of extensive regulation in ASIC's *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest*. In our submission it is neither necessary nor desirable to create an additional layer of regulatory requirements that address the issue of actual or potential conflicts of interest between lawyers, funders and plaintiffs in class actions.

7. In funded proceedings other than class actions, should lawyers be expressly required to inform the plaintiff, and keep them informed, about litigation funding charges in addition to the existing obligation to disclose legal costs and disbursements? If so, how should this requirement be conveyed and enforced?

7.1 There seems to be no basis for the imposition of a specific requirement on lawyers to keep clients informed of litigation funding charges in proceedings other than class actions. In those proceedings litigation funding fees can only arise as a matter of contract and it is for the litigation funder to make appropriate disclosure to their client.

8. How could the form and content of notices and other communications with class members about progress, costs and possible outcomes be made clearer and more accessible?

8.1 By way of general comments on the issues in paragraphs 4.28 to 4.40 of the Consultation Paper:

(a) we agree that it is important to keep class members informed of the progress of class actions, including actual or expected costs, and that the content of information that is provided to class members should be clear and comprehensible;

(b) during the course of class action proceedings, information is commonly provided by plaintiff lawyers to class members, and the Commission correctly observes that there are two types methods that are used in order to inform plaintiffs about the progress of class actions, namely informal notification by plaintiff lawyers as well as formal notification by means of Court-approved notices.

8.2 In relation to the Commission's comments (at [4.34] of the Consultation Paper) regarding the 'reach' of informal methods of notification, in our experience this will depend on a number of factors including:

(a) whether the class action is an 'open class' or 'closed class' of class members, with open classes likely to include class members who have not retained the lead plaintiff's lawyers and/or who for whatever reason may be unaware of the class action and who it is therefore intrinsically more difficult to 'reach';

(b) the number of class members and their demography;

(c) the method of distributing or publishing the communication.

8.3 In addition, in our experience it is not necessarily the case (as is suggested at [4.34] of the Consultation Paper) that mandatory, formal Court-approved notices have 'better reach to *all* potential class members'. The factors outlined above may apply equally to Court-approved notices.

8.4 We also note that plaintiff lawyers are increasingly using novel methods in order to distribute both information notifications as well as Court-approved notices to class members; these include not only the use of dedicated class action websites on which updates are published, but also social media and other digital media,[13] as well as other bespoke methods such as those in *Gagarimabu v Broken Hill Proprietary Co Ltd*.[14] These methods complement other more conventional methods including direct mail outs (whether by post or by email), advertising through print media and publication on the Federal Court of Australia's website.

8.5 In our submission, the utility, effectiveness and appropriateness of different methods of communicating with class members will depend on the features of the class action in question, including the factors mentioned above. As a result, the Court should retain its discretion (subject to s 33Y of the Supreme Court Act) to make orders regarding the method of giving Court-approved notices, and the plaintiff's lawyer should be left to form their own judgment about the appropriateness of different methods of giving informal notifications to class members in individual cases.

8.6 In relation to the content of notices and other communications that are sent to class members, in our submission different approaches should be adopted for Court-approved notices as opposed to informal notifications by plaintiff lawyers.

8.7 In relation to Court-approved notices, we note that the most common circumstances in which notices are required to be sent to class members are in relation to (1) commencement of proceedings and opt out entitlements; and (2) the proposed settlement of a class action.

8.8 In our submission it would be appropriate to develop sample notices for use in the Supreme Court of Victoria, similarly to the sample opt out notice that is annexed to the Federal Court's *Class Actions Practice Note*. However, in our view it is critical that the Court retains the discretion to adapt and modify the sample notice in order to suit the circumstances of a particular case, including the nature of the claim and the demographics of class members. For example, the profile of class members in a shareholder or investor class action is likely to be very different to that in a class action concerning a defective hip replacement device or that in a class action concerning payday lending. As was noted in the Consultation Paper, there remains significant scope for formal notices to be misunderstood by class members, and in our experience an overly prescriptive approach is likely to add to the potential for misunderstanding.

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[13] See, eg, the recent judgment of Foster J in *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042 (1 September 2017).

[14] [2001] VSC 304 (27 August 2001).

8.9 In relation to informal notices or communications to class members, in our submission it is neither necessary nor appropriate for there to be 'standardised examples' that lawyers can use in order to provide information to class members regarding the progress of a class action. In our experience, plaintiff lawyers communicate regularly with class members during the course of proceedings and these communications relate to the panoply of developments that can occur during the course of the litigation over a period of several years. It is impossible to anticipate the circumstances in which communications with class members will be appropriate or to prescribe the content of communications that might be appropriate in those circumstances. The plaintiff's lawyer is best placed to form a judgment regarding the content of informal communications with class members and the plaintiff lawyer should be left to do so without being constrained by 'standardised examples'.

8.10 We also have serious concerns about any proposed requirement that plaintiff lawyers provide information to class members regarding 'likely outcomes' as is contemplated in paragraph 4.30 of the Consultation Paper. The plaintiff lawyer's views regarding likely outcomes are privileged and the disclosure of those views to a potentially disparate group of class members (not all of whom will necessarily be clients of the plaintiff lawyer) carries an obvious risk that the plaintiff lawyer's views will be disseminated more broadly. In particular, there is a risk in practice that the defendant and its lawyers will come into possession of this information and, if this were to occur, it would provide an unfair and inappropriate tactical advantage to the defendant in the class action. Indeed, it is for this reason that even at the stage of seeking approval of the settlement of a class action, the plaintiff lawyer's views regarding likely outcomes including the risks of establishing liability, loss or damage and the range of reasonable outcomes is ordinarily filed by means of confidential evidence that is usually not even available to class members in the proceeding.

8.11 Lastly, the Consultation Paper (at [4.49]) also contemplates the issuance of guidelines on how to communicate with both funded and unrepresented class members. In our submission, the only need for guidelines is in relation to communications between the defendant and class members (whether represented by a lawyer or unrepresented), and in our view it may be appropriate to elaborate on the existing requirements in paragraphs 8.1 and 8.2 of the Supreme Court of Victoria's *Practice Note SC Gen 10: Conduct of Group Proceedings (Class Actions)*,[15] such that it adopts some of the additional provisions in paragraphs 10.1 to 10.4 of the Federal Court's *Class Actions Practice Note*.

8.12 The Consultation Paper does not discuss any issues that warrant the development of guidelines for plaintiff lawyers in their communication with class members, and we are not aware of any broader debate about the need for such guidelines nor are we aware of any specific shortcoming in practice that would be addressed by such guidelines. The professional conduct rules and existing legal obligations of plaintiff lawyers are adequate to ensure that they communicate appropriately with class members in class actions.

[15] Supreme Court of Victoria, *Practice Notice SC Gen 10 – Conduct of Group Proceedings (Class Actions),* 30 January 2017.

9. Is there a need for guidelines for lawyers on how and what they communicate with class members during a settlement distribution scheme? If so, what form should they take?

9.1 In our submission, there is no need for guidelines for lawyers on how and what they communicate with class members during the administration of a settlement and indeed there are good reasons *not* to develop such guidelines.

9.2 The main reason for our submission is the significant variability in settlement distribution schemes and settlement administration processes and the impracticality of prescribing a set of guidelines that will be well suited and appropriate to each settlement.

9.3 Professor Vince Morabito's empirical research reveals that the substantive claims advanced in class actions are diverse, with the more prevalent types of claims including shareholder and investor claims, product liability claims, mass tort claims, consumer protection claims and cartel claims.[16] The settlement distribution schemes vary significantly depending on the types of claims that are advanced in class actions,[17] and commonly there is also significant variability on a case by case basis within a given type or category of class action. As was noted above, the number and demography of class members is also significantly variable, as are other features of the case including whether the class is open or closed, whether class members were clients of the plaintiff's lawyer and whether the class action is funded or unfunded.

9.4 Over the last 12 years, the most common types of class action are shareholder and investor claims, which have together accounted for more than half of all class actions filed in that time. Typically, the settlement administration process in a shareholder or investor claim is completed within a short period of time, generally ranging from three to six months from the time of settlement approval until funds are distributed to class members. The need and scope for disclosure of progress, costs and possible outcomes of the settlement distribution scheme in that context will be very different to the disclosure that may be warranted in a settlement administration process that occurs over a period of several years.

9.5 The Consultation Paper refers (at [4.43]) to 'recent media criticism' regarding the settlement administrations in the 2009 Black Saturday bushfires in Victoria. Given the involvement of our firm in the administration of those settlements, we wish to make a number of observations regarding this criticism, even though the two media articles cited in the Consultation Paper do not actually report any criticism regarding the nature or quality of disclosure to class members (as opposed to other aspects of the process).

[16] Morabito, above n 1, 27-28, tables 6-7.

[17] For a discussion of different types of settlement schemes in shareholder, cartel and mass tort class actions, see Rebecca Gilsenan and Michael Legg, 'Australian Class Action Settlement Distribution Scheme Design', (Research Report No 1, IMF Bentham Class Action Research Initiative, 1 June 2017).

9.6 In relation to the adequacy of disclosure to class members in the Black Saturday class actions:

(a) over a period of approximately two years and seven months from January 2015 until August 2017, class members in the Kilmore action received 15 items of correspondence by way of updates or other information (excluding correspondence to individual class members regarding their individual claims) – these communications were sent on average once every 2.1 months;

(b) over a period of approximately two years and three months from May 2015 until August 2017, class members in the Murrindindi action received 14 items of correspondence by way of updates or other information (excluding correspondence to individual class members regarding their individual claims) – these communications were sent on average once every 1.9 months;

(c) affidavits and other materials (including the reports of the independent, Court-appointed costs assessor) that were filed in the context of reports to the Supreme Court of Victoria and case management hearings were made available to class members through the Court's website and Maurice Blackburn's website;

(d) in addition to the periodic updates to class members, there was an extremely high volume of individual correspondence with class members throughout the settlement administration process.

9.7 The level of communication was substantial, with class members receiving regular disclosure in a variety of ways regarding issues that arose during the settlement administration process and in relation to its progress, cost and possible outcomes.

9.8 Complaints regarding the settlement administration process were driven by a small number of class members, primarily those who are named in the two media articles that are cited in the Consultation Paper. More pertinent are the judicial comments regarding the administration of the settlement, with Forrest J in the Supreme Court of Victoria commenting in a ruling on 7 December 2016 that:[18]

> I have concluded, on the material provided, that the [settlement distribution scheme for the Kilmore action] has been administered efficiently and reasonably (in terms of both time and cost) by the Scheme Administrator.

9.9 Similarly, in relation to the Murrindindi class action, Dixon J noted on 26 July 2016 that:[19]

> I accept that the [settlement distribution scheme] is moving at an appropriate pace towards distributions being made and the Scheme Administrator has taken a number of steps to avoid delays in the assessment process. I agree with the observations made by J Forrest J in respect of the time being taken to complete the distribution of the settlement and I express my satisfaction with the efforts

[18] *Matthews v AusNet Electricity Services Pty Ltd (Ruling No 44)* [2016] VSC 732 (7 December 2016) [12].
[19] *Rowe v AusNet Electricity Services Pty Ltd (Ruling No 6)* [2016] VSC 424 (26 July 2016) [7].

being made by the Scheme Administrator to minimise delay and expenses and in ensuring that the scheme is fairly administered.

9.10 These expressions of judicial satisfaction regarding progress, timeframes and cost were made in the context of a unique settlement administration process in terms of its size and scale, which the Supreme Court of Victoria described as 'an unprecedented settlement administration in tort class action'.[20]

9.11 The Federal Court of Australia, which remains the most frequently used forum for class actions, has not perceived any need to publish guidelines for lawyers regarding disclosures to class members in a settlement administration, and in our submission the same approach should be maintained in Victoria. We consider there to be no difficulty in the amendment of the Supreme Court of Victoria's *Practice Note SC Gen 10: Conduct of Group Proceedings* so as to adopt the requirement in the Federal Court's *Class Actions Practice Note* for the affidavit/s in support of settlement approval applications to state the time at which it is anticipated settlement funds will be received by class members, although we also note that the scheme administrators may not be able to give precise estimates at that early stage.

9.12 However, in our submission the development of guidelines is not warranted and is impractical for the reasons discussed above.

CHAPTER 5: DISCLOSURE TO THE COURT

10. In funded class actions, should the plaintiff be required to disclose the funding agreement to the Court and/or other parties? If so, how should this requirement be conveyed and enforced?

10.1 If the Commission considers that reform is needed in relation to the disclosure of funding agreements to the Court and to other parties, in our submission these disclosure requirements should be modelled on those in the Federal Court's *Class Actions Practice Note*. This should include:

(a) confidential disclosure to the Court;

(b) a requirement that only standard form funding agreements need to be disclosed, and that each individual variation does not need to be disclosed;

(c) to the extent that disclosure needs to be made to the defendant, certain parts of the agreement may be redacted; and

(d) a process for the plaintiff to object to disclosure in identified circumstances.

10.2 If the Commission recommends that disclosure of funding agreements is appropriate, in our submission the Commission should also repeat the

[20] Supreme Court of Victoria, 'Court Approves Distribution of Almost $700M in 2009 Black Saturday Bushfire Class Actions' (Media Release, 7 December 2016).

recommendation in its *Civil Justice Review* (Report No 14 (2008)) regarding disclosure of insurance policies.

11. In funded proceedings other than class actions, should the plaintiff disclose the funding agreement to the Court and/or other parties? If so, should this be at the Court's discretion or required in all proceedings?

11.1 We do not see any need for the plaintiff in proceedings other than class actions to disclose the existence of funding either to the Court or other parties.

12. In the absence of Commonwealth regulation relating to capital adequacy, how could the Court ensure a litigation funder can meet its financial obligations under the funding agreement?

12.1 The Consultation Paper raises questions about the risk that litigation funders will not be able to meet their financial obligations, particularly in relation to adverse costs in the event that a class action (or other proceeding) is unsuccessful.

12.2 While the Consultation Paper notes (at [5.14]) that there may be a variety of funding arrangements in individual cases, in our experience these arrangements at a minimum provide adverse costs cover for the plaintiff (and class members) and indeed we are not aware of funding agreements in class actions that have not provided adverse costs cover.

12.3 In our submission, the most efficacious and straightforward way of ensuring that funders are able to meet their financial obligations to pay adverse costs is by means of an order for security for costs.

12.4 While the Court's decision about whether to make an order for security for costs may need to take into account a variety of factors and in this regard the simple fact that a funder is involved will not necessarily be determinative, we accept that the existence of litigation funding arrangements is a factor that the Court can take into account in deciding whether to order security for costs. This is particularly the case if there is any doubt about the capacity of a funder to pay adverse costs, including in the circumstances outlined at [5.20] of the Consultation Paper.

12.5 In our submission there is no need for law reform in order to ensure that funders are capable of meeting their obligations to pay adverse costs; this is because the Supreme Court of Victoria is already empowered under rule 62 of the *Supreme Court (General Civil Procedure) Rules 2015* to order security for costs in appropriate circumstances.

CHAPTER 6: CERTIFICATION OF CLASS ACTIONS

13. Should the existing threshold criteria for commencing a class action be increased? If so, which one or more of the following reforms are appropriate?

(a) introduction of a pre-commencement hearing to certify that certain preliminary criteria are met

(b) legislative amendment of existing threshold requirements under section 33C of the *Supreme Court Act 1986* (Vic)

(c) placing the onus on the plaintiff at the commencement of proceedings to prove that the threshold requirements under section 33C are met

(d) other reforms.

13.1 The Commission seeks comment on the potential benefits of a certification regime, whether modelled on North American regimes or imposed by placing the onus on the representative plaintiff to demonstrate at the commencement of proceedings that existing threshold requirements have been met. In particular, the Commission asks whether such a regime would:

(a) ensure class actions are conducted efficiently and costs minimised;

(b) ensure that class actions address common issues of law and fact;

(c) respond to perceived inadequacies in the existing decertification process;

(d) ensure adequacy of representation;

(e) address competing class actions; and

(f) enable monitoring of the involvement of litigation funders in proceedings.[21]

13.2 Empirical data does not support the view that the Victorian class actions regime suffers from procedural problems to the extent said by some to justify the introduction of a certification regime. In the seventeen years since Part 4A of the Supreme Court Act came into operation, a total of 82 group proceedings have been filed in the Victorian Supreme Court,[22] an average of less than five per year. The potential for adverse costs orders acts as a significant deterrent to the commencement of speculative proceedings. That deterrent does not exist in courts in the United States of America, and for that reason analogies with US certification regimes and/or US commentary on the importance of imposing a certification regime have little relevance in the Australian context.

[21] Victorian Law Reform Commission, above n 4, [6.32].
[22] Morabito, above n 1, 24.

13.3 In our submission, the introduction of a mandatory certification process would worsen the very problems it was intended to address: it would introduce additional costs and inefficiencies, while acting as a barrier to access to justice. The problems which continue to beset the certification process in the US have borne out the Australian Law Reform Commission's view that certification would only result in wasted costs and delay, without achieving its intended purpose.[23]

Efficiency and costs

13.4 The concerns raised by Professor Rachael Mulheron, and cited in the Consultation Paper (at [6.35]), regarding the prevalence of interlocutory disputes in Australian class action litigation were published in 2007,[24] and they therefore reflect the legal landscape as it stood a decade ago. Much of the 'satellite litigation' which had taken place in the antecedent years, to the extent that it dealt at all with issues that could appropriately be canvassed in a certification hearing, revolved around the question of whether or not closed classes were permissible under the Federal Court's class actions regime (Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**)). That question was decisively resolved by the Full Court of the Federal Court in December 2007.[25] The permissibility of closed classes has not been seriously doubted since,[26] and therefore has not featured significantly in recent interlocutory disputes.

13.5 As the Commission has identified (at [6.37] of the Consultation Paper), the interlocutory disputes that have been a feature of class actions practice are often related to issues that would not be addressed in a certification hearing. Now that the most significant issues with respect to the composition of classes have been resolved (see also our submission below at [13.22]-[13.23]), the introduction of a new and untested certification process would reopen the question of class composition, causing interlocutory disputes to proliferate as defendants and plaintiffs test the boundaries of the new regime. A certification process therefore would not only fail to achieve the stated end of reducing interlocutory disputes, it would be counterproductive insofar as it would increase the level of interlocutory disputation.

13.6 We do not agree that the Federal Court's active approach to case management is aptly characterised as moving towards a 'quasi-certification' format, as has been suggested in some academic commentary.[27] The Federal Court's *Class Actions Practice Note* sets out a number of tasks to be undertaken at the earliest possible stage, including outlining the issues in dispute, setting a timetable for delivery of a defence and considering the scope and timetabling of discovery, in addition to issues relating to composition of the class.[28]

[23] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) 63-64. The US regime is discussed below [13.8], [13.9].
[24] Rachael Mulheron, 'Justice Enhanced: Framing an Opt-Out Class Action for England' (2007) 70 *Modern Law Review* 550.
[25] *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.
[26] See, eg, *Matthews v SPI Electricity Pty Ltd (No 13)* (2013) 39 VR 255, 267.
[27] Victorian Law Reform Commission, above n 4, [6.41], citing John Emmerig and Michael Legg, 'Twenty Five Years of Australian Class Actions – Time for Reform' (2017) 36 *Civil Justice Quarterly* 164, 169.
[28] Federal Court of Australia, above n 10, [7.1]-[7.11].

13.7 The emphasis on early identification of the scope of the dispute is a prudent acknowledgement of the fact that class actions often involve large-scale and complex litigation, however this does not amount to 'quasi-certification'. Rather it is an appropriately tailored adaptation of the general case management principles set out in the Federal Court's *Central Practice Note*, which mandates early identification of the parameters of litigation, the appropriate parties, the appropriate forum and mode of trial, and how best to manage the justiciable issues in the proceeding.[29]

13.8 We note that there has been significant controversy in the United States concerning the inefficiency, duplication and potential for inconsistency created by the longstanding certification regime in that jurisdiction. The certification requirements of Rule 23 of the *Federal Rules of Civil Procedure* have generated inconsistent case law and ongoing debate regarding the extent to which the merits of the pleaded case should be argued in the course of a certification hearing.[30] In one instance a certification hearing was listed for a five day bench trial, with a timetable to the hearing of almost one year, which included allocating six months for discovery dedicated solely to certification issues.[31] Needless to say, in circumstances in which there are already broad concerns regarding delay in resolving civil disputes including class actions,[32] the prospect of certification hearings carries a substantial risk of adding to the cost, inefficiency and delay in resolving class actions.

13.9 The intrusion of merits disputes into certification hearings in the US has also resulted in a range of consequential disputes. Heavy reliance on expert evidence in certification hearings has created a lack of clarity about the rules of evidence that should be applied.[33] The US certification regime has also created the potential for inconsistent findings on the same issue, if an unfavourable certification decision is followed by a ruling on the merits of a related individual proceeding.[34]

13.10 In implementing the new certification process required by section 47B of the *Competition Act 1998* (UK), the Competition Appeal Tribunal in the United Kingdom has professed a desire to avoid the 'long evidentiary proceedings preceded by massive discovery efforts' that characterise certification hearings in the US.[35] Despite this, the two applications which have been adjudicated to date have already established that certification hearings will as a matter of course involve experts being briefed, preparing reports and giving oral evidence.[36]

[29] Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 25 October 2016, [8.4]-[8.9].
[30] Steig Olson, '"Chipping away": the Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus' (2009) 43(4) *University of San Francisco Law Review* 935, 937.
[31] Ibid, 955-956.
The timetable was set following the decision of the United States Court of Appeals for the Seventh Circuit in *Szabo v Bridgeport Machines, Inc* 249 F.3d 672 (7th Cir., 2001).
[32] For empirical evidence regarding the duration of class action proceedings, see Morabito, above n 1, 30-32.
[33] George Gordon and Irene Ayzenberg-Lyman, 'The Role of *Daubert* in Scrutinizing Expert Testimony in Class Certification' (2014) 82 *George Washington Law Review Arguendo* 135, 143-144.
[34] Thomas Kayes, 'Jury Certification of Federal Securities Fraud Class Actions' (2013) 107(4) *Northwestern University Law Review* 1851, 1854.
[35] *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9 [102]-[104].
[36] Ibid; *Walter Merricks v Mastercard Incorporated* [2017] CAT 16 [5].

Common questions of law and fact

13.11 The threshold criteria in Part 4A of the Supreme Court Act provide that a representative proceeding may be commenced if:

(a) seven or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common question of law or fact.[37]

13.12 The Commission raises three specific aspects of the threshold criteria: the requirement that claims be 'against the same person' in section 33C(1)(a); the breadth of the term 'related circumstances' in section 33C(1)(b); and the interpretation of the phrase 'substantial common question of law and fact' in section 33C(1)(c).

Claims against the same person

13.13 The decision of the Full Court of the Federal Court in *Cash Converters International Ltd v Gray* brought finality to questions about the interpretation of the first of these criteria,[38] confirming that section 33C(1)(a) does not require that each class member has a claim against each defendant. The decision brought to an end the uncertainty arising from earlier, inconsistent decisions including *Phillip Morris (Australia) Ltd v Nixon* [2000] FCA 229 and *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317. We respectfully agree with the reasoning of the Full Court in *Cash Converters*. The contrary interpretation could lead to a multiplicity of proceedings being brought to determine what are effectively the same issues, distinguished only by the identity of the defendant. Such a result would be inconsistent with the intended efficiency benefits of the Part 4A regime.

Related circumstances

13.14 The requirement that class members have claims arising from the same, similar or related circumstances has been interpreted by the Federal Court as extending only to those claims that have relationships which, taking into account the facts of the case and the underlying policy objectives of Part IVA of the Federal Court Act, are 'sufficient to merit their grouping as a representative proceeding'.[39] Removing the 'related' criterion would inevitably lead to the development of a new test of similarity. Given the boundaries of the existing test, a more restricted interpretation of this criterion could only have the paradoxical effect of excluding claims which are, by definition, related to a degree sufficient to merit grouping them in a representative

[37] *Supreme Court Act 1986* (Vic) s 33C(1).
[38] (2014) 223 FCR 139.
[39] *Zhang v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 384, 404-405.

proceeding. Such an outcome would be inconsistent with the imperative of improving access to justice.

Substantial common issue

13.15 The ‘substantial common issue’ test was established by the High Court in *Wong v Silkfield*.[40] In that decision, the Court unanimously held that the common issues should not be limited to those issues which would ‘have a major impact on the …litigation’, but should extent to any issues which are ‘real or of substance’.[41] The Court noted that parliament could not have intended to create a more restrictive test than was applied to representative proceedings brought under the rules of procedure which pre-date the modern class action regime.[42]

13.16 A requirement for common issues to predominate would potentially affect the viability of representative proceedings brought on behalf of victims of mass torts, particularly those involving personal injury, as has occurred in the US.[43]

13.17 In our experience, class actions are an efficient vehicle for victims of mass wrongs to obtain fair compensation. Recently resolved proceedings conducted by Maurice Blackburn on behalf of injured group members include the Kilmore East-Kinglake and Murrindindi-Marysville Black Saturday Bushfire class actions, the Bonsoy Class Action and the DePuy ASR hip implants class action. Together these class actions have recovered over $1 billion for victims of mass torts. An amendment of section 33C which had the effect of excluding claims of this kind would either deny access to justice to thousands who have suffered life-changing injuries, or require such claims to be brought in multiple proceedings with substantial overlap in the issues to be determined, resulting in judicial inefficiency, potential inconsistencies and significantly higher costs to claimants.

13.18 We do not agree that costs savings are ‘illusory’ when common issues are resolved, leaving other individual issues still to be determined.[44] On the contrary it is consistent with the intended operation of the regime, allowing the Court to resolve, in a practical manner, as many common questions of law and fact as possible, such that any remaining individual issues fall to be determined with the benefit of a consistent and clear decision on the common issues. We also consider that individual issues can be accommodated within the class action framework through pragmatic case management which draws on sections 33Q, 33R and 33S of the Supreme Court Act,[45] or even a declassing order under section 33N once the common issues have been resolved, and in each scenario the parties and class

[40] (1999) 199 CLR 255.
[41] Ibid 267.
[42] Ibid.
[43] Deborah Hensler, ‘Has the Fat Lady Sung? The Future of Mass Toxic Torts’ (2007) 26(4) *Review of Litigation* 883, 892-893.
[44] Emmerig and Legg, above n 27, 167.
[45] A good example of the way that the Federal Court has creatively case managed this process is *McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1, see Murray Wilcox, ‘Class Actions in Australia: Recollections of the Early Days’ in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 5, 9-10.

members would have the benefit of any common findings. In addition, the reality in practice is that the resolution of common issues is likely to provide the catalyst for a settlement that will allow individual issues to be addressed in one way or another in the context of a settlement distribution scheme.[46] That approach promotes both access to justice and judicial economy.[47]

13.19 For these reasons we do not believe that any amendments should be made to the existing section 33C criteria.

Decertification

13.20 We believe that replacing the existing decertification mechanism with a pre-commencement certification hearing would:

(a) impose significant and unnecessary costs on those group proceedings which are clearly appropriately constituted, in effect shifting the regulatory burden away from the intended target of the regulation;

(b) lead to the 'front loading' of costs as certification hearings increasingly become the focus of both plaintiffs' and defendants' preparation;

(c) cause significant delays, as contested certification hearings draw out the timetable to trial;

(d) result in the potential for duplication, inefficiency and inconsistency, as issues going to the merits of the proceeding are raised at certification and potentially re-litigated at trial; and

(e) lead to a revival of the satellite litigation that characterised the early years of the class actions regime as the contours of the statutory provisions establishing a new certification process are tested.

13.21 These problems are avoided by the existing procedure, which in our submission has been demonstrated to be adequate and appropriate in safeguarding the interests of all parties including defendants. The Supreme Court Act enables defendants to apply for an order under section 33N that a proceeding no longer continue as a group proceeding. The defendant-initiated decertification process has two important advantages: it is responsive to the differences between different proceedings, and adapted to deal with the development of proceedings over time.

13.22 Where there are indications at an early stage that a matter may be inappropriate to prosecute as a group proceeding, a defendant is likely to make an application for the proceeding to be declassed under section 33N. If flaws emerge at a later stage, such as after discovery, the matter need only be contested once that issue has been

[46] See, eg, the Tempo pacemaker class action: *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219 (trial at first instance); *Medtel Pty Ltd v Courtney* (2003) 198 ALR 630 (Full Court appeal); *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311; *Courtney v Medtel Pty Ltd (No 6)* [2004] FCA 1598 (settlement approval).

[47] *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27 (20 February 2003) [41]-[42].

revealed. In cases where the proceeding is clearly appropriately constituted as a group proceeding, no application is necessary and no costs are wasted.

13.23 Empirical data on the operation of the decertification regime demonstrate that a certification process is unnecessary. Only 28.4% of the group proceedings issued in the Federal Court between 1992 and 2009 were subject to formal applications for decertification.[48] The data also indicate that the low rate of challenge is not a sign that defendants are deterred from making legitimate decertification applications: only 19.1% of decertification applications (about 5% of all class actions) in the same period were successful.[49] It is therefore clear that defendants do not hesitate to apply for decertification, even when, as the outcomes suggest, many applications are speculative.

13.24 In addition to an overall low rate of success in decertification applications, the data also demonstrate a diminishing success rate over time. In the period from 2004 to 2009, none of the 20 decertification applications were successful, compared to a 40% success rate in the first five years of the Federal Court's Part IVA regime. These data suggest that after an initial period in which defendants sought to test the boundaries of the decertification regime and in doing so defendants enjoyed a modest level of success in 'declassing' proceedings, over time the legal framework surrounding section 33N has become more established. Undoubtedly this has led to improved case selection by plaintiff lawyers in their engagement of the class actions procedure, leaving defendants to pursue section 33N applications that are largely speculative and unmeritorious. The introduction of a new, untested certification regime would only serve to ignite a fresh series of costly and time-consuming interlocutory disputes that will inevitably frustrate the progress of class actions towards resolution of the substantive claims of the plaintiff and class members.

13.25 The Commission raises the ruling in *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11),*[50] as an example of the kind of proceeding in which costs may have been avoided under a certification regime. By contrast, we consider the procedural history of that case to be an example of the relative advantages of the existing decertification regime. It was discontinued as a representative proceeding after the applicant's case was made out in one respect,[51] on the basis that the specific contravention in respect of which the applicant's claim succeeded was not applicable to all class members.[52] It is unlikely that a pre-commencement certification hearing, taking place prior to the exchange of evidence and without the benefit of a ruling on the merits of the various pleaded causes of action, could have arrived at the same result.

[48] Vince Morabito and Jane Caruana, 'Can Class Action Regimes Operate Satisfactorily without a Certification Device? Empirical Insights from the Federal Court of Australia' (2013) 61 *American Journal of Comparative Law* 579, 594.
[49] Ibid 597.
[50] [2013] FCA 241 (19 March 2013).
[51] *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 10)* [2012] FCA 25 (27 January 2012) [165].
[52] *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11)* [2013] FCA 241 (19 March 2013) [65]-[67].

13.26 The evidence shows that historically there have been 5.4% (or less in recent times) where decertification is warranted and 94.6% of cases (more in recent times) where the class action procedure has been appropriately selected by the plaintiff and the plaintiff's lawyers. Replacing the existing decertification procedure with an upfront hearing creates an expensive and time consuming procedure to deal with a problem which the evidence demonstrates arises in a very small proportion of class actions. The Victorian Law Reform Commission has been charged with considering measures which promote access to justice and reduce costs to claimants. Introduction of a certification regime will do the exact opposite.

14. Should the onus be placed on the representative plaintiff to prove they can adequately represent class members? If so, how should this be implemented?

14.1 In our submission there should be no amendment to the existing provisions aimed at ensuring adequacy of representation by the representative plaintiff.

14.2 As the Commission notes, the Court has an express power to replace an inadequate representative plaintiff at the request of class members under section 33T of the Supreme Court Act. Section 33T does not provide for the Court to replace an inadequate representative on its own motion, or following an application by the defendant. In practice, however, the circumstances that would justify an order under section 33T due to inadequate representation will also tend to support applications which can be initiated by defendants using existing mechanisms, such as strike out applications,[53] or by the Court making orders on its own motion under section 33ZF where it is necessary to ensure that justice is done in the proceeding.

14.3 It is not clear that inadequate representation presents a genuine problem in group proceedings. The suggestion that representative parties are 'persons of straw' is contradicted by empirical evidence.[54] Although Finkelstein J expressed concerns about the adequacy of representation in *Kirby v Centro Properties Limited*,[55] his Honour's remarks were made without the benefit of evidence which was subsequently filed in that proceeding and which may have addressed those concerns.[56] The courts have rejected claims advanced by defendants in shareholder class actions (and by defendant lawyers in an extra-curial context) that class members who are not professional investors are inadequate representatives.[57]

14.4 Placing the onus on the representative party to prove they can adequately represent class members, either in a pre-commencement hearing or at a later stage in the proceeding, is unnecessary. To do so would result in wasted costs and a further opportunity for interlocutory disputes.

[53] See, eg, Vince Morabito, 'Replacing Inadequate Class Representatives in Federal Class Actions: *Quo Vadis*?' (2015) 38(1) *University of New South Wales Law Journal* 146, 156-157.

[54] Vince Morabito, 'Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives' *Second Report*: *An Empirical Study of Australia's Class Action Regimes* (2010) 46-49.

[55] (2008) 253 ALR 65, [4]-[7], [23]-[24].

[56] Vince Morabito, 'Clashing Classes Down Under – Evaluating Australia's Competing Class Actions Through Empirical and Comparative Perspectives' (2012) 27 *Connecticut Journal of International Law* 245, 299-300.

[57] *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469, [68]-[78].

14.5 In our experience, representative plaintiffs do not undertake their role lightly. Those who step forward are, at a minimum, exposed to public scrutiny in relation to their claim and put to considerable inconvenience in protracted litigation in circumstances where it would be open to them to remain as anonymous group members. In some instances they are required to participate in gruelling, protracted trials and risk adverse costs orders running to tens of millions of dollars.[58] In our experience, class members who take on the role of representative plaintiffs are typically motivated and have a keen sense of their responsibilities to other class members.

14.6 We consider that it would act as a further disincentive to place an additional evidentiary burden on representative plaintiffs, and by placing the evidentiary onus on them, to adopt a default position that their motives or capabilities are questionable. We are concerned that such a mechanism could be exploited by defendants to place pressure on prospective representative plaintiffs so as to prevent the bringing of, or encouraging the discontinuance of, meritorious proceedings. This would not be consistent with the purpose of the Part 4A regime.

15. Should a specific legislative power be drafted to set out how the Court should proceed where competing class actions arise? If not, is some other reform necessary in the way competing class actions are addressed?

15.1 At the outset we make the general comment that the term ‘competing class actions’ is often inapt to describe the situation where more than one class action arises from the same circumstances. Two or more class actions might be ‘competing’ if they each seek to cover the field or compete for the sole right to sue. In reality, two separate class actions arising from the same circumstances may be significantly different in a number of respects, including whether they are brought on behalf of ‘open’ or ‘closed’ classes, the types of causes of actions that are pleaded, the description or definition of the group, the claim periods that they cover, the range of common issues that are identified, the number and identity of the defendants who are sued and the courts in which they are commenced. In many cases, the two actions are better described as ‘parallel class actions’ or ‘multiple class actions’, however for the purpose of our submission below we adopt the Commission’s use of the term ‘competing class actions’.

15.2 In our submission, the existing procedural tools available to the Court are sufficient to deal with the issue of competing class actions, and allow a more tailored judicial response than is possible in jurisdictions such as Canada where a single outcome is prescribed.

15.3 In the Federal Court, Beach J recently held that there were five realistic options available to deal with two competing class actions:

(a) consolidating both actions into a single proceeding;

(b) permanently staying one of the proceedings;

[58] See, eg, *Matthews v SPI Electricity Ltd (No 9)* [2013] VSC 671 (9 December 2013) [299], [425].

(c) declassing one of the proceedings under section 33N;

(d) closing one class, leaving the other open, and trying the two proceedings together; and

(e) trying both proceedings as overlapping open class actions.[59]

15.4 His Honour considered that the appropriate order in the circumstances of the two cases before him was to allow both proceedings to remain on foot, close one of the classes and try them together. The decision to allow both proceedings to remain on foot was motivated primarily by the desire to respect the large number of registered class members' choice of legal representation and funding arrangements.[60] His Honour noted that different circumstances may warrant a decision to allow both proceedings to continue on an open basis,[61] or to permanently stay one of the proceedings.[62] In respect of the potential for duplicative costs, his Honour held active case management would mitigate the risk, and that in any case staying one of the proceedings could itself lead to multiple proceedings with duplicative costs.[63]

15.5 The importance of adopting a tailored approach, and leaving a range of case management tools available to the Court, was recently reaffirmed in the class actions against Volkswagen, Audi and Skoda arising from the 'diesel-gate' scandal. Maurice Blackburn and another law firm are each conducting representative proceedings in the Federal Court. The two proceedings are brought on behalf of open classes with some overlap in group definition, and are being tried together. In a recent case management ruling, Foster J noted that it was inappropriate to impose a 'one size fits all' approach to Part IVA proceedings, and that permitting these two proceedings to run in parallel had not resulted in undue cost, confusion or delay.[64] His Honour declined to close or stay either proceeding, permitting both to continue in parallel.

15.6 We respectfully agree with his Honour's comments, and our experience of the way those two proceedings have been conducted in parallel supports our view that there is no reason to adopt a default response of staying or closing competing proceedings.

15.7 We believe that the appropriate response to competing class actions should continue to be dictated by the circumstances of the specific proceedings. The introduction of a Canadian-style carriage motion, equivalent to a mandating a permanent stay of one proceeding regardless of the circumstances of an individual case, would create a risk of unfairness by denying group members their choice of representation.

[59] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [9].
[60] Ibid [56].
[61] Ibid [22].
[62] Ibid [8].
[63] Ibid [46].
[64] *Cantor v Audi Australia Pty Ltd (No 2)* [2017] FCA 1042 (1 September 2017) [74]-[75].

15.8 If proceedings are evaluated according to a prescribed 'checklist' along the lines of the Canadian model, with only one permitted to continue, there is also a risk of creating perverse incentives. For example, if the order in which proceedings were filed is relevant, this could incentivise a race to the courthouse, bringing to fruition the concerns expressed by Finkelstein J in *Kirby v Centro Properties Limited*.[65] If the scope of the pleaded cases is taken into account, this may create incentives in favour of joining multiple respondents and against narrowing the pleaded causes of action. The relative priority and scope of competing proceedings are both treated as relevant factors under the test applied in Canadian carriage motions.[66]

15.9 When considering whether to adopt processes that have been implemented in other jurisdictions, we believe it is important to be mindful of the differences between the Australian regime and the legal frameworks in which those processes were adopted. The extent of the problem posed by competing classes in Canada and the US is vastly greater than has been experience in Australia.[67]

15.10 Although we do not support the introduction of Canadian-style carriage motions, if such a mechanism is introduced it is important that, to the extent possible, group members' choice of legal representation and funding arrangements are respected. For that reason, if a carriage motion procedure is adopted, we believe that the competing proceedings should be evaluated by comparing the characteristics of each registered group. In matters such as shareholder class actions, the quantum of loss for registered group members should be a key consideration in deciding which matter should proceed. In cases involving personal injury or property damage, where loss is more difficult to estimate at an early stage, the number of registered group members could serve as a proxy. This would ensure that the choice of those with the greatest interest in the proceeding takes precedence, which would go some way towards mitigating the impact of denying the participants in one matter their choice of representation.

16. Does the involvement of litigation funders in class actions require certain matters (and if so, which) to be addressed at the commencement of, or during, proceedings?

16.1 The disclosure of costs and funding agreements and the settlement approval process are addressed by specific questions in other chapters of the Consultation Paper and are discussed above in our submission. Aside from those matters, it is not clear what issues relating to the involvement of a litigation funder could fall to be addressed by the representative plaintiff.

16.2 The Commission (at [6.92] of the Consultation Paper) and an article it cites,[68] raise the prospect of imposing an onus on the representative plaintiff to make an application for common fund orders at an early stage. We note that the onus is already on the representative plaintiff to make an application for common fund

[65] (2008) 253 ALR 65, [29].
[66] See *Vitapharm Canada Ltd v F Hoffman-Laroche Ltd* [2000] O.J. 4594.
[67] Above, n 53, 315-316.
[68] Above, n 24, 169-170.

orders. With regard to the timing of common fund applications, we do not believe it is necessary or appropriate to require that common fund applications be brought at an early stage in every matter. Common fund orders have been made after proceedings have been commenced,[69] and in the course of the settlement approval process.[70]

16.3 In approving the settlement of *Blairgowrie Trading Ltd v Allco Finance Group Ltd (In Liq) (No 3)*, the Court made common fund orders that placed group members in a better position than they would have been under either existing agreements or a funding equalisation order.[71] Requiring common fund applications to be made at an early stage in a proceeding would presumably deny group members the opportunity to benefit from orders made at settlement approval in future proceedings in which an early application had not been made. This presents a disadvantage to group members without any corresponding benefit.

Other procedural issues

Pleadings

16.4 While it is common for pleadings to be amended in the course of large scale litigation, including group proceedings, the introduction of a certification hearing would not prevent this. Pleading amendments are often made after discovery and the preparation of expert evidence, when the representative party's case can be refined and particularised on the basis of information not previously available to it. To introduce a new, pre-commencement opportunity for interlocutory argument over the form of pleadings would consume costs and delay proceedings, and could result in time being devoted to argument over issues that are ultimately redundant because the issues are clarified at a later stage following the exchange of detailed evidence.

16.5 In any event, it is not clear that shifting disputes over the form of pleadings into a pre-commencement certification process would be any less expensive or time consuming than conducting the same process by way of applications made after proceedings have commenced.

[69] *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) FCR 191.
[70] *Blairgowrie v Allco (No 3)* (2017) 343 ALR 476.
[71] Ibid [147].

Budgets

16.6 We note that pre-commencement costs estimates are necessarily made from a position of uncertainty regarding several important factors that are likely to influence actual costs, including the two factors that typically comprise the largest components of a litigation budget: the scale of discovery and the nature and scope of the expert evidence. As the Commission notes in the Consultation Paper, budgets setting out a roadmap to trial are of limited utility in predicting the costs of any particular proceeding because the majority of proceedings are ultimately resolved by settlement.[72] The actual costs are highly variable depending on the stage of trial preparation at which a settlement agreement is reached.

16.7 As part of the settlement approval process, the total costs payable from the settlement sum are scrutinised by the Court.[73] Settlement approval applications are typically accompanied by evidence from independent costs consultants as to the reasonableness of the costs incurred,[74] and indeed the Supreme Court's *Practice Note SC Gen 10* mandates (at [13.5(e)]) that the materials filed in support of settlement approval should address the reasonableness of legal costs. We believe that the Court's power to retrospectively disallow any unreasonably incurred costs obviates the need for prospective approval of a budget which in any case could never be more than an estimate based on incomplete information.

16.8 It would be impossible to provide a reasonable estimate of settlement distribution scheme costs at the pre-commencement stage, since the quantum of loss, size of the participating group, terms of the settlement, size of the settlement sum and the loss assessment principles and procedures to be applied under the scheme would all be unknown.

16.9 In our submission there is therefore no utility in addressing pleading or budget issues at or before the commencement of proceedings.

CHAPTER 7: SETTLEMENT

17. How could the interests of unrepresented class members be better protected during settlement approval?

Court appointment of a third party guardian or contradictor

17.1 When applying for approval of a settlement, the plaintiff is required to persuade the Court that the proposed settlement is fair and reasonable having regard to the claims made on behalf of *all* group members who will be bound by the settlement, not just the plaintiff and defendant/s.[75] If the Court is dissatisfied with the evidence adduced by the plaintiff, or is concerned that the interests of unrepresented class

[72] Above, n 20, 37.
[73] See, eg, *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014) [348].
[74] Ibid [380].
[75] See Supreme Court of Victoria, above n 15, [13.1].

members are not being protected, the Court already has the power to appoint a third-party guardian or contradictor to advise the Court.

17.2 For example, in *Kelly v Wilmott Forests Ltd*,[76] Murphy J considered that it was appropriate to appoint a contradictor in circumstances where his Honour had concerns that the settlement before him was not fair and reasonable to *all* group members. Similarly, in the Supreme Court of Victoria, Robson J in *Re Banksia Securities Limited (Rec & Mgr Apptd)*[77] made orders appointing a contradictor or third party guardian as part of the settlement approval process.

17.3 In light of the existing power to appoint contradictors and the fact that the courts have exercised this power where it is warranted, in our submission it is not in the interests of unrepresented class members to erode the Court's discretion by making it mandatory to appoint a third-party guardian or contradictor for every settlement approval. To do so would likely create unintended and unnecessary delay and costs for plaintiffs and group members in those cases where a contradictor is not needed.

17.4 We are concerned about an overly prescriptive approach being adopted. The circumstances of each settlement approval can be significantly different depending on the nature of the action, the size of the settlement and number of affected group members. In addition, the cost of any contradictor will need to be met. If a settlement is not approved there is no settlement sum from which to make a payment, and it is not clear who should pay in a contradictor in those circumstances. Where the costs are to be paid from the settlement sum, they will necessarily erode the funds that are available for distribution to group members. Unrepresented group members are best protected by allowing the court flexibility to decide whether a third-party guardian or contradictor is necessary, and in the best interests of *all* group members.

17.5 To illustrate the above, in *Blairgowrie Trading Ltd v Allco Finance Group Ltd* one of the defendants proposed the appointment of counsel to act as a contradictor with respect to issues that were raised regarding the settlement approval. Beach J noted that he had 'exhausted the universe of possibilities as to how to deal with [the settlement]' and that he understood the relevant issues.[78] His Honour noted that such an appointment would be redundant insofar as the contradictor was likely to make the same submissions and arguments that his Honour was already considering.[79] Ultimately Beach J decided that the cost and delay involved would outweigh the potential benefits.[80]

[76] *Kelly v Wilmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439.
[77] [2017] VSC 148 (31 March 2017).
[78] Transcript of proceedings, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* (Federal Court of Australia, NSD 1609 of 2013, Beach J, 16 February 2017) 21.
[79] Transcript of proceedings, *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec and mgr apptd) (in liq)* (Federal Court of Australia, NSD 1609 of 2013, Beach J, 16 February 2017) 22.
[80] *Blairgowrie v Allco (No 3)* (2017) 343 ALR 476 [90].

Requirement for defendant's lawyers to submit evidence as part of the settlement approval process

17.6 In most cases there would be little or no utility in requiring defendants to make submissions given that they also agree to the settlement, and would likely duplicate the work undertaken by the plaintiff's lawyer. The benefit of any cross-checking of the plaintiff's affidavit evidence is likely to be outweighed by cost considerations. The increase in legal costs is only likely to deplete the amount of settlement funds that are available for distribution to class members.

17.7 There may be instances where a submission by the defendants may be necessary and entirely appropriate, or where there may be discrete issues that it is appropriate for the defendant to address by means of evidence.[81] Where necessary, the Court already has the flexibility to request submissions and in our submission the Commission should eschew any mandatory requirement for the defendant to make submissions or adduce evidence.

18. What improvements could be made to the way that legal costs are assessed in class actions?

18.1 It is well established that in considering whether or not to approve a provisional settlement, the Court must consider whether to approve the plaintiff's legal costs.[82] In order to obtain court approval of the plaintiff's legal costs, the lawyers must justify the legal costs being sought and adduce evidence in order to do so.

18.2 In this context, we support the requirement for a review of legal costs by an independent expert, particularly where those costs are substantial.

Presumption that an independent expert be appointed

18.3 If legal costs are substantial (which is the case in the majority of class actions due to their complexity and duration), the presumption should be that an independent costs expert be appointed to review the plaintiff's legal costs.

18.4 However, the appointment of an independent costs expert should not be mandatory. There may be class actions where the Court may decide that the expense of an independent expert is not required due the small amount of legal costs. In our submission, the Court should retain its existing discretion as to the type of evidence required in these circumstances.

Independence of expert

18.5 We note the Commission's concern that costs assessors appointed by plaintiff lawyers are not independent, and that costs assessors who are given repeat work may be less likely to reduce their legal costs.

[81] See, eg, *Stanford v DePuy International Ltd and Another (No 6)* [2016] FCA 1452 (1 December 2016).
[82] *Reiffel v ACN 075 839 226 Pty Ltd (No 2)* [2004] FCA 1128 (1 September 2004) [11]; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167 [39].

18.6 In their capacity as expert witnesses, cost assessors have obligations to the Court and must comply with the expert code of conduct,[83] and there are also provisions in the *Civil Procedure Act 2010* (Vic) which impose overarching obligations.[84] In addition, in our experience most costs experts are solicitors, and for that reason they also have additional legal and ethical duties to the Court.

18.7 Regardless of these legal and ethical obligations to act with honesty and independence, in our experience we have not observed any costs expert having been influenced by the prospect of repeat work. To the contrary, cost assessors who we have appointed have on occasion reduced our legal costs where they considered those costs to be unreasonably charged or incurred.

18.8 We also provide the following counter-example of a class action where a Court-appointed costs expert did not reduce our substantial costs.

Case study 1: Kilmore and Murrindindi Bushfire Settlement Administration

In the Kilmore and Murrindindi Bushfire settlement administration processes, the Court on its own motion appointed an independent costs expert.

The court-appointed costs expert, Mr John White, prepared multiple expert reports to the Court throughout the settlement administration. He attended court to give sworn evidence and was questioned by both Justice Forrest and Justice Dixon, and also by group members. Mr White throughout the Bushfire Settlement Administration found Maurice Blackburn's costs to be reasonable, and did not propose any deductions. Mr White commented in evidence:[85]

> I really just simply can't see how Maurice Blackburn could have - the scheme administrator could have tackled this whole process any differently. I think that they have commenced with an extraordinary amount of planning and foresight, the implementation of the scheme. Probably taking one step back, the construction of the Scheme itself. They have dealt with issues as they have arisen from time to time and it would be unreasonable to expect an impossible degree of clairvoyance at the beginning of a matter such as this, in so far as what was likely to transpire. My view, having examined a great deal of material, is that the Scheme was thoughtfully considered in the first place, implemented properly and accurately and efficiently; that as problems arose, they were expeditiously dealt with and there are not problems that I can see generally that would have been foreseen. I think they were problems that could only become evident in the course of the administration process. The other thing I will say too is I have been mightily impressed with the dedication of the file operators that I have met - and I have met a few of them [and] discussed matters with a few of them - and in those circumstances, as I have said, I am not certain that the whole of the process could have been tackled in any more of an efficient manner than it has been.

[83] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) O 44.
[84] *Civil Procedure Act (2010)* (Vic) s 10.
[85] Transcript of Proceedings, *Matthews v Ausnet Electricity Services Pty Ltd and Rowe v Ausnet Electricity Services Pty Ltd* (Supreme Court of Victoria, S CI 2009 4788 and S CI 2012 4538, Forrest and Dixon JJ, 29 November 2016) T43/30-T44/25.

Court powers to further investigate

18.9 It is important to recognise that the Court has the power to conduct its own investigation if it has any doubt about the reasonableness of legal costs. In *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 2)*,[86] Gordon J (as her Honour then was) emphasised this point:

> It is the judicial officer (not an independent costs expert) that is required to determine whether the fees and disbursements are reasonable. Second, the information to be provided to that judicial officer must be 'sufficient' to enable that judicial officer to undertake that assessment.[87]

18.10 Gordon J found that the evidence provided by the independent expert was insufficient and subsequently sought the advice from the Registrar. The Registrar subsequently provided advice to the Court as to whether the legal costs were fair and reasonable.

Maurice Blackburn review of reasonableness of costs

18.11 Since the introduction of the Part IVA regime in the Federal Court 25 years ago, a substantial body of case law has developed in relation to the costs charged by plaintiff lawyers.[88]

18.12 Before our engagement of an independent cost expert, we undertake a review of our tax invoices in order to ensure that they conform to the principles established by the relevant authorities.

18.13 Our invoices for professional fees and disbursements are reviewed in detail by an experienced legal assistant and regularly by at least two solicitors, including the supervising principal or senior lawyer with the day-to-day supervision of the class action. We review our bills to ensure that the fees being charged are both reasonable and comply with legal requirements.

18.14 The result of this process is that we regularly write off some of our costs before the tax invoice is even provided to the independent costs expert. To the extent that the Commission is aware of individual cases where costs experts did not reduce the amount of our fees, in our view this is likely to be due to the internal review process that we undertake with respect to every invoice.

Addressing misconceptions about legal fees

18.15 Australia's class action regime is an efficient mechanism that allows multiple victims of mass wrongs access to have access to justice with an equality of arms that enables the actions of large organisations to be properly challenged. It is important

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[86] [2013] FCA 1163 (7 November 2013).

[87] *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626 (21 June 2013) [35].

[88] See *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626 (21 June 2013); *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No. 3)* [2014] FCA 680 (26 June 2014); *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311.

to recognise that class action litigation is expensive due to the complexity, size and duration of the litigation. In most instances, we seek to recover many millions of dollars on behalf of thousands of claimants. Given the size of the damages typically sought in the cases we conduct, the defendants may be more likely to vigorously defend the claims against them.

18.16 We have the largest class actions practice in Australia. To date, Maurice Blackburn has recovered more than $2.5 billion in compensation in more than 50 class actions cases we have conducted since 1998. For example, in the Leighton Holdings class action, we achieved a recovery for shareholders of over 90% of their losses within months of the proceeding being commenced.

18.17 The Consultation Paper states (at [7.3]):

> Much of the controversy surrounding class actions has been focused on the amounts recovered by class members at settlement, when compared to the amounts received by lawyers and litigation funders.

18.18 This 'controversy' is based on a misconception that the legal costs are greater than or constitute a disproportionate amount of the compensation available to be paid to group members. This misconception is fuelled by sensational reporting that fails to take into account the complexity of the litigation or the proportion of costs and the total settlement sum, instead focussing only on the total amount of legal fees. In practice, based on the majority of class actions we have conducted since 1998, Maurice Blackburn's legal costs have been on average approximately 12%-13% of the amounts recovered. Needless to say, this is an average, and actual costs in individual cases may be a higher or lower proportion and will depend on many different factors.

18.19 For example, the legal fees charged in the Black Saturday bushfire cases have been the subject of some negative media attention.

Case study 2: Kilmore East bushfire class action litigation costs

Matthews v SPI Electricity Pty Ltd (the Kilmore East bushfire class action) was the largest civil trial in the history of Victoria. The action settled for $500 million including legal costs, and as such is the biggest class action settlement in Australian history. Our legal costs constituted about 7% of the settlement sum (approximately $37 million) whilst expenses on barristers, experts and other disbursements constituted about another 5% (approximately $23 million). In addition, two independent costs experts opined that Maurice Blackburn could legitimately have charged more for its fees and disbursements in the case (in one case estimating a figure of *at least $69.5 million* and in the other $77.6 million). Media reports referred to '$60 million in legal fees' but failed to mention that not all of these costs are related to our professional fees, that in total those fees constituted just 12% of the settlement sum or that Maurice Blackburn had sought approval for amounts substantially less than had been independently assessed as appropriate.

The Kilmore East bushfire class action settlement followed a 16 month civil trial, which involved more than 200 court sitting days. The proceeding included:

- 26 pre-trial directions hearings;
- 34 pre-trial applications;
- 60 court rulings;
- evidence heard from 40 expert and 60 lay witnesses;
- 2,466 documents loaded on to the electronic courtbook;
- 10,364 documents tendered; and
- more than 20,000 pages of transcript.

The case was commenced in June 2010. After the conclusion of evidence and submissions in the trial but before a decision was handed down, the parties agreed on terms for a settlement of the class action. The settlement was approved in December 2014.

For this particular case, given the size of the legal costs, we considered that it would be appropriate to engage two separate independent cost assessors to assess the reasonableness of the costs, and both independent expert reports were later tendered at the application for settlement approval.

The legal fees charged are substantive when viewed in isolation from the litigation. However, when viewed in the context of 4.5 years of litigation and the overall settlement sum achieved, the amount of our costs was fair and reasonable given the complexity and length of the litigation.

Case study 3: Murrindindi class action litigation costs

Maurice Blackburn also acted in *Rowe v SPI Electricity Pty Ltd* (the Murrindindi bushfire class action). After the settlement of the Kilmore East bushfire class action, we subsequently settled the Murrindindi class action for $300 million including costs, representing the second largest class action settlement in Australian history.

Although the Murrindindi bushfire occurred on the same day as the Kilmore East bushfire and involved the same defendant, it involved an entirely different set of factual circumstances. It was also not filed until June 2012 due to an ongoing Victorian police investigation into the (erroneous) theory that the fire was caused by arson.

The Murrindindi bushfire class action settled on the first day of the trial, which significantly reduced the overall legal costs compared to those incurred during the Kilmore East bushfire class action. Our professional fees constituted about 4% of the settlement sum (approximately $13 million) while the fees of barristers and experts and other disbursements constituted about another 2% (approximately $7 million).

Despite the fact that the case settled on the first day of trial, a considerable amount of work was had been necessary in order to prepare for trial.

The plaintiff and defendants proposed to call 21 expert and 131 lay witnesses and tender thousands of pages of exhibits. The preparation involved to prepare a case of this magnitude for trial required more than 20,000 hours of preparation by our staff. The defendants

discovered more than 56,000 documents. The review of discovery alone constituted at least a quarter of Maurice Blackburn's total legal fees.

18.20 Both of the Black Saturday bushfire class actions were conducted on a conditional fee basis and without the support of any litigation funder. If either class action had been unsuccessful, we would have lost many millions of dollars in unrecovered disbursements that were funded by our firm, not to mention the lack of payment for any of the substantial work done by our professional staff in achieving landmark settlements totalling $800 million, a vast majority of which was distributed to the victims of the bushfires.

Disclosure of legal costs incurred by the defendants

18.21 In the Black Saturday bushfire cases, the independent costs assessor reviewed the legal costs incurred by each of the defendants in order to contextualise the amount of legal costs incurred by the plaintiffs. We support this practice, and believe that it provides a valuable barometer for the cost assessor to evaluate whether the plaintiff's costs are reasonable.

19. Should the following matters be set out either in legislation or Court guidelines?

(a) criteria to guide the Court when assessing the reasonableness of a funding fee

(b) criteria for the use of caps, limits, sliding scales or other methods when assessing funding fees

(c) criteria or 'safeguards' for the use of common fund orders by the Court.

19.1 In general terms we support a greater degree of judicial scrutiny of litigation funding fees during the settlement approval process. If there is any doubt as to the Court's power to amend a funding fee, we support the adoption of a specific legislative source of power for the court to assess the reasonableness of a funding fee.

19.2 However, we do not support the adoption of overly prescriptive criteria that risk curtailing the Court's discretion to consider the funding fee based on the circumstances that subsist in a specific class action.

19.3 Although litigation funding is relatively new in Australia, the market has deepened to the extent that there are now some 19 litigation funders who are active in the Australian market.[89] Downward pressure continues to be applied on the prices charged by litigation funders not only by market forces but by courts using their

[89] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 205, 208.

existing case management powers, as shown by *Money Max v QBE.*[90] As noted by Beach J, there is no evidence of market failure in the setting of commission rates.[91]

19.4 The role of litigation funding in providing access to justice through class actions is well recognised.[92] Class actions are costly to run, and in the absence of the litigation funder, these costs will either have to be borne by group members or by plaintiff law firms who act on a conditional fee basis. Litigation funders also indemnify the lead plaintiff against an adverse costs order that could run into millions of dollars. However, funders have in general not provided funding to cases which are especially expensive to run or that carry a significant amount of risk, such as the bushfires litigation. Only 21% of successful cases in State courts in the past 10 years have been funded.[93] Overly prescriptive criteria will make it harder to attract funders to the types of class actions that tend to be brought in Victorian courts.

19.5 In *Money Max v QBE*,[94] the Full Court of the Federal Court recognised the importance of not 'pre-determining' the appropriate considerations in assessing a funding fee, and that the court's review will depend on the individual circumstances of the case.

19.6 In *Earglow Pty Ltd v Newcrest Mining Ltd*,[95] the Court noted that the funding commission rate should not be considered on a stand-alone basis, and should also take into account a range of factors including whether the funder provides coverage for adverse costs either directly or through 'after the event insurance, whether the funder pays disbursements only or whether they pay costs and disbursements up to a fixed cap, or whether the funder pays a fixed percentage of the cost and disbursements.[96] It would be difficult for any sort of legislative cap, limit or sliding scale on funding fees to take into account these important variations.

19.7 In relation to the suggestion that there be some sort of criteria or 'safeguards' in relation to common fund orders, we refer to the following remarks by Beach J:

> Generally… any supervision by a Chapter III court of funding commissions in a particular case must be mindful of this contextual setting. But a Chapter III court is well suited to the task of bringing flexibility and nuance to that role in an individual case (including supervising funding terms generally and confirming capital adequacy), as compared with say regulation under idiosyncratic State legislation (and any consequent market distortion) informed only by and limited to local jurisdictional factors and, in any event, subject to the exercise of Federal judicial power under ss 33V and 33ZF.[97]

[90] [2016] FCA 1433 (28 November 2016).
[91] *Blairgowrie v Allco (No 3)* (2017) 343 ALR 476 [142].
[92] Jason Betts, David Taylor and Christine Tran, above n 89, 219-220.
[93] Morabito, above n 1, 34.
[94] *Money Max Int Pty Ltd v QBE Insurance Group Pty Ltd* [2016] FCA 1433 (28 November 2011) [80].
[95] *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469.
[96] Ibid [179].
[97] *Blairgowrie v Allco (No 3)* (2017) 343 ALR 476 [142].

20. Is there a need for an independent expert to assist the Court in assessing funding fees? If so, how should the expert undertake this assessment?

20.1 While we agree that the Court should have a role in assessing funding fees, we have reservations about referring the assessment of reasonableness of those fees to a costs expert.

20.2 The assessment of legal costs is not analogous to funding fees in terms of the expertise required to assess such fees. While legal fees are charged pursuant to legal work undertaken and assessed pursuant to legislative requirements and case law, the criteria for assessing the reasonableness of a funding fee are quite different and not readily comparable. So too, the basis for calculating or charging funding fees is not comparable.

20.3 If an expert were to be appointed to assist the court, the independent expert would most likely need to be an economist who can assess risk, and make a determination as to whether the fee is reasonable given the level of risk the funder took in funding the action. Even then determining the level of risk in a legal proceeding is presumably something which requires legal expertise and so it is not clear that economic expertise per se will provide assistance to a court in its task.

21. At which stage of proceedings should the Court assess the funding fee? What, if any, conditions should apply to this?

21.1 Again, in our submission it is not appropriate to adopt a prescriptive approach in relation to the time at which the funding fees should be assessed. Different cases may demand a different approach depending on the individual circumstances.

21.2 In some cases, the funding fee should be assessed at the settlement approval stage. On the other hand, there will be cases where it is appropriate to assess the funding fee at a much earlier stage of the case.

22. In class actions, should lawyers and litigation funders be able to request that the total amounts they receive in settlement be kept confidential?

22.1 We have always favoured an approach whereby the amount of legal costs and funding fees is publicly available (or at least available to class members in the case) and in our experience this is the approach that is adopted in the vast majority of cases.

22.2 Although there are strong presumptions in favour of disclosure,[98] nevertheless we recognise that there may be individual cases in which it is necessary or appropriate for some or all aspects of a settlement to be kept confidential. Depending on the circumstances of the case, this could conceivably include the amount of legal costs or funding fees.

[98] See, eg, *Open Courts Act 2013* (Vic) s 4.

22.3 As to whether there should be a blanket prohibition on confidentiality of legal costs and funding fees, we consider that the Court should retain its discretion in deciding whether to make a confidentiality order. In the absence of cogent reasons supporting confidentiality of costs and funding fees and satisfying the high threshold that needs to be met in order to justify a confidentiality order, we expect that the Court will be reluctant to make such an order except in rare circumstances.

23. How could the management of settlement distribution schemes be improved to:

(a) ensure that individual compensation reflects the merits of individual claims

(b) ensure that it is completed in a manner that minimises costs and delays?

Merits of individual claims

23.1 At the outset we note that we disagree with the presumption that is inherent in question 23(a), namely that it will always be necessary or appropriate for individual compensation amounts to reflect, in an exact or precise manner, the merits of individual claims. The question also presumes that there will always only be one methodology or approach to the assessment and quantification of individual claims.

23.2 We also note that the second limb of question 23 asks how settlement schemes can be improved in order to minimise cost and delay. While we agree that this is an important objective, we also consider that there will often be a trade-off between cost and delay on one hand, and on the other hand the ‘precision’ with which individual compensation is assessed. This tension is particularly acute in cases involving personal injury damages or damage to physical property which requires the involvement of loss assessors.

23.3 For example, in an individual personal injury claim, the plaintiff will ordinarily obtain a suite of expert reports that are relevant to individual causation and loss. This might include one or more medical specialists as well as numerous allied health experts including an occupational therapist, physiotherapist, psychologist, vocational expert among others. On one hand this might enable individual compensation to be assessed precisely (putting to one side the fact that different experts might reach different conclusions). On the other hand, in the context of a class action settlement scheme, it will almost never be appropriate to obtain this full suite of expert evidence because it will not only add significantly (and unreasonably) to the costs of administering the settlement, thereby detracting from the overall amount that is available for distribution to group members, but will also add substantially to the time that it takes to assess all claims under the settlement scheme.

23.4 In this sense there is a balance that needs to be struck between cost and delay and the type and scope of work that needs to be undertaken in order to assess individual claims. How this balance is achieved in an individual class action will depend on its circumstances, and ultimately one of the Court’s functions in deciding whether to

approve a settlement is to consider whether there is an appropriate balance between these competing factors.

23.5 From our perspective we are working to improve the handling of settlement distribution schemes by implementing innovative assessment mechanisms. For example, in the settlement of the DePuy ASR hip implants class action in the Federal Court, we proposed a novel mechanism whereby group members can elect to receive a 'Fast Track Resolution', which is a single, standardised lump sum payment of $55,000.[99] Election of this option means that group members waive their rights to a more rigorous, individuated assessment of the merits of their claim, however one of the fundamentally important features of the Fast Track Resolution is that it was not mandatory.

23.6 While election of the Fast Track Resolution involves a standardised payment that obviated any individual consideration of the merits of a claim, it is empowering in the sense that group members have a choice and can prioritise prompt payment if they wish to do so, or if they wish to avoid the need to undergo a potentially invasive individual assessment process, or if they prefer the certainty provided by the standardised lump sum payment. The availability of the Fast Track Resolution also has implications for the overall costs of administering the settlement, which is in the interests of group members as a whole. Further details of the Fast Track Resolution in the context of the DePuy ASR hip implants class action are described in the following case study.

Case study 4: DePuy hip implants class action settlement distribution scheme

In March 2016, the DePuy ASR Class Action settled for $250 million plus interest (including legal costs; without admission of liability) and as such was the third largest class action settlement in Australian legal history. The DePuy hip implants class action was conducted on behalf of all patients who have had one or more DePuy ASR components surgically implanted by a doctor in Australia. It was alleged that the DePuy ASR hip implants were defective and not fit for their purpose.

Once group members have been assessed as eligible to receive compensation, they have a choice to elect either a Fast Track Resolution or they may proceed to an individual assessment of their claim pursuant to the Settlement Scheme.

Under the individual assessment option, the group member is entitled to a minimum of $40,000 for general damages / non-economic loss. The group member will then be appointed an assessor to determine compensation for past and future loss of income, past and future care requirements, and past and future treatment and other expenses. Any compensation will be paid in several instalments and adjusted based on the aggregate of all group members' compensation entitlements compared to the total amount available for distribution.

On the other hand, the Fast Track Resolution enables a group member to elect a single, standardised lump sum payment of $55,000. The intent of this option is to make compensation available to group members on an expedited basis. The Fast Track resolution

[99] See *Stanford v DePuy International Ltd and Another (No 6)* [2016] FCA 1452 (1 December 2016) [110], [140]-[143].

does not involve an assessment of a group member's actual losses and does not include a component for loss of income or wages.

Even though the group member may receive more compensation from a detailed individual assessment of the merits of their claim, the Fast Track Resolution allows group members to receive compensation faster and removes the need for the assessment process which would involve ongoing interaction with the Administrators, and might also involve the group member attending an appointment with a surgeon or other specialist for the purpose of preparing a report.

More group members have elected the Fast Track Resolution than had been anticipated at the time of seeking settlement approval. To date, approximately 70% of claimants have elected this type of assessment.

23.7 While the Fast Track Resolution was considered by the Federal Court to be appropriate in the circumstances of the DePuy ASR hip implants class action, it would not necessarily be appropriate to employ this mechanism in all settlements involving personal injury claims.

23.8 This indicates that each settlement distribution scheme needs to carefully consider the type of loss, and how best to balance that loss with the need to minimise costs and delays.

Costs of administering settlement distribution schemes

23.9 The settlement distribution costs for the Kilmore and Murrindindi Bushfire class actions were calculated pursuant to the hourly rates in the Settlement Distribution Scheme. The Consultation Paper (at [7.135]) states:

> Justice Forrest has also commented on the legal and administrative costs of administering settlement distribution schemes. He observed that much of the administration work in the Bushfire trials was done by paralegals and the cost of this work was based on the Supreme Court scale. While it was quite proper for paralegals to perform administrative work of this type, Justice Forrest queried whether there is scope to apply a different scale or measure for such costs.

23.10 With great respect to his Honour, the observation that the legal fees were based on the Supreme Court scale is not correct. As was noted above, the costs were in fact calculated pursuant to rates set out in the Settlement Distribution Scheme.

23.11 During the Case Management Conference held in the Kilmore and Murrindindi Bushfire Class Action settlement administrations on 14 November 2016, Mr White, the independent costs expert appointed by Justice Forrest and Justice Dixon gave evidence that Settlement Distribution Scheme contained rates which resulted in the overall administration costs being less than would have been the case if the Supreme Court scale had been applied:

> If you apply a modest loading to the Supreme Court hourly rate, and I am saying in the context of this matter a very modest loading of, say, 20 per cent, that brings the hourly rate for a paralegal under scale to $248 an hour in 2015 and $355.20 an

hour in 2016. The hourly rate that's been charged is $320 and it's a flat rate that's been applied throughout the whole of the administration.

So on any analysis the hourly rate stipulated in the Scheme is less than a reasonable hourly rate which would be allowed under the Supreme Court scale on a taxation of costs. The same considerations can be applied to every other level of file operator taking into account notions of seniority that the Supreme Court scale embodies as well.[100]

23.12 The rates contained in the Settlement Distribution Scheme were approved by the Supreme Court. The settlement administration costs were paid from the interest earned on the settlement.

23.13 An administration of a class action settlement scheme of this size had never been undertaken in Australia. Many of the processes and systems were designed from the ground up to cater for the uniqueness of this administration. These processes and systems sought to balance:

(a) the need to examine and assess each claim individually as required by the Court-approved Settlement Distribution Scheme;

(b) a recognition of the very personal nature of the losses and the ongoing psychological trauma suffered by many of the claimants; and

(c) the need for the assessment process to be completed as efficiently and quickly as possible so as to minimise administration costs and ensure that claimants received compensation as soon as possible.

23.14 Given the high level of interest in settlement administration costs displayed by claimants and media commentators during the settlement administration, the costs associated with the settlement administration warrant examination.

Case study 5: Review of legal and administrative costs associated with the Kilmore & Murrindindi settlement distribution schemes

The Kilmore and Murrindindi settlement distribution schemes combined involved the assessment of 2,330 registered personal injury and dependency claims (**PI**) and 11,653 registered economic loss and property damage claims (**ELPD**). To determine the recovery rate for ELPD and PI claims, each claim needed to be assessed under the Court-approved settlement distribution scheme.

Assessment of PI claims

The assessment of the 2,330 PI claims for the Kilmore and Murrindindi Class Actions took almost two years from the date of the approval of the Kilmore settlement distribution scheme until compensation payments were made. On average personal injury and dependency assessments were processed at a rate of 3.2 assessments per day.

[100] Transcript of proceedings, *Matthews v AusNet Electricity Services Pty Ltd and Rowe v AusNet Electricity Services Pty Ltd* (Supreme Court of Victoria, S CI 2009 4788 and S CI 2012 4538, Forrest and Dixon JJ, 14 November 2016) 43.

The total costs associated with the PI settlement administrations in the Kilmore and Murrindindi Class Actions were $20,973,716, resulting in an average cost per claim of $9,001.

The total costs and cost per claim figures noted above include amounts required to be paid to third parties to complete assessments such as independent assessors, medico legal assessors and medical practitioners. It also includes those costs associated with establishing, conducting and reporting to the Court on the settlement administration which are attributable to PI claimants.

The total compensation paid to PI claimants in the Kilmore Class Action was $159,646,747, with compensation awards ranging from $0 (for those who were found not eligible or to have suffered no compensable losses) and $2,912,528. For those who received compensation the average payment was $107,724.

The total compensation paid to PI claimants in the Murrindindi Class Action was $33,374,942, with compensation awards ranging from $0 (for those who were found not eligible or to have suffered no compensable losses) and $855,946. For those who received compensation the average compensation was $106,290.

Assessment of ELPD claims

The assessment of the 11,653 ELPD claims for the Kilmore and Murrindindi Class Actions took a little over two years from the date of the approval of the Kilmore settlement distribution scheme until compensation payments were sent out. On average ELPD assessments were processed at a rate of 14.1 assessments per day over the period of the ELPD settlement administration.

The total costs associated with the ELPD settlement administrations in the Kilmore and Murrindindi Class Actions were $32,388,464. There were 11,653 ELPD claims assessed as part of these settlement administrations, resulting in an average cost per claim of $2,779.

The total costs and cost per claim figures noted above include amounts required to be paid to third parties to complete assessments such as independent assessors and expert valuation reports. It also includes those costs associated with establishing, conducting and reporting to the Court on the settlement administration which are attributable to ELPD claimants.

The total compensation paid to ELPD claimants in the Kilmore Class Action was $259,432,178 with compensation awards paid to above insurance claimants ranging from $0 (for those who allocated their compensation to another claimant (ie a spouse), who were found not eligible or who were found to have suffered no compensable losses) and $2,074,810.

For those above insurance claimants who received compensation, the average compensation was $37,357. This compensation was additional to any amounts that above insurance claimants had received from their insurers, and no repayment obligations arose in respect of these amounts to their insurer.

The total compensation paid to ELPD claimants in the Murrindindi Class Action was $236,633,198, with compensation awards paid to above insurance claimants ranging from $0 (for those who allocated their compensation to another claimant (i.e. a spouse), who were

found not eligible or who were found to have suffered no compensable losses) and $14,739,935.

For those above insurance claimants who received compensation, the average compensation was $106,450. This compensation was additional to any amounts that above insurance claimants had received from their insurers, and no repayment obligations arose in respect of these amounts to their insurers.

Review of various settlement administration schemes

23.15 We also provide the following examples of additional settlement schemes administered by our firm, and in doing so we note the steps taken to minimise costs and delays.

Case Study 6: Cash Converters NSW settlement administration

In 2015, Maurice Blackburn settled two class actions on behalf of approximately 36,000 Cash Converters customers on low incomes who, it was alleged, were charged exorbitant and unlawful interest rates of between 145% and 633% on personal loans and cash advances. The plaintiff, Julie Gray, a pensioner and grandmother from western Sydney, alleged that Cash Converters avoided an interest rate cap for loans in NSW by having borrowers sign a document electing to repay their loans earlier than 24 months. They were then charged a 'Deferred Establishment Fee' because of the early repayment. The case settled for $20 million (exclusive of costs).

Maurice Blackburn identified that the refunds due to group members would be relatively modest, ranging from $0.02 to $17,000, with the most common payment being $140. The group members in this action were socially disadvantaged and had lower levels of education and literacy than the general population.

Given the group member characteristics and the reasonably modest refund amounts, it was important to establish a cost-effective and efficient administration process so as to avoid the risk that the administrative costs would be disproportionate to the refund payments.

To minimise costs and delays, Maurice Blackburn took a number of steps.

We obtained information from Cash Converters regarding the deferred establishment fees paid by each group member and their last known bank account and contact details. This was a significant efficiency in the settlement administration because it meant that no group member was required to submit any documents to evidence their claims to a refund, which many would not have been capable of doing and would have increased costs by requiring Maurice Blackburn to check and verify such documents.

We used paralegal staff to carry out the majority of the settlement administration work rather than legal staff with higher charge out rates.

We made payments to group members using mass electronic funds transfers to the last known bank accounts of group members, many of which had been updated by group members following the distribution of the Settlement Notice.

In total, Maurice Blackburn's administration costs were approximately $1.6 million, resulting in an average cost per claim of approximately $45.

As a result of the efficiencies implemented above, group members recovered between 66.5% and 78.7% of their losses. This was a significantly positive outcome having regard to the large size of the group involved, the socio-economic disadvantage experienced by the majority of group members, and the relatively small amounts of compensation payable to each group member.

Case Study 7: Leighton settlement administration

In 2014, Maurice Blackburn settled the Leighton class action for approximately $70 million on behalf of more than 6,000 shareholders of Leighton Holdings Limited (now known as CIMIC Group Ltd) to recover losses suffered as a result of alleged breaches of continuous disclosure obligations and misleading or deceptive conduct between 2010 and 2011.

In order to minimise costs and delays, Maurice Blackburn took a number of steps.

We implemented an online platform to gather trade data and other claim information from group members and thereby reducing the costs of data entry.

We targeted our requests for clarification and verification of claim details to group members whose claims were problematic or unusual rather than imposing stringent verification requirements on all group members.

We utilised paralegal staff to carry out the majority of the settlement administration work rather than legal staff with higher charge out rates.

As a result of the efficient and cost-effective assessment process, Maurice Blackburn's administrative costs were approximately $560,000, resulting in an average cost per a claim of approximately $84.

Case Study 8: Rivercity settlement administration

In 2016, Maurice Blackburn settled the RiverCity class action for $121 million on behalf of 1,031 group members who invested in Brisbane's Clem 7 road tunnel. The claim alleged that investors suffered loss as a result of misleading traffic forecasts.

We conducted the distribution electronically to the extent that this was possible. The reasons for that decision were the anticipated efficiency benefits given the large number of group members and their characteristics (being spread around Australia, with various levels of sophistication).

We only sent one notice to group members, which included trade data verification as well as a provisional assessment. This had the effect of minimising double-handing of information and avoiding costs of sending multiple notices to group members.

The assessment process was conducted efficiently, with all payments made to group members within three months of settlement approval. Maurice Blackburn's administrative costs were approximately $181,000, resulting in an average cost per claim of approximately $175.

Court supervision of settlement distribution schemes

23.16 The intensive approach undertaken by the Court in relation to the settlement of the Kilmore and Murrindindi class actions would not be appropriate in every class action. This is largely due to the costs associated with preparation for case management conferences; there may be smaller settlements, where the costs of regular case managements might unreasonably deplete the settlement sum. In addition, the Kilmore and Murrindindi settlement administrations took approximately two years to complete, whereas other types of settlement administrations (particularly in shareholder or investor class actions such as those described in the case studies above) will be completed within a matter of months, and it therefore may not be practicable or necessary for the Court to supervise the settlement administrations on a regular basis.

23.17 We note that the Supreme Court's Practice Notice does not specify how Court supervision should be carried out, including as to the frequency of reports to the Court. In our submission, this issue should continue to be left to the discretion of the supervising judge. The level of supervision will depend on a number of factors including:

(a) the size of the settlement sum;

(b) the types of losses claimed and the processes for assessing compensation entitlements;

(c) the timeframe required to assess individual claims;

(d) the complexity of the settlement distribution scheme; and

(e) the need (or otherwise) for close court scrutiny.

24. How could Court-approved notice for opt out and settlement be made clearer and more comprehensible for class members?

24.1 We note our submissions above in response to question 8 and make the following further submissions specifically in relation to opt out and settlement notices.

24.2 In our experience, the courts have developed flexible and effective methods for providing notice group members. Some of these are referred to in paragraphs 8.4 to 8.5 above.

24.3 For example:

(a) in the Allco class action, Wigney J recently made orders allowing access to the defendant's share register for the purpose of notifying potential group members about the proposed settlement. This resulted in more than 5,000 additional group members registering to participate in the settlement;

(b) in the Kilmore class action, Forrest J made orders for notices to be placed in legal practices, medical offices and local councils. It was later identified that this particular strategy was not as effective as had been hoped, so similar orders were not made for the Murrindindi proceeding;

(c) in the Volkswagen class action, Foster J recently made orders that a notice be placed on the defendant's Facebook page with the following post:

> Class actions have been commenced in the Federal Court of Australia against Volkswagen, Audi and Skoda in relation to the diesel emissions issue. Important information for vehicle owners about the class actions, including the right to opt out of those proceedings, is now available on the Federal Court of Australia website at www.fedcourt.gov.au.

24.4 Although we have sought to ensure that Court-approved notices are expressed in plain English and are comprehensible by group members, as we acknowledge in paragraph 8.8 there is still scope for these notices to be misunderstood. The drafting of notices is a difficult task which seeks to balance ease of comprehension against the need to explain complex legal and factual issues. In our view it is not possible to provide generalised guidelines about how to aid or ensure comprehension of notices in all types of class actions. Litigants and the courts will need to continue to strive to improve the clarity and comprehensibility of notices on a case by case basis, taking into account the circumstances of the case in question.

24.5 An example of a case where the parties adapted the settlement notice in order to aid comprehension of the settlement by group members is the recent class action on behalf of workers with intellectual disabilities. Maurice Blackburn in conjunction with the AED Legal Centre conducted a class action against the Commonwealth that alleged unlawful discrimination against workers with intellectual disabilities who work in Australian Disability Enterprises. The parties, in conjunction with the Federal Court, prepared a simple English version of the notice which included pictures to aid comprehension of the class.[101]

25. Are there other ways the process for settlement approval and distribution could be improved?

Technology in settlement administration

25.1 Over the last five years we have increasingly made use of technology for the purpose of implementing cost-effective and efficient settlement administration processes.

25.2 Examples of some of the tools that we have recently developed and deployed in our work in the Black Saturday bushfire settlement administrations are as follows:

[101] 'Proposed Settlement Notice', available at <http://www.fedcourt.gov.au/__data/assets/pdf_file/0008/31859/vid13672013-easy-english-translation.pdf >.

(a) An upload tool to automatically upload data to our online database from thousands of assessments completed by external assessors rather than having this data input manually. This data capture process was necessary to distribute compensation on a pro rata basis to claimants. The upload tool avoided manual processing, which ensured data integrity, increased the speed of processing of assessments and reduced settlement administration costs.

(b) A data verification tool to ensure that claims had been assessed correctly by external assessors and matched our records. This tool saved significant time and costs which would otherwise have been incurred if we had needed to manually review assessments to ensure that the claims had been correctly assessed and cross-referenced Maurice Blackburn's records.

(c) Claims books were prepared electronically and managed via an online platform, preventing the costs and time delays associated with the preparation of hard copy files. In preparing these claim books, we requested insurance files electronically and in bulk. Insurers were provided with access to the online platform and required to upload the insurance file to the relevant folder directly rather than providing the file to us. This prevented double handling of insurance files, reducing costs and increasing the speed within which claims could be allocated for assessment.

(d) Automated SMS reminders were implemented to remind group member of their scheduled appointment with an assessor to assess their personal injury claim.

25.3 In other settlement administrations that we have carried out, the following technological tools were adopted:

(a) Requiring claimants to submit data about their claims online. All class action registration processes are now online, which removes the risk of misplacing hardcopy materials and increases the speed and accuracy of claim data in preparation for the settlement administration process. For example, for the Volkswagen class action, we established an online portal for claimants to login, submit details about their claim and even update their contact details.

(b) For the DePuy Hips class action, an online data portal has been created for joint settlement administrators to access a centralised data repository. This has reduced the double handing of data between Maurice Blackburn and the other law firm appointed as a joint administrator.

(c) Where appropriate, payment details for compensation have been collected online. Group members then login and submit their bank details;

(d) A bulk email tool has been developed to simplify the process for sending out bulk communications to group members.

(e) Recently, we have included a feature in one of our new class actions where claimants are able to upload documents electronically along with their registration. This reduces the need for manual filing of claimant documents.

Common fund orders

25.4 One important mechanism for reducing the cost of litigation funding is a common fund order. Common fund orders are desirable because they have the effect of spreading the cost of the litigation amongst a broader group. This is done with the protective oversight of the court, which may order a different commission than that specified in the funding agreement. The court is therefore able to ensure that common fund orders are implemented in a way which is fair and reasonable given that a larger group of claimants are now contributing to the funder's recovery.

25.5 Combined with the ability of the court to vary the funding fee, common fund orders have a significant economic impact by increasing competition between funders and spreading funding costs amongst the broader group. The use of common fund orders, coupled with oversight of funding commissions by courts, avoids the disadvantages associated with a prescriptive regulatory approach to litigation funding fees. A 'one size fits all' prescriptive solution would inevitably fail to account for the diverse situations in which class action litigants may require third party financing; and would risk restricting access to funding and therefore justice.

CHAPTER 8: CONTINGENCY FEES

26. Would lifting the ban on contingency fees mitigate the issues presented by the practice of litigation funding?

26.1 The introduction of contingency fees for commercial litigation and class actions will:

(a) increase access to justice;

(b) provide greater transparency regarding the price of legal services;

(c) significantly improve returns to group members in class actions;

(d) provide further competition for litigation funders and thereby placing downward pressure on litigation funding commissions.

26.2 The current ban on contingency fees is illogical and not in the best interests of clients or access to justice. In Victoria:

(a) lawyers' fees must be 'proportionate'[102] but cannot be a proportion of the amount in dispute;[103]

[102] *Legal Profession Uniform Law* s 172.
[103] *Legal Profession Uniform Law* s 183.

(b) litigation funders who owe no ethical or fiduciary duties to their clients can charge a percentage fee but litigation lawyers who owe such duties cannot;

(c) lawyers in non-litigious matters are permitted in certain circumstances to charge fees by reference to the value of property involved;[104]

(d) lawyers in Canada, the UK and the US can apparently act ethically and consistently with their professional obligations to clients and charge contingency fees, while somehow Australian lawyers will be irrevocably ethically challenged by such a system;

(e) a lawyer may have an 'interest' in the outcome of litigation running to the tens of millions of dollars under a conditional fee agreement, but is not permitted to have an 'interest' in the outcome of litigation expressed as a percentage of a few thousand dollars.

26.3 Litigation funding improves access to justice but it is inherently more likely to lead to more expensive outcomes and to provide that access to justice in a narrower range of cases than would contingency fees. The introduction of contingency fees will improve and increase access to justice and should reduce costs to legal consumers.

26.4 Both the Productivity Commission and the Victorian Law Reform Commission have previously recommended the introduction of contingency fees. Recently in the Federal Court they were described as being 'pro-competitive' with litigation funding.[105]

26.5 Empirical evidence suggests that the combined cost to the consumer of a lawyer's fees and litigation funder's commission and charges is greater than an appropriately structured contingency fee arrangement. There should be no real surprise in this: in a litigation funding arrangement each of the litigation funder and the private lawyer seek to make a return whereas in the contingency fee arrangement only the lawyer has to make an acceptable return.

26.6 The table below shows the total distribution breakdown of settlement sums from the fourteen funded class action cases Maurice Blackburn has settled since 2006 and compares the distribution which would have occurred if lawyers had instead been permitted to charge a 25% contingency fee.[106] As is evident consumers would have received more than $134 million more under a 25% contingency fee arrangement.

[104] See *Legal Profession Uniform Law* s 183(1); Cf *Legal Profession Act 2004* (Vic) s 3.4.29(1) as in force before its amendment by *Legal Profession Amendment Act 2007* (Vic) s 52.
[105] *Blairgowrie v Allco (No 3)* (2017) 343 ALR 476 [142].
[106] None of the 10 cases involved claims for personal injury and so the amount payable on a 25% or 30% contingency fee does not have to be adjusted for matters such as Medicare payback amounts.

Actual		**25% contingency fee**	
Settlement sums	$926.0m	Settlement sums	$926.0m
Funding Charges and Legal Costs	$366.0m	Contingency fee	$195.5m
Paid to Claimants	$559.8m	Paid to Claimants	$694.5m
% to Claimants	60%	% to Claimants	75%
Funder Profit	$238.5m	**Benefit to Claimants**	**$134.7m**

26.7 IMF Bentham's 2017 Annual Report (at page 2) provides further evidence of the overall costs of litigation funding commissions and legal fees. It notes that claimants have had returned to them $1.3 billion of $2.1 billion recovered in IMF Bentham funded cases; that is, approximately 62% of settlement value has gone to claimants whilst approximately 38% has been paid in legal fees and funding charges. It should be noted that although the Maurice Blackburn and IMF Bentham data overlap, they are by no means coextensive.

26.8 There are reasons to believe that the combined rates of funding commissions and legal fees may be higher when measured across the full spectrum of lawyers and funders. Each of Maurice Blackburn and IMF Bentham are frequent actors in their respective roles and they have tended to act in the larger cases where there are economies of scale. Generally in smaller settlements the proportion that costs and funding charges represent is higher. In other words an overall picture of the percentage of settlements returned to claimants under the existing model of third party funder and lawyer is likely to be somewhat worse than the 60% to 63% implied by the Maurice Blackburn and IMF Bentham data.

26.9 The conclusion which follows is that provided a contingency fee arrangement, on average, results in a return to the client of greater than 63% of recoveries (ie the contingency fee is less than 37%), clients will be better off than under existing third party litigation funding arrangements.

26.10 Cases which are not currently economic to run under a model involving both a litigation funder and lawyer may become so under a model where contingency fees are permitted.

26.11 A practical constraint on funding arises because third party litigation funders will require a 'multiple of funds returned on funds invested. Generally third party litigation funders will require at least a 3 times multiple before they will fund a case, though some overseas funders say that they require a multiple of ten times in a prospective action before they will approve funding; ie the prospective commission on the total amount claimed is ten times the proposed budget for legal fees.

26.12 These constraints restrict the availability of funding. There will be cases which do not obtain third party litigation funding which would be economic and appropriate to run on a contingency fee basis.

26.13 One of the significant policy rationales underpinning the class actions regime is that class actions permit the aggregation of small claims which may not be economic to pursue on an individual basis and thus provide access to justice in circumstances where it would otherwise simply not be available. At present this goal is often not realised with 'smaller class actions because the economics of funded class action litigation tend against the availability of litigation funding for claims of less than $50 million, and in practice it is almost impossible to secure litigation funding for a class action involving claims of less than $30 million.

26.14 For example, suppose a claim in a class action for $50 million in damages and assume that the likely settlement range is calculated as being $35 million all in. If the proposed legal fees budget is $7 million (which is not unrealistic in a major piece of litigation going all the way to trial), then there is no sensible way the funder can obtain a 3 times multiple and so the case will not be funded. Even if costs are lower (say $5 million), a 3 times multiple will see combined costs and commission substantially exceeding 50% of the putative settlement sum, making it unlikely the case will be funded. These factors are exacerbated for smaller claim values like $30 million, making funding for class actions of that scale very scarce.

26.15 However, these kinds of cases would be economic if a lawyer was acting on a contingent basis and charging 25% or 30%.

26.16 Absent third party litigation funding, the only real option for running class actions is for the plaintiff to expose themselves to the risk of adverse costs orders running into the millions of dollars, in other words run the risk of losing all their assets and being made bankrupt. Some plaintiffs will run this risk. Most will not.

26.17 The result is that without contingency fee arrangements, a range of worthy class action cases simply do not proceed. In these cases the capacity to charge contingency fees will provide a significant improvement in access to justice and allow the class actions regime to meet more adequately one of its critical underpinning policy rationales. This is no mere theoretical possibility: Maurice Blackburn has over the course of the last several years investigated a number of potential class actions which were otherwise meritorious but which would not have obtained funding and where the case could not proceed by way of conditional fee arrangements because a lead plaintiff willing to expose themselves to the risk of adverse costs was not found. In making this observation, we accept that the introduction of contingency fees would be accompanied by a requirement that lawyers charging contingency fees may also be required, if ordered by a court, to provide security for the defendant's costs.

26.18 In relation to other forms of civil litigation the same problems can arise, just at a smaller scale. Consider a case for a small business claiming $2 million with a litigation budget of $250,000. If the small business cannot afford to pay the legal

fees (and many could not) then no matter how meritorious the claim, it is unlikely under current legislative restrictions that it will be run: litigation funding is unlikely to be available (and if it is, it will likely see more than half the recovered sum paid in legal fees and commission) and experience suggests a case like this is unlikely to be run on a conditional fee basis. However, the case could be run on a 25% or 30% contingency fee. Again this is no mere theoretical possibility: Maurice Blackburn's litigation funding business, Claims Funding Australia Pty Ltd which funds other law firms in general commercial litigation routinely sees cases which are uneconomic to fund or would be run more favourably to clients under a contingency fee basis.

26.19 The availability of contingency fees in matters *other than* class actions might have also avoided the unfortunate outcome in the claim by trustees for former employees of Huon Corporation Ltd's 'Empire Rubber' and 'Nylex Frankston' and 'Mills Elastomers' businesses.[107] There was understandable community concern[108] regarding the ultimate outcome in that case, where the quantum of the litigation funder's fees and legal costs meant that Empire Rubber employees received no money despite the trustees succeeding in their claim against the insurer.

27. If the ban on contingency fees were lifted, what measures should be put in place to ensure:

(a) a wide variety of cases are funded by contingency fee arrangements, not merely those that present the highest potential return

(b) clients face lower risks and cost burdens than they do now in proceedings funded by litigation funders

(c) clients' interests are not subordinated to commercial interests

(d) other issues raised by the involvement of litigation funders in proceedings are mitigated?

27.1 Our submissions above demonstrate that the introduction of contingency fees is itself likely to ensure a wider range of cases receive funding compared with reliance on third party litigation funding alone. By creating the economic conditions where lawyers have a greater incentive to take on cases and allowing a new form of private funding of litigation, the removal of the ban on contingency fees will promote market competition placing downward pressure on overall costs of litigation and create greater access to justice by ensuring that cases which currently would not receive third party litigation funding are provided with an opportunity to proceed. It is not clear that other additional measures are needed to ensure this outcome.

27.2 In our submission the best course would be to remove the ban on contingency fees and to review the effect of that removal in three to five years. If the worst fears of

[107] *Fitzgerald and Another v CBL Insurance Ltd* [2014] VSC 493 (2 October 2014); *Fitzgerald and Another v CBL Insurance Ltd (No 2)* [2015] VSC 176 (1 May 2015).

[108] See <http://www.bendigoadvertiser.com.au/story/3953132/empire-rubber-saga-settles-no-money-for-workers/>.

opponents of contingency fees are realised – for example there has been an outbreak of unmeritorious, speculative litigation, or there is evidence of widespread overcharging and no improvements in access to justice – then the current position can be restored.

27.3 It is also important to note that there will extensive scrutiny of the effect of contingency fees through a number of exiting mechanisms including:

(a) the Victorian Legal Services Commission;

(b) the LIV and, assuming barristers were permitted by the Bar Rules to charge them, the Bar Council;

(c) the courts in their general supervisory jurisdiction over costs; and

(d) in class actions through the requirement to obtain court approval for legal costs.

27.4 In these circumstances it is not clear that other further protections are necessary to ensure the objectives in (a) to (d) above are met, but if it were considered to be necessary, we would support:

(a) consideration to capping the percentage for the contingency fee. As the empirical evidence above demonstrates a cap of 30% or 35% would produce better outcomes on average than the combined effect of current third part litigation funding arrangements and legal fees;

(b) a requirement that those charging contingency fees provide security for costs if a Court orders it;

(c) levying 1% of all contingency fees for the creation of a fund to promote access to justice;

(d) if necessary, providing additional resources to the LSC to monitor the introduction of contingency fees.

28. Are there any other ways to improve access to justice through funding arrangements?

28.1 Maurice Blackburn generally supports innovation in the provision of funding to increase access to justice.

28.2 We support a public fund to provide support to class action litigants such as exists in Ontario and was recommended by the Australian Law Reform Commission and the Victorian Law Reform Commission. However, Maurice Blackburn recognise that with existing constraints on the provision of government funding for legal aid and community legal centres those areas may take priority in the allocation of additional money, particularly when the introduction of contingency fees provides an effective private sector solution in enabling access to justice through class actions.

28.3 Further innovations like crowd funding deserve consideration, but are unlikely to make a substantive impact on access to justice outside of the area of public benefit litigation.

Maurice Blackburn Lawyers
22 September 2017