SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION ON CLASS ACTIONS AND LITIGATION FUNDING

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I. ACCESS TO JUSTICE AND JUDICIAL ECONOMY

> We live in an age of mass production of goods and services. The potential for loss or damage which can be caused by a single supplier of goods or services on a mass scale is enormous.
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> However, while the overall damage may be great, the amount of damage incurred by an individual may be relatively small in proportion to the legal fees and court costs.
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> In the worst cases, litigants can face ruin yet lack the means to bring proceedings to redress the wrong they have suffered. The class actions procedure addresses some of the imbalance between ordinary litigants and large and powerful corporate litigants.[1]

These comments were made by then Victorian Attorney-General in the Second Reading Speech with respect to the Bill that contained the Victorian group proceeding/class action/Part 4A regime. This represents the most important policy goal of class action regimes, universally known as the access to justice goal. Contemporary class action regimes are also intended to improve judicial economy by eliminating or reducing multiple legal proceedings with respect to essentially the same legal dispute.

Which of these two desirable scenarios are attained (or attainable) with respect to a given legal dispute depends on the types of legal claims possessed by the claimants in question. Where all or most of the persons with a legal grievance, caused by the same or similar conduct, have individually non-recoverable claims, then the class action device can facilitate access to justice. Conversely, if a majority of the claims are individually recoverable, then judicial economy is more likely to be secured. The term individually non-recoverable claims encompasses claims which, whilst of significant monetary value, would not justify the costs that would be incurred to advance these claims through legal proceedings. Individually recoverable claims are legal claims whose monetary value is so significant that they would warrant the filing of legal proceedings regardless of the availability of a class action regime; that is, the filing of an "orthodox" legal proceeding would constitute a rational step.[2]

II. WHAT IS ULTIMATELY IN THE INTERESTS OF GROUP MEMBERS?

I strongly believe that in considering what reform, if any, is desirable with respect to Part 4A it is crucial not to lose sight of these important benefits that this regime is intended to secure; especially in light of the very limited use that has been made of this regime to date and the reform proposals that have been advanced, over the last 12 months, by several commentators and stakeholders. Many of these proposals are either intended to reduce the availability of class actions or will most likely have this effect. And they are frequently justified on the basis that, if implemented, these changes will enhance the interests of absent group members. In considering what will, ultimately, be of benefit to group members in class actions, I respectfully submit that the following philosophy - adopted by the Australian Law Reform

[1] Victoria, *Parliamentary Debates*, Legislative Assembly, 31 October 2000, p 1250.
[2] See V Morabito, "Class Actions - the Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)" (1994) 19 *Melbourne University Law Review* 615, 627 and the references cited therein.

Commission ("ALRC") with respect to the desirability or otherwise of a certification regime - should be applied with respect to *all the reform proposals* that will likely *result in a reduced employment* of the Part 4A regime:

> In individually non-recoverable cases, the right to bring an individual proceeding is of no real value and a group member's interests are not usually prejudiced by a grouped proceeding. Failure to certify a proceeding on the basis that the interests of the class are not being adequately protected is therefore an empty gesture. The only chance group members have in these cases of securing legal redress for wrongful injury or loss is through a class action.[3]

This approach possesses the important virtue of reminding us that reducing the availability of a class action regime - in certain circumstances or as a result of the implementation of measures that are said to provide a greater level of protection of the interests of group members - will have the *boomerang* effect of harming the very people that this reform seeks to protect if a class action proceeding constitutes the only procedural tool that similarly-situated claimants realistically have at their disposal to secure any form of legal redress. I will develop this line of reasoning further in Part VIII below.

III. INDIVIDUALLY RECOVERABLE CLAIMS – DO THEY STILL EXIST FOR MOST AUSTRALIANS?

It is also important to note that individually recoverable claims are becoming increasingly rare, as a result of the increasing costs of litigation. Evidence of the fact that for most ordinary Australians there is no such thing as an individually recoverable claim, notwithstanding the fact that the claim in question may be of significant monetary value, is furnished by the Kilmore East bushfire class action. The trial lasted over 16 months but the trial would have lasted almost as long if Mrs Matthews had filed this proceeding solely on her behalf. This is because in many class actions, in considering the common issues raised by the individual claims of the group members, focus will usually be placed entirely or predominantly on the individual claims of the lead plaintiffs.[4]

Thus, even for those victims of the Kilmore East bushfire whose losses exceeded one million dollars it is probably not correct to describe their claims as individually recoverable. And so far I have put to one side the significant non-economic barriers faced by many persons with a legal grievance in seeking access to the legal system.[5] Admittedly, the Kilmore East bushfire trial is at the very end of the spectrum, as far as complexity and length of trials is concerned. But it is difficult to identify, in the last ten years or so, trials where the costs incurred by the lead plaintiffs did not exceed at least $1 million.[6]

IV. CONSUMPTION OF FINITE JUDICIAL RESOURCES

This brings me to the next important point. As mentioned by the VLRC in its Consultation Paper, Chief Justice Allsop of the Federal Court has drawn attention, speaking extra-curially,

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[3] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988), para 147.

[4] The trial in the Kilmore East class action was "conducted as a full hearing of all issues raised by the plaintiff's individual claim on the basis that her claim raised most of the 'common questions' relevant to the group members. The hearing … also extended to consideration of certain limited issues raised by the claims of four 'sample' group members": *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, para 29 (per Osborn JA).

[5] See V Morabito, "Class Actions - the Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)" (1994) 19 *Melbourne University Law Review* 615, 631-632.

[6] I am referring to the costs incurred by lead plaintiffs in class actions because my empirical research over the last ten years has concentrated on class actions. But I think it is safe to say that a similar conclusion may also be made with respect to most orthodox litigation.

to the need for class actions to have some social utility in light of the significant public resources that these proceedings consume. Many of the advocates for significant reform of the class action and litigation funding industry have placed some reliance on these observations.

It is important to make several points with respect to the Chief Justice's observations. Because access to justice is the main goal of modern class action regimes a greater consumption of the court system's resources is an inevitable outcome of these regimes achieving one of the dimensions of access to justice. As explained by a Canadian court, "the goal of access to justice addresses the right of a class member to have his or her claim heard. It is a procedural right to access to the justice system".[7] Given that most of the claims that have been litigated pursuant to the class action device would not have reached the court system, in the absence of such a device, then obviously an increase in the volume of litigation follows.

The most fundamental characteristic of a class action proceeding - group members who do not opt are bound by its outcome - means that a number of costly measures, not found in orthodox litigation, are required to protect the interests of group members. But Part 4A confers wide discretion on trial judges to require the implementation of the least costly measure, or the non-implementation of the safeguard in question, where such a strategy does not adversely affect the interests of group members.[8]

I have seen calls for various restrictions on the availability of class actions where some reliance was placed on the public costs incurred, as a result of long trials in these proceedings. But, as noted above, in many class action trials the class action nature of the proceeding has not resulted in a longer trial. The crucial difference that is made by the class action device is that the aggregation of the claims of all members of the group makes litigation (including a long trial) rational and, as a result, may attract funding whether through no win - no fee agreements or through the involvement of litigation funders. But to use this fact to advocate the erection of barriers to the use of this procedural device is tantamount to the rejection of the very essence of class actions. As explained in Part XI below, it is equally inappropriate to rely on the public resources consumed - in those class actions which produce no tangible benefits for group members following an unsuccessful and long trial - to justify the introduction of a certification device.

V. COMPROMISES INHERENT IN THE CLASS ACTION DEVICE

It is also desirable to bear in mind the significant compromises that are inherent in any form of representational litigation, including modern class action regimes; a fact which is frequently forgotten by those who call for the unavailability of the class action device whenever a less than perfect or ideal scenario is faced. As explained by Lord Woolf in 1996, "the effective and economic handling of group actions necessarily requires a diminution, compromise or adjustment of the rights of individual litigants for the greater good of the action as a whole". [9]

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[7] *1176560 Ontario Limited v The Great Atlantic & Pacific Company of Canada Limited* (2002) 62 OR (3d) 535, para 56 (per Winkler J). See also *Kelly v Willmott Forests Ltd (in Liquidation)* [2012] FCA 1446, para 129 (per Murphy J) ("[it is important not to] unfairly deprive people of their fundamental right of access to the courts through the Part IVA mechanism"); *Fostif Pty Ltd v Campbells Cash & Carry Ltd* (2006) 229 CLR 386, para 144 (per Kirby J); *Marks v GIO Australia Holdings Limited* [1996] FCA 1465, para 60 (per Einfeld J); and *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317, para 119 (per Finkelstein J).

[8] See, for instance, s 33X(2) and s 33X(4) of Part 4A.

[9] Lord Woolf,*Access to Justice Inquiry: Issues Paper (Multi-Party Actions)* (1996), para 2.

And in rejecting a constitutional challenge against the federal class action regime in 2000 the Full Federal Court of Australia drew attention to the fact that the class action procedure:

> was designed to vindicate rights that otherwise could not be pursued, or could be pursued only with great inconvenience and expense. It recognised, at least implicitly, that there is a critical difference between proceedings seeking relief against a person and those seeking to vindicate rights he or she holds in common with others ... The price of providing a mechanism for the vindication of rights held in common with others may be departure to some extent from the procedure ordinarily applicable in litigation *inter partes.*[10]

VI. INSTANCES OF ABUSE OF THE VICTORIAN CLASS ACTION REGIME?

In paragraph 1.12 of the VLRC's Consultation Paper reference is made to the fact that progress in resolving a class action may be seen as too slow and that the outcome of a class action may be seen as inadequate or unfair. Four examples are then provided of this state of affairs. It is telling that in the first three instances, the "controversy" was generated solely by the media whilst the last of the four examples *did not concern a class action.* The second and third examples relate to various aspects of the settlements of some of the Part 4A proceedings brought for the benefit of the victims of the 2009 Black Saturday bushfires. I will deal with the approval of settlements in Part 4A proceedings and the subsequent distribution of the settlement proceeds later in my submission.

The first instance of controversy surrounding Victorian class actions was described as follows in para 1.12 of the Consultation Paper:

> payment of about $3 million of a $23.5 million settlement to thousands of investors in failed plantations group Great Southern, the remainder being used to pay legal fees.

The $20 million in question was used *to reimburse* those group members who had already paid the solicitors on a "pay-as-you-go" basis throughout the litigation. As subsequently explained by Justice Murphy of the Federal Court, with respect to a similar settlement scheme executed in four other investor class actions filed by the same law firm, it is only fair that these contributing group members be reimbursed given that without their contributions there would have been no class actions in the first place[11] and the proceedings would have been subsequently dismissed for a failure to provide the ordered security for costs.[12]

Criticism of the settlement agreement executed in the Great Southern class actions would have been amply justified if: (a) these class actions had been run *on a no win - no fee basis* and (b) the law firm running these 16 class actions had executed a settlement agreement which allowed it *to be reimbursed for all of its costs and fees* whilst group members received only a small proportion of their losses. But, as noted above, the solicitors *had already been paid* throughout the course of the litigation.

The only criticism that may, respectfully, be made of Justice Croft in the way that he dealt with the settlement of the Great Southern class actions, is that his Honour held that - in light of the fact that these legal fees of approximately $20 million had already been paid by some of the group members - there was no need for a judicial assessment of the reasonableness of these fees.[13] But then again, Justice Murphy undertook precisely that task in the four federal class actions mentioned above, with the assistance of a contradictor, and concluded that the

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[10] *Femcare Ltd v Bright* (2000) 172 ALR 713, para 65.
[11] See *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323, para 85 (per Murphy J).
[12] Ibid para 89.
[13] *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 516, para 137 (per Croft J).

fees and disbursements that had been paid by the relevant group members during the course of these proceedings were reasonable.[14]

For the sake of completeness, I should add that I am not in favour of funding models, in class actions not supported by litigation funders, pursuant to which the risk of an unsuccessful outcome is assumed, not by the solicitors for the lead plaintiffs acting on a no win - no fee basis, but instead by the group members pursuant to a pay-as-you-go model. But there is nothing illegal or inappropriate about such arrangements.

VII. BENEFITS RECEIVED BY GROUP MEMBERS IN VICTORIAN CLASS ACTIONS

As noted in Part IV above, one dimension of the access to justice goal of class action regimes is simply that of enabling similarly-situated group members to secure access to the courts. There is an obvious example of this aspect of access to justice in Part 4A litigation. The Part 4A proceeding in question was filed in November 2012 on behalf of 88 holders of abalone fishery access licences who suffered losses as a result of an outbreak of a disease in wild abalone populations in the eastern and central zones of the Victorian abalone fishery in 2006. As noted later in this submission, the settlement agreements that were approved by the Court did not result in any monetary compensation being received by them. But thanks to the class action, they were able to have their grievances considered by the Court during a trial that ran for 19 days.[15]

Once they secured this access to the court, what tangible benefits did the group members receive from the class actions brought on their behalves? An example of a favourable ruling for group members in a Part 4A proceeding is furnished by *McEachern v Broad*; one of the first proceedings brought pursuant to this regime. The group members were holders of rock lobster fishery access licenses issued by the Minister for Energy and Resources and Ports with respect to either the western or eastern zones of the Victorian rock lobster fishery.[16] They successfully challenged the validity of certain quota orders issued by the Minister for these zones.[17]

But, of course, most of the legal redress secured for group members in Part 4A litigation has come from settlement agreements. Before considering the benefits stemming from settlements for group members, it is important to also draw attention to monetary compensation received by Part 4A claimants from settling their individual claims directly with the defendants; settlement offers that may not have been made in the absence of the Part 4A litigation.[18]

As noted by the VLRC in the Consultation Paper, approximately two out of every three resolved Part 4A proceedings have been settled. None of the other local class action jurisdictions can match this settlement rate. And the country's two largest ever class action settlements have been secured in two Part 4A proceedings, brought on behalf of some of the victims of the 2009 Black Saturday bushfires.

Even more significant is the fact that monetary compensation equal to $1,037,086,043 has been received by 28,312 group members from settled Part 4A proceedings, providing an average payment per group member of $36,630. Given that I was provided with this data with

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[14] *Kelly v Willmott Forests Ltd (in Liquidation) (No 5)* [2017] FCA 689.
[15] See *Regent Holdings Pty Ltd v State of Victoria* [2013] VSC 601.
[16] *McEachern v Broad* [2001] VSC 526, para 1 (per Habersberger J).
[17] *McEachern v Minister for Energy and Resources, and Ports* [2001] VSC 506.
[18] See, for instance, *Tasfast Air Freight Pty Ltd v Mobil Oil Australia Ltd* [2002] VSC 457, para 3 (per Bongiorno J) ("most, if not all group members, have now claimed, and Mobil has already paid something in the order of $25 million in compensation").

respect to many (but not all) judicially-approved settlement agreements in Victorian class actions, the figures in question necessarily underestimate the overall number of group members who have received monetary compensation from settled Part 4A cases and the overall value of this compensation.

In 45 per cent of the settled class actions in question the average compensation per group member was $50,000 or more and in 20.8 per cent of the settled class actions in question the average compensation per group member was equal to $100,000 or more.

VIII. MY APPROACH TOWARDS REFORM OF VICTORIA'S CLASS ACTION REGIME

The information provided in Part VII above - together with the discussion with respect to: (a) the increasing prevalence of individually non-recoverable claims; and (b) the harmful effect on group members of measures that prevent the use of the class action regime, in the name of protecting their interests, when such measures deprive them of their only realistic chance of seeking legal redress - invariably lead to the crucial conclusion set out below.

Restrictions should not be placed on the employment of the Part 4A regime in the absence of: (a) compelling empirical evidence that significant problems exist with particular dimensions of the practical operation of this regime; and (b) strong evidence that the suggested solutions are likely to address the identified problems without at the same time creating unfair, unjust or otherwise unacceptable scenarios.

In the remainder of my submission I will be applying these two criteria when judging those reform proposals that are likely to restrict the availability of the Part 4A regime; whether generally, with respect to particular claimants or in particular circumstances. I will employ a less stringent approach when assessing reform proposals that are not likely to produce these undesirable outcomes.

The desirability of this approach or conceptual framework, towards reform of the Victorian class action regime, is confirmed by the very small number of Part 4A proceedings filed in recent years; the involvement in Part 4A proceedings of a very small number of litigation funders; and the involvement in Part 4A proceedings of a decreasing number of plaintiff law firms in recent years. These three aspects of Victoria's class action landscape are considered below.

A. Part 4A proceedings filed over the last five years

Below is data with respect to the number of Part 4A actions filed in the period from 11 November 2012 to 10 November 2017:

- 11 November 2012 - 10 November 2013 = 4;
- 11 November 2013 - 10 November 2014 = 6;
- 11 November 2014 - 10 November 2015 = 12;
- 11 November 2015 - 10 November 2016 = 2; and
- 11 November 2016 - 10 November 2017 = 6.

These numbers do not suggest, on their own, the need for measures that will make it more difficult for similarly-situated claimants to avail themselves of this regime. On the contrary, they suggest the need *to explore why there has been such limited employment of the Part 4A regime.*

B. Plaintiff law firms

A total of 28 law firms have represented class representatives in the 85 Part 4A proceedings that, to my knowledge, have been filed on or before 10 November 2017. Sixteen of these law firms were involved in only one Part 4A proceeding each. And 70 or 82.3% of all Part 4A proceedings saw the involvement of only one or more of the following: Mark Elliott,[19] Maurice Blackburn, Slater & Gordon, Macpherson and Kelley and Maddens Lawyers.

And over the last five years only two of these lawyers continued to be extensively involved in Victorian class actions. In fact, twenty (or 66%) of the 30 Part 4A proceedings filed during the period from 11 November 2012 to 10 November 2017 were supported or run by either Maddens Lawyers or Mark Elliott.[20] During this five-year period, only two Part 4A proceedings were filed by Slater & Gordon; one by Maurice Blackburn; and none by Macpherson and Kelley. The remaining seven Part 4A proceedings (23.3%) were run by a total of seven law firms.

These figures do not suggest the existence of a belief, among many plaintiff lawyers, that significant profits can be made by them from Victorian class actions.

C. Litigation funders

To my knowledge, only 10 (or 11 per cent) of all filed Part 4A proceedings received the support of litigation funders; half of these funded class actions were Mark Elliott-driven class actions. Conversely, litigation funders have supported all of the class actions that, to my knowledge, have been filed to date in the Supreme Court of Queensland; 38 per cent of all NSW class actions; and 26 per cent of all federal class actions. And the most recent funded Part 4A proceeding was filed back on 16 May 2016. Since May 2016, 34 funded class actions have, to my knowledge, been filed in the other three class action jurisdictions.

The picture that emerges from this data on funded class actions is that, as has been the case with plaintiff law firms, the Part 4A regime has not been particularly attractive to litigation funders: the other major category of class action protagonists on the plaintiff side.

IX. REGULATION OF LITIGATION FUNDERS IN VICTORIAN CLASS ACTIONS?

It is sadly ironic that the Australian class action jurisdiction - that is being placed under close scrutiny with respect to, among other things, the potentially adverse impact on group members of the involvement of litigation funders - is the jurisdiction with the lowest proportion of funded class actions. As the analysis below will show, it is also a jurisdiction with no apparent instances of the interests of group members being compromised by the conduct of the litigation funders that supported the class action litigation.

A. Five funded Mark Elliott-driven Part 4A proceedings

As already noted, I have identified only 10 funded Part 4A proceedings; five of which saw the involvement of Mark Elliott. Let's start with the latter group of funded class actions. Two were transferred to the Federal Court; one was permanently stayed; one was settled whilst the remaining one was partly settled as the claims of some but not all of the defendants were settled.

[19] Mark Elliott was involved in the sense that he or his law firm were solicitors on the record for the lead plaintiff; the lead plaintiff was "his" company Melbourne City Investments and/or the litigation was funded by a litigation funder that he has an interest in: BSL Litigation Partners Pty Ltd.

[20] It should also be noted that the most recent Mark Elliott-driven Part 4A proceeding was filed back in May 2016.

In the partly settled Part 4A case, the Court had earlier restrained lawyers (both senior counsel and Mark Elliott's law firm) from representing the lead plaintiff. This was done "in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice".[21] The Court's conclusion was based on the fact that Elliott and senior counsel's wife were major shareholders in the litigation funder that was underwriting the proceedings.

B. Five funded Part 4A proceedings not involving Mark Elliott

With respect to the remaining five funded Part 4A proceedings (that did not see the involvement of Mark Elliott), one is in progress; two were transferred to the Federal Court; and the other two were settled, pursuant to agreements that were approved by the Court.

C. Settlement of four funded Part 4A proceedings

Let's consider the four settled funded Part 4A cases. One has already been mentioned and concerned the contaminated abalone. As noted by Ginnane J, in the judgment that explained the reasons for the approval of the settlement agreement executed by the parties to the litigation, "no group member will receive any payment under the settlement".[22] This unfavourable scenario for group members stemmed, of course, from the unfavourable outcome of the trial and the significant costs incurred in running the proceeding on behalf of the 88 claimants in question.

In the other funded settled Part 4A proceeding, that did not involve Mark Elliott, a far more positive outcome was secured for the group members. This class action was brought on behalf of persons:

> who acquired shares in the National Australia Bank between 1 January 2008 and 24 July 2008. Their case against the bank is that the value of their shares was inflated because the Bank had not sufficiently disclosed to the market the Bank's exposure to collateralised debt obligations (CDOs) held by the Bank through conduits.[23]

Pursuant to the Deed of Settlement $115 million was to be paid by the defendant, inclusive of interest and costs. As explained by Justice Pagone, "the amount of the settlement sum available to the group members is about $103 million after payment of the Plaintiffs' costs of about $11.8 million".[24] The litigation funder behind this litigation was entitled, pursuant to the funding agreement executed by the original group members, to a funding commission equal to 40 per cent of the proceeds received by the group members who held less than 1 million shares; 35 per cent if they held between 1 million shares and 10 million shares; and 30 per cent if they held more than 10 million shares.[25] I understand that the registered group members ultimately received just over 57 per cent of the $115 million plus interest. As revealed elsewhere, I found that the average proportion of settlement funds secured in funded federal class actions, left for distribution to eligible class members after the deduction of funding fees, legal costs and other costs, was approximately 58 per cent.[26]

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[21] *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582, para 5 (per Ferguson JA).
[22] *Regent Holdings v State of Victoria & Anor* [2015] VSC 422, para 28.
[23] *Pathway Investments Pty Ltd & Anor v National Australia Bank Limited (No 3)* [2012] VSC 625, para 7 (Pagone J).
[24] Ibid para 15.
[25] Ibid para 20.
[26] V Morabito and V Waye, "Seeing Past the US Bogey - Lessons from Australia on the Funding of Class Actions" (2017) 36 *Civil Justice Quarterly* 213, 242.

Turning to the settlements executed in the funded Elliott-driven Part 4A proceedings, in *Bolitho v Banksia Securities Limited* Bolitho filed a Part 4A proceeding on behalf of approximately 16,000 investors, holding debentures issued by Banksia Securities Limited, to recover losses suffered following the collapse of this company in 2012. Pursuant to the settlement agreement executed by the lead plaintiff and most of the defendants, a total of $5.2 million was to be paid by the settling defendants. The Court appointed Mr David O'Callaghan QC (now Justice O'Callaghan of the Federal Court of Australia) to act as amicus curiae/contradictor with respect to, *inter alia*, the application for the approval of the settlement agreement. Justice Robson approved the settlement agreement in question and authorised the deduction from the $5.2 million settlement fund, before distribution to the entitled group members, of the following:

- $858,000 to be paid to the litigation funder;
- $2,550,000 to be paid in respect of the plaintiff's legal costs; and
- one half of the costs of Mr O'Callaghan QC of and incidental to the appointment as amicus curiae, to be paid on an indemnity basis.[27]

Accordingly, once this proceeding comes to an end, eligible group members will be entitled to approximately 34 per cent of this settlement fund less half of the (unrevealed) fees to which the amicus curiae was entitled. Whilst the proportion earmarked for group members was hardly impressive, the approval of the legal costs and funding fees noted above was granted only after careful consideration by the amicus curiae and ultimately Justice Robson. It is also important to draw attention to two other matters: (a) similar percentages of settlement funds were left for distribution to group members in recent funded class action settlements approved by the Federal Court;[28] and (b) in *Bolitho*, the litigation funder was initially seeking a payment of $1.3 million.[29]

The last settlement agreement, approved by the Supreme Court of Victoria, with respect to funded Part 4A litigation was in the *Camping Warehouse Australia Pty Ltd v Downer EDI Limited* shareholder class action. It was settled for $8.25 million, exclusive of legal costs.[30] Justice Digby approved this settlement agreement which also provided that the following payments were to be made from the settlement fund: (a) a litigation funding premium of $825,000 and (b) a reimbursement to the lead plaintiff of $100,000.[31] As a result, over 88 per cent of the settlement fund was made available for distribution to eligible group members.

D. Evaluation

Does the brief description provided above of the outcomes of the ten funded proceedings, filed pursuant to Part 4A, provide strong empirical evidence of the need for special procedures or measures (or indeed the certification device), to be applied with respect to those Part 4A proceedings that are supported by litigation funders? The answer is a resounding "No".

The settlement agreements that were executed in the funded class actions provided group members with compensation broadly similar to what has been witnessed in the federal sphere. Like the Federal Court, judges presiding over Part 4A proceedings have also displayed no

[27] *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148, para 11 (per Robson J).
[28] See *Farey v National Australia Bank Ltd* [2016] FCA 340; *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409; and *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in Liq) (No 3)* [2017] FCA 650.
[29] *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148, para 95 (per Robson J).
[30] Justice Digby revealed that "pursuant to a separate agreement between the parties, Downer has agreed to pay Camping Warehouse's legal costs in the sum of $2.85m": *Camping Warehouse Australia Pty Ltd v Downer EDI Limited* [2016] SC 784, para 27.
[31] Ibid para 21.

hesitation in making security for costs orders in favour of entities on the receiving end of funded class actions.[32] And such orders constitute the most appropriate protection, for defendants in funded class actions, with respect to the risk of not being able to recover some of their costs from the relevant litigation funder. It is also crucial to note that the Supreme Court dealt with the unsatisfactory dimensions of the Mark Elliott model promptly and effectively; with respect to both funded[33] and unfunded[34] class actions.

The unique tripartite relationships that are created, whenever litigation funders are involved, have prompted papers by several scholars,[35] including yours truly.[36] But Professor Vicki Waye is the only one who has explored these relationships through extensive interviews with some of the litigation funders that have funded Australian class actions and some of the solicitors who have run funded class actions. The findings she made, as a result of these interviews, were predominantly positive.[37]

Furthermore, I believe that close judicial supervision constitutes the most appropriate and effective form of "regulation" over the involvement of litigation funders in class actions. This point was made most eloquently by Justice Beach of the Federal Court when he explained that courts can bring:

> 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.[38]

There are three major dimensions to the Federal Court's approach towards supervision over the conduct of litigation funders in federal class actions:

1. a number of provisions in the Part IVA Practice Note that deal with litigation funders and the disclosure of funding agreements (which have been summarised by the VLRC in its Consultation Paper);
2. the recognition and exercise of a judicial power to make a "common fund" order at the early stages of the class action; and

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[32] See, for instance, *Pathway Investments Pty Ltd v National Australia Bank Limited* [2012] VSC 97; *Regent Holdings v State of Victoria & Anor* [2015] VSC 422, para 44 (per Ginnane J); *Camping Warehouse Australia Pty Ltd v Downer EDI Limited* [2016] VSC 23; *Camping Warehouse Australia Pty Ltd v Downer EDI Limited* [2016] VSC 29; and *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148, para 109 (per Robson J).

[33] See *Bolitho v Banksia Securities Limited (No 4)* [2014] VSC 582.

[34] See, for instance, *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* (2014) 45 VR 585; *Walsh v WorleyParsons Ltd (No 4)* [2017] VSC 292; and *Melbourne City Investments Pty Ltd v Myer Holdings Ltd* [2017] VSCA 187.

[35] Some of these papers have been of high quality. See, for instance, V Waye, "Conflicts of Interest Between Claimholders, Lawyers and Litigation Entrepreneurs" (2007) 19 *Bond Law Review* 225; MJ Duffy, "Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory" (2016) 39 *University of New South Wales Law Journal* 165; and V Waye, "The Initiation and Operation Phase of the Litigation Funder - Class Action Law Firm Relationship: An Australian Perspective" (2018) 60 *International Journal of Law and Management* (forthcoming).

[36] See, for instance, V Morabito and V Waye, "Reining in Litigation Entrepreneurs – A New Zealand Proposal" [2011] *New Zealand Law Review* 323; and V Waye and V Morabito, "Financial arrangements with litigation funders and law firms in Australian class actions" in WH van Boom (ed), *Litigation, Costs, Funding and Behaviour – Implications for the Law* (Routledge; 2017) 155.

[37] See V Waye, "The Initiation and Operation Phase of the Litigation Funder - Class Action Law Firm Relationship: An Australian Perspective" (2018) 60 *International Journal of Law and Management* (forthcoming).

[38] See *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, para 184.

3. the recognition of (and stated willingness to exercise) the power to make a s 33V order (approving the settlement of a funded class action) whilst reducing an excessive funding commission.[39]

This approach ensures that trial judges have the required information and means for ensuring (right from the outset of the litigation) that the interests of group members will not be compromised by the conduct of the litigation funder. It also enhances transparency and places group members in a better (and more informed) position to protect their interests. The common fund doctrine, in particular, provides litigation funders with an incentive to use open, rather than closed, classes and thus enhance access to justice. And, as discussed in Part XIV below, it appears to have already led to a decrease in the rates demanded by litigation funders.

The common fund order recently made by Justice Murphy in *Pearson v State of Queensland*[40] vividly brings to the fore another aspect of the greater protection of group members, provided by this doctrine, which appears to have been ignored by most commentators. Most, if not all, litigation funding agreements empower litigation funders to terminate the agreement at any time as long as the notice period, prescribed in the funding agreement, is complied with. Clause 19 of the funding terms that were judicially approved in *Pearson* instead provided that:

> The funding arrangements under these Funding Terms may only be terminated by order of the Court, granted on application made by the Applicant, the Funder or a Group Member, upon giving notice to the Applicant, the Funder and such other persons as ordered by the Court.

The termination of a funding agreement in a class action, by the relevant litigation funders, is likely to have an adverse impact on the respondent/defendant facing the class action as they may not be able to recoup some of their costs, in the event of a victory, if there is no longer a litigation funder behind the lead plaintiff. Accordingly, they are likely to oppose any such application, unless adequate alternative funding arrangements are put in place. Such adversarial context will facilitate the court in considering any application filed by a litigation funder to terminate the funding arrangements.

What is the position in Victoria? The first of the three major features of the federal approach outlined above is not present, due to an apparent preference by the Supreme Court of Victoria for a flexible, case-by-case approach. In the event that litigation funders "return" to the Victorian class action landscape, an emulation of the federal practice note would, in my view, be highly desirable.

The limited number of funded Part 4A proceedings has meant that there have not been (to my knowledge) common fund applications filed in the early stages of Part 4A proceedings. Similarly, the even smaller number of settled Part 4A proceedings has meant that it is not clear whether Victorian judges would recognise - and, if so, be willing to exercise - the power to approve a settlement agreement and simultaneously modify it by decreasing the proportion (set out in settlement agreement) of the gross settlement fund to which the relevant litigation funder is entitled to.

Does this state of affairs render necessary or desirable legislative intervention by inserting provisions in Part 4A that expressly confer, and clearly delineate the ambit of, a judicial

[39] See *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, paras 133-158 (per Murphy J); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, paras 35 and 119 (per Beach J); *Mitic v OZ Minerals Ltd (No 2)* [2017] FCA 409, paras 28-29 (per Middleton J); and *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in Liq) (No 3)* [2017] FCA 650, para 105 (per Wigney J).
[40] [2017] FCA 1096.

power to issue common fund orders and, where appropriate, reduce the remuneration to be received by litigation funders pursuant to a judicially approved settlement agreement? In my view, the answer is "no" as the Supreme Court of Victoria should be given the opportunity to determine for itself, when the opportunity arises, whether it should follow the approaches implemented by the Federal Court.

When it will be called upon to make that decision, it will have the benefit of the evolving federal jurisprudence; and will accordingly be able to determine the advantages and shortfalls of the federal approach - on the basis of *actual cases, facts and circumstances as well as empirical data* - instead of relying solely on general principles or reasoning at an abstract level. Another significant reason for avoiding legislative intervention in this area is the fact that, no matter how well the provisions in question are drafted, they can only deal with the litigation funding and class action landscape, as it exists at the time the legislative provisions are drafted. But given that it is likely that such landscape will continue to evolve, the legislative provisions in question may not provide judges presiding over Part 4A litigation with the tools they need to protect the interests of group members. And *they may in fact hinder* the ability of courts to secure such protection.

In light of the analysis outlined above, it is clear that I am hoping that the Supreme Court: (a) will embrace the common fund doctrine or other doctrines that will enable trial judges presiding over class actions to assume a pro-active role, right from the outset of the litigation, with respect to the impact on group members of the conduct of litigation funders; and (b) will recognise the existence of a power to decrease the proportion of a settlement fund to which a litigation funder is entitled to under a proposed settlement distribution scheme.

X. COMPETING CLASS ACTIONS

The fact that competing class actions have not represented a major problem for judges presiding over Part 4A proceedings is vividly highlighted by the fact that there has not been a single judgment handed down by the Supreme Court of Victoria with respect to competing class actions.

To my knowledge, there have been only eight instances of competing class actions where one or more of the competing class actions in question were Part 4A proceedings.[41] In three of these eight instances of competing class actions, all of the competing Victorian class actions saw the involvement of Mark Elliott. Below I provide a brief description of these eight sets of competing class actions.

A. One instance of all the competing class actions being Part 4A proceedings

Maurice Blackburn and Slater & Gordon each filed a Part 4A proceeding with respect to the victims of the outbreak of Legionnaires disease in April 2000, stemming from the water cooling towers at the Melbourne Aquarium. The Slater & Gordon class action was filed three years after the Maurice Blackburn class action. Justice Gillard stayed, until further order, the second-filed Part 4A proceeding. After the Maurice Blackburn class action was settled, Justice Gillard lifted the stay, with respect to the Slater & Gordon class action, and issued a s 33V order with respect to the settlement agreement that had been executed by the parties to this class action.[42]

[41] See V Morabito, "Clashing Classes Down Under - Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives" (2012) 27 *Connecticut Journal of International Law* 245, 253-254 for the broad definition of the term competing class actions that I employ.
[42] Ibid 260-263.

B. Two instances of three competing class actions - two Part 4A proceedings and one Part IVA proceeding

With respect to each of these two instances of competing class actions, there were three class actions filed by different solicitors: two Victorian class actions and one federal class action.

The first time this scenario was witnessed was with respect to class actions filed on behalf of retired Victorians and Tasmanians who suffered losses as a result of their involvement in the "Money for Living Scheme". The two Part 4A proceedings were filed against one defendant: a law firm. In the Part IVA proceeding, this law firm was only one of numerous respondents: the 13th respondent. An agreement was reached by the two law firms running the competing Victorian class actions, pursuant to which one of the proceedings in question would no longer proceed as a Part 4A proceeding. The remaining Victorian class action and the federal class action continued until a settlement agreement was executed with the law firm on the receiving end of both proceedings. This settlement agreement was first approved by the Victorian Supreme Court and then by the Federal Court.[43]

Three different law firms each filed a class action on behalf of Vocation Limited shareholders: two in the Supreme Court of Victoria and one in the Federal Court. Both of the Victorian class actions were subsequently transferred to the Federal Court.

C. Five instances of competing Victorian and federal class actions

In each of these five instances of competing class actions, one of the "competing" law firms was running the Part 4A litigation and the other competing law firms were running Part IVA litigation.

The first set of competing class actions stemmed from the damage and loss suffered by light aircraft owners, as a consequence of contaminated fuel distributed by Mobil Oil Australia Ltd in January 2000. Three law firms each filed a class action: one Part 4A proceeding and two Part IVA proceedings. The two federal class actions were discontinued for reasons unrelated to the competing class actions issue.[44]

The second instance of this category of competing class actions occurred with respect to investors in the Great Southern managed investment schemes. The filing of a Part 4A proceeding on behalf of these investors was followed by the filing of a Part IVA proceeding by a different firm. The federal proceeding was permanently stayed until the final resolution of the Victorian proceeding and transferred to the Supreme Court of Victoria.[45]

The remaining three instances of this category of competing class actions arose as a result of the filing by several law firms of federal class actions on behalf of shareholders - of WorleyParsons Limited, Treasury Wine Estates Limited and Leighton Holdings Ltd (now CIMIC Group) - and the filing of Mark Elliott-driven Part 4A proceedings with respect to essentially the same disputes. The Mark Elliott-driven Part 4A proceeding filed on behalf of Treasury Wine Estates shareholders was transferred to the Federal Court. The Mark Elliott-driven Part 4A proceeding filed on behalf of Leighton Holdings shareholders was recently discontinued by the lead plaintiff whilst the two Mark Elliott-driven Part 4A actions filed on behalf of WorleyParsons shareholders suffered the following fate: one was summarily dismissed and the other was permanently stayed.

[43] Ibid 303-306.
[44] Ibid 302-303.
[45] Ibid 306-307.

D. Evaluation

Two matters are apparent (at least to me) from the brief summary sketched above of all instances of competing class actions that, to my knowledge, involved Part 4A litigation.

The first is that, as I suggested with respect to the supervision or regulation of litigation funders, the Supreme Court of Victoria should be given the opportunity to determine for itself, when the opportunity arises, what approach it should follow with respect to competing class actions. When that occurs, it will have the benefit of a number of judicial pronouncements from the Federal Court and the Supreme Court of NSW.

The other important matter to emerge from the discussion set out above is that competing class actions are rapidly becoming a "national" problem and cannot therefore be adequately addressed by the legislatures or courts of class action jurisdictions acting on their own.[46]

XI. A CERTIFICATION DEVICE FOR VICTORIA?

Having considered funded class actions and competing class actions, it is appropriate to now consider the question of whether a certification device should be introduced in Victoria. I will start by making some general observations.

A. Conclusions by Australian law reform commissions and similar entities

As explained elsewhere by Justice Murphy and I, none of the local law reform commissions and similar *ad hoc* entities that have considered class action reform, since the commencement in March 1992 of the federal class action regime, have made recommendations that were intended to limit the availability of class action regimes,[47] including the employment of the certification devices.

Indeed, in September 2009 the Access to Justice Taskforce of the Commonwealth Attorney-General's Department recommended that one of the dimensions of the federal class action regime, that ought to be reviewed by the ALRC, included "whether the ability for the Federal Court to terminate a class action under s 33N should be limited or removed, and whether it should be replaced with any specific criteria".[48]

One of these law reform commissions was, of course, the VLRC itself in its comprehensive and outstanding review of the Victorian civil justice system in 2008.[49] The last local law reform commission to consider the desirability of introducing the North American certification device in Australia was the Law Reform Commission of Western Australia, in May 2015. This Commission did not:

> recommend its incorporation into any Western Australian legislative regime. To do so would be fundamentally inconsistent with the federal, New South Wales and Victorian regimes. In the

[46] See also Justice Bernard Murphy and V Morabito, "The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?" in in D Grave and H Mould, *25 Years of Class Actions in Australia 1992 – 2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law; 2017) 13, 42.
[47] Ibid 15-17.
[48] Commonwealth Attorney-General's Department's Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Canberra; September 2009), 117 (recommendation 8.11).
[49] See generally V Morabito, "A Critique of the Victorian Law Reform Commission's Class Action Reform Strategy" (2009) 32 *University of New South Wales Law Journal* 1055.

> Commission's view, the inclusion of a certification regime should not occur in the absence of agreement for its uniform adoption by all relevant states and the Commonwealth.[50]

Introducing a certification regime for Victoria would prompt plaintiff solicitors to abandon the Part 4A regime and file class actions in other states or in the Federal Court, regardless of whether those courts represent the most appropriate forum or indeed whether they have jurisdiction to hear the case. This would see a return to the pre-Part 4A days when federal class actions were filed, despite the fact that it was likely that the Federal Court did not have jurisdiction to hear the case, solely because Victoria did not have a class action regime. The most significant illustration of this practice is furnished by the class action litigation filed in the Federal Court on behalf of the victims of the explosion at the Longford gas plant in Victoria in the late 1990s.

As posited below, no certification regime should be introduced in Victoria or in any other local class action jurisdiction.

B. A crucial fact not mentioned by supporters of certification devices

A fact which supporters of certification devices frequently neglect to mention is that Australian courts have greater powers to determine which proceedings should be conducted as class actions than courts which have the power to withhold certification orders.[51] This state of affairs stems from differences in the power to discontinue properly commenced class actions. In the United States and Canada, once proceedings are certified as class actions, the power of the Court to decertify the proceedings, that is, to stop the proceedings from progressing as class proceedings, is limited to a judicial determination that the certification prerequisites no longer exist or never existed. That is to say, certification regimes do not empower Courts to terminate properly constituted/certified class actions pursuant to criteria or factors that are different from those that are considered during the certification hearing. And in some Canadian jurisdictions, this power to decertify may not be exercised by the Court on its own motion.

The scenario under Part 4A (and under the other Australian class action regimes) is fundamentally different. The Supreme Court can of course bring to an end Part 4A proceedings, where it accepts the arguments of the defendants that the threshold criteria have not been satisfied. But Part 4A also vests the Supreme Court with broad powers to terminate proceedings which have adhered to the commencement prerequisites. In fact, these termination powers, unlike the power of US and Canadian Courts to decertify, are not dependent on a finding that the commencement prerequisites no longer exist or never existed. Instead, these powers are based on additional criteria, some of which confer on the Court a very broad power, including the ability to terminate a proceeding, under s 33N(1)(a), because the Court is of the view that it is "inappropriate" that the proceeding progress as a class proceeding.

C. Calls for more restrictive commencement criteria

Almost invariably, calls for the introduction of certification devices are accompanied by calls for changes in the "commencement criteria" that will have the effect of restricting significantly the availability of the country's class action regimes. I will let the VLRC Commissioners reach their own conclusions as to whether these reform strategies are prompted by a desire to protect the interests of potential group members - whose ability to

[50] Law Reform Commission of Western Australia, *Representative Proceedings* (Project 103; Final Report; May 2015), para 5.92.

[51] See V Morabito, "The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions" (2004) 42 *Osgoode Hall Law Journal* 473, 475-476.

access the court system will be removed by this reform (see Part II above) - or whether they are in fact prompted by a desire to reduce the number of entities and individuals that will be on the receiving end of class action litigation.

No persuasive evidence has been put forward to justify more restrictive commencement prerequisites, particularly in light of the existence of the already-mentioned very broad powers conferred on trial judges to terminate, as class actions, proceedings that complied with the commencement prerequisites.[52] A similar line of reasoning was embraced by the High Court of Australia 18 years ago in rejecting a narrow construction and application of the commencement prerequisites found in Part IVA's s 33C which are identical to those found in s 33C of Part 4A.[53]

D. Strong empirical evidence of problems caused by the absence of a certification device?

As already noted, I have identified the filing of a total of 85 Part 4A cases whilst nationally 535 class actions have been filed to date. Have the supporters of the certification device provided objective evidence of systematic abuse of Australia's class action regimes as a result of the lack of a certification device? Only a handful of class actions have been put forward as evidence of systematic abuse and, with all due respect, all that these cases provide is evidence that the type of certification device that is being advocated is one pursuant to which a mini-trial, with respect to the merits of the substantive claims, is to take place.

Let's start with the example provided in the VLRC's Consultation Paper itself. In paragraph 6.72, a Part IVA proceeding brought with respect to a franchise dispute is provided as an illustration of the existence of the following unsatisfactory scenario:

> [t]here have been proceedings that were terminated as class actions, under the decertification provisions, long after they commenced and had used significant resources. It is likely that some of these could have been excluded by a certification.

The s 33N order was made in this case after the trial of the lead plaintiff's claim. After handing down two post-trial judgments, Justice Mansfield formed the view that, in light of the findings contained in the two judgments and the orders that were required, it was no longer of sufficient benefit to the other group members to continue the proceeding as a Part IVA proceeding.[54] This was essentially because of Justice Mansfield's conclusion that it would be necessary to focus on the individual circumstances of each group member.[55] Surely, it is not being suggested that a certification hearing would have allowed Justice Mansfield to reach this conclusion without first conducting a full trial.

Another crucial fact about this Part IVA proceeding, which unfortunately is not revealed in the Consultation Paper, is that eight months after this class action was filed the respondents

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[52] See also Justice Michael Lee, "Certification of Class Actions: A 'Solution' in Search of a Problem?" (Paper presented to the Commercial Law Association Seminar "Class Actions - Different Perspectives"; Friday, 20 October 2017), 5 ("[a] common misstep for those inexperienced in class actions, at least initially, was seeking to invoke s 33N when the real complaint was a want of compliance with s 33C (which meant there was no class action properly before the Court, allowing the representative aspects of the proceeding to be struck out or dismissed). *Constitution* and *continuation* are two distinct matters that must be kept quite separate - a distinction elided in 'informal consultations' referred to in part of the VLRC consultation paper").

[53] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

[54] *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 11)* [2013] FCA 241, para 64 (per Mansfield J).

[55] Ibid paras 65-66.

filed a declassing application; which was rejected by Justice Mansfield.[56] Accordingly, with all due respect to the VLRC, I fail to see how this class action provides evidence in favour of certification devices or highlights problems experienced with the current Australian regimes. Identical problems are faced by those who have put forward the Vioxx federal class actions, filed by Slater & Gordon, as evidence of the problems that have been encountered as a result of the lack of a certification device.

The fact that many of the Mark Elliott-driven class actions have not been allowed to continue does not provide evidence in favour of the certification device. Those proceedings were dismissed or permanently stayed because, among other things, of the significant conflicts of interest problems generated by the model chosen by Mark Elliott; not because the substantive claims in question had no merit or because the class action procedure was not a suitable vehicle for resolving the legal disputes in question. Strong evidence in support of these statements is provided by the fact that class actions filed by Maurice Blackburn, Slater & Gordon and ACA Lawyers - with respect to disputes and claims identical or similar to those encompassed by a number of Mark Elliott-driven class actions - have not been declassed or discontinued by the courts.

The extensive empirical data (which I will not summarise here) that is available with respect to the first 250 Part IVA proceedings strongly supports retention of the existing regimes.[57] My review of Part 4A court files reveals the existence of a similar scenario in Victoria. Indeed, the percentage of resolved Part 4A proceedings, discontinued by the Court as Part 4A proceedings (5.4 per cent), is lower than the percentage of resolved Australian class action proceedings not judicially allowed to continue as class actions (7.3 per cent).[58] It is important to draw attention to the fact that I am here comparing the total number of declassed class actions with the total number of *resolved* class actions. Had I compared instead the total number of declassed class actions with the total number of *filed* class actions, these percentages would have been even smaller.

Furthermore, as recently noted by Justice Lee of the Federal Court of Australia, one of the country's leading class action litigation experts:[59]

> [T]he introduction of a one size fits all pre-commencement certification hearing seems likely to:
>
> - impose significant and unnecessary costs on those vast majority of group proceedings which are appropriately constituted;
> - delay the progress of the resolution of substantive disputes; and

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[56] See *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 4)* [2009] FCA 817, paras 1 and 18 (per Mansfield J); and *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 6)* [2010] FCA 295. The respondents were also the beneficiaries of a security for costs order: see *Pampered Paws Connection Pty Ltd v Pets Paradise Franchising (Qld) Pty Ltd (No 7)* [2010] FCA 626.

[57] See V Morabito and J 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.

[58] See V Morabito, *The First Twenty-Five Years of Class Actions in Australia* (An Empirical Study of Australia's Class Actions Regimes; Fifth Report: July 2017), 37.

[59] As a barrister, Justice Lee "was briefed in most of the largest representative proceedings over the last decade and has been required to give detailed consideration to the structure of representative proceedings and has been involved, in one way or another, with the cases that have given rise to a number of the procedural developments in class actions in recent years": Justice Michael Lee, "Certification of Class Actions: A 'Solution' in Search of a Problem?" (Paper presented to the Commercial Law Association Seminar "Class Actions - Different Perspectives"; Friday, 20 October 2017), 2.

- encourage a new world of adjectival disputation and a potential return to the "satellite litigation" that characterised the early years of the class actions regime as different boundaries are explored.[60]

E. Would certification devices produce superior outcomes?

A fascinating feature of the arguments put forward by those who call for the introduction of certification regimes in Australia is that they usually place reliance on the benefits that these regimes are intended to secure rather than on any concrete evidence that these benefits *have actually been secured* in those jurisdictions that have used these regimes.

Similarly, no reference is usually made to the fact that the certification hearings are usually extremely complex and thus costly; a problem exacerbated by the availability of a right to seek appellate intervention with respect to certification rulings and the fact that "defendants can file [decertification applications] repeatedly".[61]

Reference should also be made to the fact that the comparison of empirical data on the first 17 years of operation of Part IVA with data collected by US scholars revealed: (a) that more often than not declassing applications filed with respect to Part IVA proceedings were dealt with more promptly than certification motions in the United States;[62] and (b) that when Part IVA respondents failed to secure a declassing order they were not, unlike their American counterparts, invariably faced with the prospect of a class-wide settlement.[63]

But probably the most significant omission in the case advanced by the advocates of certification regimes is the conspicuous absence of any reference to a "hotly debated issue"[64] with respect to the American class action landscape: settlement classes. Essentially, lawyers for both sides approach the Court asking for a certification order only for the purpose of implementing, on a class-wide basis, the settlement agreement that they have executed.

Thus, the non-adversarial context that critics of class actions are so fiercely opposed to is faced by courts with respect to two crucial questions: (1) should this proceeding be certified; and (2) should the proposed settlement agreement be approved. In these circumstances, it is not entirely surprising that the former question has frequently been considered in a fairly superficial manner (a practice criticised by the US Supreme Court);[65] and that some of the most criticised class action settlements were judicially-approved pursuant to this type of certification/settlement hearing. The unsatisfactory settlements in question have included coupon settlements[66] and settlements that discriminated against future victims of asbestos.[67]

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[60] Ibid 13.
[61] EJ Cabraser and S Issacharoff, "The Participatory Class Action" (2017) 92 *New York University Law Review* 846, 856.
[62] See V Morabito and J 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, 610-611.
[63] Ibid 603-608.
[64] DR Hensler, B Dombey-Moore, B Giddens, J Gross, EK Moller and NM Pace, *Class Action Dilemmas - Pursuing Public Goals for Private Gain, Executive Summary* (RAND Institute for Civil Justice, 1999), 27.
[65] *Amchem Products Inc v Windsor*, 521 US 591, 620-621 (1997).
[66] See V Morabito, "An Australian Perspective on Class Action Settlements" (2006) 69 *Modern Law Review* 347, 363 and references cited therein; and HM Erichson, "The Problem of Settlement Class Actions" (2014) 82 *George Washington Law Review* 951.
[67] See, for instance, *Amchem Products Inc v Windsor*, 521 US 591 (1997).

And two leading US scholars have recently referred to "a broad-scale indictment of settlement classes".[68]

But even if all the submissions set out above were to be rejected, is the alleged superiority of the certification device so significant to justify a long period of uncertainty in Australia's class action landscape? This point was made in an extremely cogent manner by Justice Lee speaking extra-curially:

> [t]he notion there is some significant problem does not seem to be justified on the facts. There is much to be said for the view that the blunt instrument of legislative change in introducing a certification regime would unsettle a landscape that has become largely settled and potentially herald a new form of costly and time-consuming interlocutory disputation that will retard the progress of determining on the merits what are largely properly constituted claims that ought to continue as representative proceedings. This would be an outcome which is hard to reconcile with the policy informing case management imperatives in Part VB of the Act (and cognate provisions) which require primacy to be given to the just resolution of disputes as quickly, inexpensively and efficiently as possible.[69]

F. Adequacy of representation requirement

The impressive way in which the Supreme Court of Victoria has dealt with the unsatisfactory features of the Mark Elliott model provides strong evidence of the fact that there is no need to introduce provisions, in either Part 4A or the practice note, with respect to the adequacy of Part 4A class representatives. The fact that in two Part 4A proceedings[70] the lead plaintiffs had not provided their consent to act in that role also does not provide sufficient evidence in support of placing the onus on lead plaintiffs to prove (in a certification hearing or through other mechanisms) to the satisfaction of the Court that they can provide adequate representation of the interests of group members.

Proving adequacy of representation in North American class actions, as part of the certification hearing, has meant that aspiring lead plaintiffs have frequently been subjected to extensive cross-examination with respect to a very wide range of matters, as class action defendants have been allowed "a reasonable latitude or exploration to see whether there are any skeletons in the closet which may legitimately be advanced by them as showing unsuitability".[71] There are already numerous disincentives to becoming lead plaintiffs, especially in unfunded class actions, and no further obstacles should be erected in the absence of strong evidence that such reform is necessary.[72]

If, in the future, this strong evidence does emerge the solution is to be found, as I noted elsewhere, in expressly empowering Courts to initiate the process prescribed under s 33T for

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[68] EJ Cabraser and S Issacharoff, "The Participatory Class Action" (2017) 92 *New York University Law Review* 846, 848.

[69] Justice Michael Lee, "Certification of Class Actions: A 'Solution' in Search of a Problem?" (Paper presented to the Commercial Law Association Seminar "Class Actions - Different Perspectives"; Friday, 20 October 2017), 12.

[70] *Cohen v The State of Victoria & Ors (No 2)* [2011] VSC 165; and *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Led (Ruling No 1)* [2011] VSC 167.

[71] *Millgate Financial Corporation Limited v BF Realty Holdings Limited* [1997] OJ No 4020, para 10 (Ont Div Ct; Farley J).

[72] See V Morabito, "Additional Compensation to Representative Plaintiffs in Ontario - Conceptual, Empirical and Comparative Perspectives" (2014) 40 *Queen's Law Journal* 341, 348-351; J Caruana and V Morabito, "Turning the Spotlight on Class Representatives - Empirical Insights from Down Under" (2012) 30 *Windsor Yearbook of Access to Justice* 1, 12-15 and 35-36; V Morabito, "An Empirical and Comparative Study of Reimbursement Payments to Australia's Class Representatives and Active Class Members" (2014) 33 *Civil Justice Quarterly* 175, 190-191; and *Turon v Abbott Laboratories Ltd*, 2011 ONSC 4343, para 24 (per Strathy J).

replacing inadequate class representatives.[73] At the moment, the s 33T mechanism for removing or replacing allegedly inadequate class representatives may only be activated by applications filed by one or more dissatisfied group members.

G. General observations

I wish to make it clear that my comments, with respect to certification devices, apply equally to any other devices (whatever their names) which operate in a similar manner to certification regimes or which place the onus on class representatives to demonstrate adherence to the commencement prerequisites. Again, it is useful to refer to the observations made by Justice Lee:

> The respondent or Court-initiated "declassing" progress has three important advantages: *first*, it is invoked only where there is a perceived problem (hence avoiding costs being spent in cases where there is no issue); *secondly*, it can occur at different stages, and hence can be adapted to deal with problems which may arise or become evident at different stages of the proceeding; and *thirdly*, its scope transcends "problems" with the proceedings and can be invoked after an initial trial as a case management tool to provide for the most effective mechanism of determining the individual claims of group members after all common issues (and issues of commonality) have been resolved.[74]

XII. COURT-APPROVED NOTICES

A. Overview

Dealing adequately with this dimension of Australia's class action regimes requires an appreciation of the significant difference between, on the one hand, the class action landscape envisaged by the ALRC and the drafters of Part IVA and, on the other hand, the *actual operation* of the country's class action regimes.

Looking first at the former, the ALRC (and as a result the drafters of Part IVA) saw the opt out model as one of the fundamental dimensions of the class action regime, as they (correctly) expected that the same barriers, that prevent many persons with a legal grievance from seeking legal redress, would also preclude them from taking positive steps with respect to class action litigation, including filing a consent to be a group member pursuant to an opt in device. In light of this belief, and given that access to justice is the principal policy goal of class action devices, they chose an opt out device.

Under this model, a non-response from the group members in question will result in them being able to enjoy the benefits of a successful outcome for the class. Neither Part IVA (and as a consequence the other local class action regimes) nor ALRC's proposed legislative regime expressly envisaged the court extending to group members the opportunity to opt out of a settlement agreement executed by the formal parties to the litigation. It was envisaged that this would not be necessary given that the settlement agreement would have no legal validity without the approval of the court. The purpose of sending a settlement notice to group members was to give them an opportunity to put forward their views, with respect to the settlement, thus facilitating the task of the court.[75]

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[73] See V Morabito, "Replacing Inadequate Class Representatives in Federal Class Actions - *Quo Vadis*?" (2015) 38 *University of New South Wales Law Journal* 146, 178.

[74] Justice Michael Lee, "Certification of Class Actions: A 'Solution' in Search of a Problem?" (Paper presented to the Commercial Law Association Seminar "Class Actions - Different Perspectives"; Friday, 20 October 2017), 10-11.

[75] See V Morabito, "Judicial Responses to Class Action Settlements that Provide no Benefits to Some Class Members" (2006) 32 *Monash University Law Review* 75, 94-95.

In the envisaged class action environment briefly outlined above, choosing the wrong means of distributing a court-approved notice or approving a court-approved notice that may be difficult to comprehend by most or some group members would not have overly unsatisfactory consequences for the group members in question. With respect to opt out notices, the group members who were unable to lodge an opt out notice would remain as group members and as such have the possibility of securing some form of legal redress. Failure to respond to a settlement notice would also not have drastic consequences, in light of the fact that it was not envisaged that the notice would extend to them the option of opting out of the settlement in question.

Australia's class actions landscape, over the last few years, is substantially different from that depicted above and, as a result, the notice regime has become of even greater importance. As recently explained by the Full Federal Court in its recent and ground-breaking common fund judgment in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*:

> the Court has accepted in numerous cases that, with proper notice to unidentified class members and an opportunity to object, subject to leave of the Court the applicant may take steps that are contrary to their interests.[76]

The most significant illustration of this practice is the class closure device, pursuant to which:

> a court may require group members to identify themselves by a certain point in time as having an interest in any judgment or proposed settlement. Failing a declaration of such interest (normally achieved by registering with the court or a firm of solicitors by a certain date), any subsisting entitlement to damages of the group members relating to the claim may be extinguished.[77]

Group members are usually advised of this registration process through the opt out notice and, as a result, a failure to take any steps following receipt of this notice will have adverse consequences for them.

B. Have Court-approved notices "kept up" with the changes outlined above?

The dimension of Australia's class action regimes, succinctly summarised by the Full Federal Court in the passage quoted above, may be seen as the outcome of Australian Courts increasingly seeing group members as quasi-parties rather than passive beneficiaries of class action litigation; and, as such, they are expected to take steps whenever they feel that the litigation is moving in a direction that is no longer consistent with their best interests.

In order for group members to have a meaningful opportunity to protect their interests: (a) they must be able to receive court-approved notices that advise them of future steps in the litigation that may harm their interests; (b) they must be provided with adequate information regarding these developments; and (c) they must be able to comprehend the contents of the notices, ideally without requiring the services of a lawyer; although the services of a lawyer may be required in order to assess adequately the advantages and disadvantages of alternative strategies.

Determining the extent to which group members actually understand the contents of court-approved notices - that are intended to advise them of the progress of the class actions and/or of what steps they need to take in order to advance their interests - is something that has always been of great interest to me. As a result, one of the first steps that I took, after I

[76] [2016] FCAFC 148, para 118 (per Murphy, Gleeson and Beach JJ).
[77] *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 13* [2013] VSC 17, para 19 (per J Forrest J).

commenced my empirical work, was to seek permission from the Chief Justices of the Federal Court and the Supreme Court of Victoria to review the opt out forms filed by group members. Several months were spent by the members of my research team going through these forms for the purpose of seeing if they contained any comments. And, as the VLRC noted in its Consultation Paper, this exercise highlighted great confusion on the part of a majority of the group members who wrote (unsolicited) comments on their opt out forms.

The Draft Opt Out Notice - attached to the Part IVA Practice Note that was released at approximately the same time as the review of the opt out forms filed by group members was coming to an end - addressed those aspects and/or parts of opt out notices that had confused some of the group members, as revealed by their comments on the opt out forms. This was achieved predominantly through the use of additional explanations written in plain English. That was a very important step in the evolution of the federal notice regime. The Supreme Court of Victoria decided not to attach to its Part 4A Practice Note a draft opt out notice. But, ironically, most of the opt out notices that have been proposed by the parties to Part 4A proceedings and approved by Victorian judges (since 2010) have essentially been slightly modified versions of the draft opt out notice attached to the Part IVA practice note.

The problem is that, since this important development in July 2010, notices have become far longer and more complex as they have dealt with, not just the right to opt out and settlements, but also *inter alia*: (a) opt in/registration devices; (b) applications with respect to the level or quantum of remuneration that the entities funding the litigation desired or applied to receive;[78] (c) requests for *inter alia* information, from group members, with respect to their ability to help the lead plaintiff provide their opponent with security for costs;[79] and (d) where there are overlapping competing class actions, requests that the group members in question decide which class actions they prefer to be bound by.[80]

Also, the increasing importance and use of social media has meant that we are becoming accustomed to extremely simplified and abbreviated forms of communication. Another relevant problem is that, at the end of the day, class action notices are drafted and approved by lawyers who have no sociolinguistic or media communications qualifications.

Do the problems briefly summarised in the preceding two paragraphs justify the insertion of provisions, in either Part 4A or the practice note, that provide guidance to Part 4A judges in dealing with the form, content and distribution of notices for group members? In my view, this reform is not required. As I noted elsewhere, in recent times we have seen plaintiff lawyers securing orders from our class action courts that envisage the use of social media as well as the use by Levitt Robinson Solicitors, in the Palm Island riot class action, of the services of a graphic designer and a sociolinguistic expert.[81] I am confident that these will not be isolated instances, as more plaintiff solicitors will realise that embracing non-traditional forms of communication and seeking the services of experts in this area (as is the case in North America) will decrease their costs overall[82] and increase the proportion of group

[78] See, for instance, V Morabito and V Waye, "Seeing Past the US Bogey - Lessons from Australia on the Funding of Class Actions" (2017) 36 *Civil Justice Quarterly* 213, 231.
[79] See, for instance, *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323, para 182 (per Murphy J).
[80] See V Morabito, "Empirical Perspectives on 25 Years of Class Actions" in in D Grave and H Mould, *25 Years of Class Actions in Australia 1992 - 2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law; 2017) 43, 67.
[81] See V Morabito, *The First Twenty-Five Years of Class Actions in Australia* (An Empirical Study of Australia's Class Actions Regimes; Fifth Report: July 2017), 20.
[82] See, for instance, EJ Cabraser and S Issacharoff, "The Participatory Class Action" (2017) 92 *New York University Law Review* 846, 854 ("whereas a simple mailing of class notice to a class of one million members would have cost over $5 million in the 1980s in terms of postage and copying alone, electronic transmission of the same notice, on the same scale, is effectively free today").

members who will receive the notices and/or actually understand the information that they contain.

XIII. SETTLEMENTS

A. Legislative list of settlement criteria?

In 2006, I called for the inclusion in s 33V of the criteria that courts should apply when considering applications for the approval of class action settlement agreements.[83] At the time, the jurisprudence in this area was very limited. But that is no longer the case. We have numerous judicial pronouncements and extensive guidance provided by the practice notes with respect to settlement approvals and practitioners may therefore determine, with a high degree of precision, the approach that the court is likely to take and what documents and information they will need to file with their s 33V applications. Nothing that has happened in the bushfire class actions requires any reform in this area. The involvement of litigation funders also does not require amendments to s 33V with respect to applications for settlement approval filed in funded class actions.

B. Legislative requirement for the appointment of contradictors, court-appointed legal costs consultants and litigation funding costs experts?

In 2006, I called for greater judicial use of contradictors in settlement hearings.[84] Up to that point, contradictors had been appointed in only one class action and several settlement agreements - which in my view unjustifiably discriminated against certain categories of group members (eg group members who were not clients of the lead plaintiff's solicitors) - had been approved by trial judges.[85]

But the current judicial approach to class action settlements is fundamentally different. To my knowledge, two of the three most recent settlement hearings in Part 4A litigation saw the involvement of a contradictor/amicus curiae[86] and with respect to the third settlement approval application, the trial judge referred a question relating to a portion of the costs payable to the lawyers for the class representative to an Associate Justice in the Costs Court.[87] And, as noted in the VLRC's Consultation Paper, Justice Jack Forrest writing extra-curially, expressed the view that he should have appointed a contradictor in the Kilmore East settlement hearing.

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[83] See V Morabito, "An Australian Perspective on Class Action Settlements" (2006) 69 *Modern Law Review* 347, 381.

[84] Ibid 380.

[85] See V Morabito, "Judicial Responses to Class Action Settlements that Provide no Benefits to Some Class Members" (2006) 32 *Monash University Law Review* 75.

[86] See *Re Banksia Securities Limited (Rec & Mgr Apptd)* [2017] VSC 148, para 9 (per Robson J); and *Kamasaee v Commonwealth of Australia & Ors (Approval of settlement)* [2017] VSC 537, para 18 (per Macaulay J). In the latter case, an independent law firm was also appointed "to make an application to the Court on behalf of those persons who elected to seek an extension of time within which to opt out of the proceeding": *Kamasaee v Commonwealth of Australia & Ors (Approval of settlement)* [2017] VSC 537, para 18 (per Macaulay J).

[87] See *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, paras 106 and 121 (per Emerton J); and *Williams v AusNet Electricity Services Pty Ltd (No 3)* [2017] VSC 528. It is interesting to note that in the final judgment handed down, with respect to the approval of the settlement in this class action, Justice J Forrest drew attention to the fact that the Supreme Court of Victoria "is fortunate to have a skilled body of costs professionals headed by an experienced Associate Justice who can provide advice, assistance and answers - as occurred in this case. That demonstrates the difference between this Court and the Federal Court (which lacks this facility) …": *Williams v AusNet Electricity Services Pty Ltd (No 4)* [2017] VSC 619, para 42.

A similar scenario exists with respect to federal class actions. Justice Murphy appointed a contradictor with respect to two different aspects of the settlement agreements executed with respect to the four Willmott Forests class actions.[88] And in two other recent s 33V judgments, Justices Beach[89] and Wigney[90] of the Federal Court revealed that they considered, but ultimately decided against, the appointment of contradictors with respect to the settlement approval applications that they were considering.

In light of this greater judicial willingness to consider whether the appointment of a third party would assist them in their deliberations, I can see no reason at all for a "one size fits all" legislative measure that would force judges to use third parties even where they considered that the costs incurred as a result of these appointments would outweigh the benefits that they would produce. The same conclusion applies with respect to the appointment, by the court, of costs consultants and experts with respect to the remuneration provided to litigation funders in the proposed settlement agreement. The Court should retain the power/discretion to decide what external assistance (if any) it requires or desires.

It is also worth remembering that, as pointed out in Part IX(C) above, the appointment of a contradictor in the Banksia Part 4A proceeding resulted in a reduction in the settlement proceeds, that were available for distribution to group members, as a result of half of the contradictor's costs, calculated on an *indemnity basis*, being paid from the settlement fund.

C. Settlement distribution schemes

In my view, the only desirable change in this area would entail inserting in the Part 4A practice note the provisions that are currently contained in the Part IVA practice note.

Justice Murphy and I have expressed elsewhere our views on this important dimension of class action litigation and the distribution of the settlement proceeds in the Part 4A proceedings that were criticised by some sectors of the media.[91] Thus, there is no need for me to repeat these views except in drawing attention to the fact that Justice Murphy and I concluded the book chapter in question by expressing our agreement with the following comments made by Justice Jack Forrest in December 2016, on making orders which paved the way for the distribution of almost $700 million to many thousands of group members in the Kilmore East and Murrindindi bushfire class actions:

> 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.[92]

I also wish to add that, contrary to what has been implied in the relevant media reports, the distribution of the settlement proceeds in the Kilmore East class action has not set new records in Australian class actions, as far as the duration of such distribution is concerned. There was, for instance, a federal class action where it took over five years to complete the distribution of the settlement fund. And the claimants in question were only 34.

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[88] *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; and *Kelly v Willmott Forests Ltd (in Liquidation) (No 5)* [2017] FCA 689.
[89] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, para 90 (per Beach J).
[90] *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in Liq) (No 3)* [2017] FCA 650, para 90 (per Wigney J)
[91] Justice Bernard Murphy and V Morabito, "The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?" in in D Grave and H Mould, *25 Years of Class Actions in Australia 1992 – 2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law; 2017) 13, 35-37.
[92] Supreme Court of Victoria, *Media Release*, 7 December 2016, quoting Justice J Forrest.

XIV. CONTINGENCY FEES

I find it difficult to believe that allowing Australian class action solicitors to be remunerated on a contingency fee basis would lead to widespread unethical and inappropriate conduct when no such abuse has been caused by litigation funders - who it will be recalled are not, unlike solicitors, officers of the court - charging on that basis in class actions since December 2001.

I also find it difficult to comprehend that there is any meaningful difference, as far as the existence of incentives to engage in unethical conduct is concerned, between acting on a contingency fee basis, on the one hand, and acting on a no win - no fee basis, on the other hand. Pursuant to both models, solicitors face the prospect, in class actions, of: (a) paying millions of dollars, with respect of disbursements; and (b) either not being paid at all (if the outcome of the litigation is negative) or waiting for several years for any payments, in the event of a successful outcome.

The VLRC's Consultation Paper referred to comments by the Legal Services Commissioner to the effect that lawyers charging contingency fees and funding fees are mutually exclusive. I have no idea whether that comment can be empirically substantiated in orthodox litigation but I can say that this comment is, with respect, erroneous in relation to class actions. I can refer to, for instance, the fact that several instances of competing class actions in Australia have arisen as a result of funded and unfunded class actions being brought by different lawyers. The competing class actions filed by Maurice Blackburn and Bannister Law against several German car manufacturers also highlight the fact that instances of funded and unfunded competing class actions have not been confined to the shareholder and investor spheres.

I agree with the conclusions reached by the VLRC in 2008 and more recently by the Productivity Commission that contingency fees would enhance access to justice. In the class actions arena, this positive development is likely to be witnessed through the filing of class actions where there is no interest from litigation funders. As Jarrah Ekstein and I have noted elsewhere, contingency fees (and public class action funds) will provide legal redress for a far greater number of vulnerable claimants than has been possible to date, under the available funding models.[93]

The availability of contingency fees would also help to reduce the gap which currently exists between the demand for funds to bring class actions and the available sources of funding. This may, in turn, place downward pressure on the commission fees charged by litigation funders. Very recently, lower funding fees have been witnessed in three federal class actions,[94] probably as a result of the common fund doctrine and the recent judicial pronouncements, mentioned above, which signalled (with respect to Part IVA proceedings) the judicial ability and willingness to reduce (in the context of approving class action settlements) excessive funding fees.

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[93] V Morabito and J Ekstein, "Class Actions Filed for the Benefit of Vulnerable Persons - An Australian Study" (2016) 35 *Civil Justice Quarterly* 61, 89.

[94] See *Pearson v State of Queensland* [2017] FCA 1096, para 23 (per Murphy J); *Hardy v Reckitt Benckiser (Australia) Pty Limited (No 3)* [2017] FCA 1165, para 15 (per Nicholas J); and VID1213/2016 *Hall v Slater & Gordon Limited* (Order by Middleton J; 25 September 2017), "Schedule A" (Opt out and settlement notice), p 6 ("[o]n a common fund basis, ILP15 [the litigation funder] will not receive a commission based on the 30-35% rates. Instead, the Court will be asked to approve a payment to ILP15 of $8.25 million, which represents approximately 25% of the estimated amount net of legal costs which may be paid to Class Members in this proceeding out of the Scheme Fund plus the Lender Contribution").

Contingency fees, together with the adoption of a similar approach by Part 4A judges, would bring Victorian class actions a step closer to what I regard as the ideal (and thus unattainable) scenario: group members receiving in most settled class actions at least 70 per cent of the settlement funds and there being no or little difference in the size of the "settlement cake" going to group members in funded and unfunded class actions.

As far as safeguards are concerned, if the introduction of contingency fees does lead to inappropriate conduct by plaintiff solicitors, an appropriate solution in the class action context might entail the implementation of the regime recommended by the ALRC in 1988. The ALRC recommended that the Court should be empowered to approve, at any stage of the proceedings (except after the proceedings have come to an end), an agreement concerning the remuneration to be paid to the class representative's solicitor. The prohibition, with respect to applications filed after the litigation in question was resolved, stemmed from the ALRC's concern that once an outcome in favour of the class was secured the Court would not be in a position to properly assess the financial risk the relevant lawyer undertook with the undesirable consequence of the Court underestimating the risk of losing the case.[95]

It was envisaged by the ALRC that the Court should approve individual conditional costs agreements only when it formed the view that the agreements were fair and reasonable to all concerned. In determining whether a fee agreement was reasonable, the Court would consider the circumstances of the case, including the nature and complexity of the proceedings, the nature of the legal work involved, the time reasonably required of lawyers and others involved in the conduct of the litigation, out-of-pocket expenses and other expenditure incurred or likely to be incurred by the class lawyer and the financial risks to the lawyer.[96]

Before undertaking this important task notice would need to be given to class members of the fee agreement application in order to provide them with an opportunity to advise the Court of their objections.[97] This requirement stemmed from the fact that one of the purposes of this mechanism was to regulate the liability of class members to contribute to the costs incurred in running the case for their benefit. Once the fee agreement was approved by the Court, the apportionment of costs would take place after a settlement or judgment in favour of the class was secured. The ALRC envisaged that when an aggregate assessment was made or the matter settled, the costs incurred in running the proceeding on behalf of the class could be deducted from the total and the remainder distributed to those entitled to compensation.[98]

The final comment that I would like to make is that, as adverted to above, a public class action fund would represent an extremely positive development and I have, in fact, been advocating the establishment of these funds since 1995![99]

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[95] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988), para 293.
[96] Ibid.
[97] Ibid.
[98] Ibid para 290.
[99] See V Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 *Monash University Law Review* 231, 265-270.