Submission to Victorian Law Reform Commission, Access to Justice — Litigation Funding and Group Proceedings Consultation

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Chapter 3: Current regulation of litigation funders and lawyers

Court Oversight

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

To protect against unfair risks or disproportionate cost burdens this submission suggests that the class actions regime in Victoria should be amended to provide the Court with specific power to review all fees and costs charged in relation to a class action, in particular legal costs, litigation funding fees and settlement distribution costs. This should not be controversial as the Full Court of the Federal Court has stated that it has a supervisory or protective role in relation to legal costs and litigation funding fees proposed to be charged to group members.[1] Further, that the legislation specify the objective of that power in general terms. It could simply state that all fees and costs must be fair and reasonable and the court has power to review and alter any fee or cost to ensure that it is fair and reasonable. A reference could also be made to proportionality but that is problematic for some costs, such as legal costs, as discussed below.

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

Litigation funding usually involves an agreement to pay the costs of the litigation, including the legal fees, and indemnifies the representative party against the risk of paying the other party's costs if the case fails. In return, if the claim is successful, the funder will be reimbursed the cost of legal fees and disbursements, and receive a fee, typically a percentage of any funds recovered.[2] Some litigation funders have varied this model of payment by instead setting their fee as a multiple of the funds

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[1] *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98, [90].
[2] Simone Degeling and Michael Legg, 'Funders and Fiduciaries: Litigation Funders in Australian Class Actions' (2017) 36 *Civil Justice Quarterly* 244, 245.

paid out in legal fees and disbursements, or as being the higher of the multiple and a set percentage.[3]

Lawyers running cases without litigation funding typically employ conditional billing, also called speculative fee agreements or no win no fee agreements, which involve the lawyer's fee only becoming payable to the lawyer if a successful outcome is achieved. Conditional billing may also be combined with an uplift fee agreement where the lawyer takes his or her usual fee plus an agreed amount or percentage of this usual fee, the uplift, if the action succeeds.[4] Uplift fees must not exceed 25% (excluding disbursements) of the legal fees otherwise payable.[5] However, when a lawyer is acting in a case with litigation funding they will typically charge an hourly fee which the funder will pay. There may be a risk-sharing arrangement with the funder so that some of the fee is held back pending a successful outcome or a success fee is added if the case resolves in the applicants favour. Equally, there have been examples of lawyers, without a litigation funder, who have charged each group member a fixed fee by reference to particular stages in the litigation.[6] The growth in alternative fee arrangements may see other forms of billing develop.[7]

These variations make drafting a legislative provision that is other than generally expressed a challenge. Some of these challenges are discussed below in relation to chapter 7.

A Back-Stop Provision

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

This approach has started to be embraced in practice with funders specifying that their fee and the legal fees charged will not together be more than 50% of any settlement or judgment.[8] As a result a group member receives at least 50% of any recovery.

A back-stop provision or cap may be an effective last-ditch protection for group members. However, the risk of setting caps is that they become the default fee.[9] If class actions can only be prosecuted with half the recovery going in transaction costs then the class action procedure has failed in its objective of providing access to justice.

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

[4] Conditional fee agreements are dealt with by the *Legal Profession Uniform Law 2015* (Vic) s 181. Uplift fees are permitted by *Legal Profession Uniform Law 2015* (Vic) s 182.

[5] *Legal Profession Uniform Law 2015* (Vic) s 182(2).

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

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

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

[9] Michael Legg, "Contingency fees — Antidote or poison for Australian civil justice?" (2015) 39(3) *Australian Bar Review* 244, 266.

Chapter 4: Disclosure to plaintiffs

In group proceedings where there is some form of litigation funding then group members should be informed of this as part of the mandatory opt out notice. In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* the Court saw the ability of group members to opt out knowing how litigation funding would impact any potential recovery as an important protection:

> In the case of unfunded class members, disclosing such a possibility [operation of a common fund order] sooner rather than later is fairer than informing them as part of settlement approval. Unfunded class members may have made a different decision in relation to opt out had they been aware of a proposal to make a substantial deduction from any settlement or judgment they obtain.[10]

In the Allco class action settlement Beach J examined the notice that had been given to group members of the intention to seek a common fund order. The intention and the terms of the existing funding agreement were set out in the opt out notice.[11] Beach J opined:

> In relation to notification, each notice sent to group members since the original application for the common fund order has referred to the applicants' intention to seek such an order. This is not unimportant. If group members had not been given fair and early notice of the basis upon which it might later be suggested that they ought bear the costs of funding the proceeding, then it may well be unfair at the settlement stage to impose an arrangement of this kind rather than a funding equalisation mechanism. But that is not the present case.[12]

The notice should be as specific as possible as to the ramifications of the presence of a funder for a group member. This may include giving notice that legal fees are being paid for by the funder and that the funder will provide any security for costs that is ordered or agreed. Of significance for any group member is also to know how the funder will be paid and what that means for the group member's recovery. At present how the funder will be paid will depend on whether there is an open class or closed class, whether a common fund is sought at the beginning of proceedings or at settlement, or whether some form of equalization order is going to be sought. In some situations, it will be possible for the notice to specify the percentages to be charged or a range of percentages to be sought, while in others only the method of charging may be known.

Chapter 5: Disclosure to the court

<u>Disclosure of Funding Agreements</u>

This submission endorses the approach to disclosure of litigation funding agreements in the Federal Court of Australia, Class Actions Practice Note (GPN-CA), 25 October 2016 paragraphs [5] and [6].

In *Coffs Harbour City Council v Australia and New Zealand Banking Group Limited (trading as ANZ Investment Bank)* [2016] FCA 306 Rares J considered the operation of the requirements to disclose

[10] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; 245 FCR 191, [110].
[11] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476, [50].
[12] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476, [94].

the litigation funding agreement to the respondent and objections based on legal professional privilege and confidentiality.

Security for Costs and Ensuring a Litigation Funder Meets its Financial Obligations

In the absence of Commonwealth regulation relating to capital adequacy it falls to the security for costs procedure as the way in which some assurance is obtained that a litigation funder can honour an obligation to pay an adverse costs order.[13]

The purpose of a security for costs order is protective, so as to ensure that the primary purpose of an award of costs, that is, indemnification of the successful party is achieved. As stated in *Idoport v National Australia Bank*:

> The jurisdiction to award security for costs should thus be seen as protecting the efficacy of the exercise of the jurisdiction to award costs. The discretion should be exercised with the same rationale in mind, namely that, to the extent it can be provided, the court should not permit a situation where a party's success is pyrrhic.[14]

A security for costs order is not usually thought of as being to protect the plaintiff. However, the plaintiff is protected (as well as the defendant) as the security means that funds are available to pay an adverse costs order if the case is unsuccessful so that the plaintiff is not left to foot the bill and possibly be bankrupted.

Security for costs prevents a funder terminating a funding agreement when the going gets tough and leaving a plaintiff exposed. Most funding agreements provide that a funder can terminate for any reason but they remain liable for costs incurred to date. This is a provision that the lawyer acting for the plaintiff, the defendant and the court should pay close attention to when disclosure of the funding agreement is made.

Security for costs ensures only funders of substance can support litigation or only big funders can bring big litigation.

Despite the availability of security for costs where a funder is involved Heydon J sounded the following warning:

> Judges are reluctant to order security for costs in large amounts, perhaps fearing that this will simply prolong the litigation in an ill-disciplined way. … The lack of judicial generosity is one of several signs that applications seeking security for costs have little attraction for judges. In part that is because they are interlocutory, satellite and hypothetical. Their interlocutory character is repellent to courts eager to deal with trials but hard pressed to do so. They are satellite in character because they often involve spending significant time examining complex questions of solvency which are irrelevant to the main proceedings. They are hypothetical in character because their point depends on the hypothesis, which may or

[13] Michael Legg, 'Security for costs the solution for litigation funding', *The Australian Financial Review*, 13 November 2009, 42; Michael Legg and Edmond Park, 'Litigation Funding and Security for Costs' (2009) 47 (11) *Law Society Journal* 74.
[14] *Idoport v National Australia Bank* (No. 35) [2001] NSWSC 744, [33] and [52].

> may not be realised, that the defendant will succeed, so that through them stalks the fear in many instances that they are a waste of time. They generate additional costs of their own.[15]

Security for costs will only protect the plaintiff if it adequately covers the costs exposure created by the undertaking of the litigation. Further, the plaintiff will need to rely on the defendant to make an application for security for costs.

Lastly, lest it be thought that the protection of plaintiffs from insolvent or offshore litigation funders was unnecessary reference should be made to the Equine Influenza class action.

The class action was commenced with funding from Argentum Centaur El Funding Private Limited.[16] This company appears to have been a special purpose vehicle (SPV) related to the Argentum group that was specifically incorporated to fund the Equine Influenza class action. The main companies in the Argentum group were Argentum Capital Limited, which was described as "a CISE-listed, Jersey-regulated, closed-end Expert Fund which focuses on litigation funding in the UK and Australia"; Argentum Investment Management Limited, which was described as "the Investment Manager for the Argentum Group, with extensive legal, fund and insurance expertise and a network of legal practitioners"; and Argentum Litigation Services Limited, which was described as "the UK and Australian operational subsidiary of Argentum Investment Management. It sources, assesses and structures funding for litigation and monitors post-investment exits".[17]

The problem with a SPV as a litigation funder is that it is designed to use the corporate veil to insulate up-stream shareholders from having their funds exposed to a claim pursuant to an adverse costs order. If the litigation is successful the funder's fee is paid to the SPV which then distributes it to its off-shore investors. If the litigation is unsuccessful then the exposure to any adverse costs order is limited to the assets of the SPV.

In the Equine Influenza class action Argentum Centaur El Funding Private Limited ceased funding the proceedings and left the law firm out of pocket by "a very substantial sum".[18] A settlement was reached which involved no compensation being paid but that each party would bear their own legal costs. One of the reasons for the settlement was "[t]he prospect that the applicants may suffer an adverse costs order for many millions of dollars in the event that the Commonwealth was successful in defeating the applicants' claims".[19] The adverse costs exposure which Argentum would have indemnified the applicant against, but which was now worthless due to Argentum's insolvency, was averted by the terms of the settlement.

Chapter 6: Certification of Class Actions

The Commission has sought comment on whether the process for commencing a class action should be reformed, including whether commencement should include a requirement of certification. We

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[15] *Jeffery and Katauskas Pty Ltd v Rickard Constructions Pty Ltd* [2009] HCA 43, [93].
[16] *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119.
[17] See David Marchant, Argentum Capital litigation fund financed by £90 m Ponzi scheme, *Offshore Alert*, 18 February 2014. https://www.offshorealert.com/brendan-terrill-argentum-litigation-fund-buttonwood-legal-capital-suspected-ponzi-scheme.aspx . See also Ben Butler, 'Ponzi scheme claims against litigation funder of equine class action' *The Sydney Morning Herald*, 22 February 2014.
[18] *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, [43], [45].
[19] *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, [45].

recommend that Victoria should adopt a certification requirement for the commencement of class actions. In addition to requiring a demonstration by the plaintiff that the prerequisites for commencing a class action have been satisfied, the certification hearing should also determine that the plaintiff is an adequate representative for the absent group members. The Court could further use the certification hearing, and the adequacy determination, as a mechanism for addressing the claims of competing class actions. Finally, issues associated with litigation funding that need to be determined at an early stage of proceedings could also be addressed at a certification hearing.

Certification

We recommend the introduction of a hearing to certify that the preliminary commencement criteria have been met, with the onus being on the plaintiff to prove that the criteria have been met. Already in current practice, the Supreme Court of Victoria's class actions practice note requires that key matters be dealt with at the first case management hearing.[20] This step, together with the need more generally for the contours of the class action to be resolved as early as possible to facilitate notice to group members and the management of future case preparation steps, has resulted in what amounts to a quasi-certification regime. Victoria should formally adopt an actual certification regime by introducing a specific certification requirement as a necessary precondition to the commencement of a class action.

Certification would require that the plaintiff affirmatively satisfy the court that the preliminary criteria for commencing the class action have been met. As a result of this commencement requirement, the Supreme Court of Victoria would be placing the burden of justifying the bringing of a class action on the entities with the best knowledge of the proposed action, thereby enhancing efficiency.[21] A certification hearing would further allow for the early identification of problems with the class action, including pleadings and group definition, and could avoid costs and delay associated with interlocutory challenges and responding amendments. The need to address issues associated with litigation funding and orders to facilitate a common fund[22] that are required at the beginning of proceedings can also be dealt with as part of a certification hearing. As will be discussed further below, certification will also provide the Court with the opportunity to determine that the plaintiff complies with requirements for cohesion and adequacy of representation

The criteria in sections 33C and 33H should remain as they currently appear in the Supreme Court Act, with the exception that section 33H should be amended to provide that the originating process for a class action will be a notice of motion seeking certification. This ensures that a reform aimed at introducing certification does not become conflated with arguments over the requirements for cohesion and the regime will to continue to have the benefit of the precedent that has been developed to date.

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

[21] See John Emmerig and Michael Legg, "Twenty Five Years of Australian Class Actions – Time for Reform" (2017) 36 *Civil Justice Quarterly* 164, 169-70.

[22] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.

Adequate Representation

Victoria should require that the representative plaintiff prove that he, she or it is an adequate representative of the absent group members as part of the criteria for certification. The legislation should be amended to accommodate this requirement. In the first instance, section 33D of the Supreme Court Act should be amended to include a requirement that adequacy of representation be demonstrated by the representative plaintiff in order to have standing to serve as group representative. The standing requirement could also incorporate the objective set out in the Supreme Court's class action practice note that "the plaintiff's personal claim can be used as the vehicle for determining the common questions in the action."[23]

Adequate representation would need to be defined, in terms that focus the inquiry on the avoidance of conflicts of interest and self-dealing. The Supreme Court of the United States has explained the meaning of adequacy of representation as follows:

> The adequacy inquiry under [Federal Rules of Civil Procedure] r 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. . . . [A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.[24]

In *Carnie v Esanda Finance Corporation Ltd*, Brennan J stated that adequacy of representation was meant to guard against, "The self-proclaimed carrier of a litigious banner [who] may prove to be an indolent or incompetent champion of the common cause in the courtroom."[25]

A suggested definition is that it means the ability to represent and protect group members' interests with diligence and undivided loyalty. This should reduce the likelihood of conflicts arising and will require the court to make a finding of adequacy at the stage of certification.

Competing Class Actions

Certification could also be used to address the issue of competing class actions. Along with a determination of adequacy of representation, the Court could use the certification hearing as a vehicle for making any orders necessary to stay or consolidate certain proceedings so that the most adequate representative is selected and only a single class action is allowed to proceed. Amending the legislation to give the Court the power to select that most adequate representative at certification would therefore be necessary. The result of such amendment would be to allow for the realization of efficiencies and economies of scale that have, to date, been largely illusory.

A useful illustration of both a means of addressing competing class actions and a way in which adequacy of representation could be administered by the Court can be seen in the Federal Court's recent judgment in *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd*.[26] Beach J was faced with two substantially identical class actions filed on behalf of overlapping groups of people who had an interest in ordinary shares of the respondent: the McKay proceedings and the Basil

[23] Supreme Court of Victoria, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [4.2].
[24] *Amchem Products, Inc v Windsor* 521 US 591, 625-26 (1997).
[25] *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 408.
[26] *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947.

proceedings. The defendant sought an order permanently staying one of the competing proceedings. Ultimately, Beach J made orders closing the class with respect to the Basil proceeding, but allowed it to remain on foot to be tried jointly with the McKay proceedings. With amended legislation, as suggested above, a Victorian Court faced with the same circumstances could instead select the more adequate of the proceedings to be the class action to go forward on behalf of all group members.

Beach J identified several factors that suggested that the McKay proceeding was the one that should remain open – factors that could easily be incorporated into a test for adequacy of representation, which would also serve to determine which competing proceeding should receive priority by the Court. These factors included the experience of the practitioners seeking to bring representative actions, the costs the practitioners expect to charge, the funding terms associated with the proceedings, the time at which the proceeding was commenced, the number of group members, whether a common fund order is to be sought and the position adopted by any litigation funder on security for costs and whether the funder has the resources to meet an adverse costs order.[27]

However, devising an approach for selecting a class action to proceed does not end the issue. Victorian class actions may then face the "Worldcom problem."[28] A law firm or funder that is not part of the class action selected to proceed may encourage their clients to opt out, with the result that there is a large-scale exit of group members. Those group members may sue individually or together. To prevent the selection of a single class action being undermined it may be necessary to stay any non-group proceeding until the group proceeding has resolved. The ability of group members to opt out is preserved, but those former group members go to the back of the queue. Where multiple jurisdictions are involved, the cross-vesting regime would also play an important role. A solution to the "Worldcom problem" needs to choose between reducing the costs associated with multiple proceedings and allowing group members to have the right to choose how their claim will be prosecuted (or not).

Consideration of Funding Issues

As set forth above, funding terms, the position of a funder on security for costs and whether the funder has the resources to meet an adverse costs order are all factors that should be considered by the Court in making its determination on the most adequate representative for the class action. Thus, it is necessary that the funder disclose all of these matters at the time of certification. The funder should also be required to disclose any actual or potential conflicts of interest, which would further assist the Court in making its selection of the most adequate representative for the group.

Chapter 7: Settlement of class actions

Interests of Unrepresented Class Members

The interests of unrepresented class members could be better protected, first, by amending section 33V of the Supreme Court Act to specify the test the Court must apply when approving a class action

[27] See above at [71].

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

settlement, along with a non-exhaustive list of factors for the Court to take into account when undertaking the approval determination. Section 33V should be amended to require that in approving a settlement, the Court must determine whether (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the class members who will be bound by the settlement; and (b) the proposed settlement has been undertaken in the interests of class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).[29]

This provision should be accompanied by a non-exhaustive list of factors for the Court to take into account when determining whether to approve the settlement. The factors have already been approved in the Victorian Supreme Court practice note addressed to class actions,[30] but should be incorporated into the legislation to ensure consistency, guide judges and ensure the factors are given due consideration in each case. The factors to be applied are:

(a) the complexity and likely duration of the litigation; (b) the reaction of the group to the settlement; (c) the stage of the proceedings; (d) the likelihood of establishing liability; (e) the likelihood of establishing loss or damage; (f) the risks of maintaining a group proceeding; (g) the ability of the Defendant to withstand a greater judgment; (h) the range of reasonableness of the settlement in light of the best recovery; (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

Legal Costs

Australian courts have power to regulate costs agreements between a solicitor and a client.[31] In the class action context, the power in section 33ZF has been interpreted as allowing for the supervision of costs agreements with lawyers.[32]

In the Mickleham bushfire class action Emerton J explained the court's role:[33]

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

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

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[29] See Supreme Court of Victoria, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.1]. See also Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 25 October 2016, [14.3].
[30] Supreme Court of Victoria, *Practice Note SC Gen 10 Conduct of Group Proceedings (Class Actions)*, 30 January 2017, [13.3].
[31] *Woolf v Snipe* (1933) 48 CLR 677, 678.
[32] *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, [35]–[37].
[33] *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [79].

Gordon J in *Modtech Engineering Pty Limited v GPT Management Holdings Limited* explained the role of the court as involving two aspects: the test to be adopted by the court and then the material necessary to undertake the assessment. The task of the court is not a taxation. Rather, the questions for the court in assessing the fees and disbursements claimed by the lawyers are:[34]

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

The types of information that should be put before the judge were stated to include:[35]

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

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

The above methodology is comprehensive and considers a range of factors relevant to fairness and reasonableness. However despite its comprehensiveness and admirable objectives it may be ineffective. These concerns may be illustrated by the description of the approach in *Blairgowrie Trading Ltd v Allco Finance Group Ltd*:[36]

> subject to the question of proportionality, if unchallenged expert opinion is put before the Court which sets out a commercial and reasonable methodology consistent with the terms

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[34] *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [32]. See also *Stanford v DePuy International Ltd (No 7)* [2017] FCA 748, [12]; *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [120]; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [179] (In determining whether to approve the deduction of costs from the settlement sum, courts must be satisfied that the costs claimed are 'reasonable in the circumstances'. This does not necessarily require a taxation of the costs claimed (although it may), but rather the tendering of 'sufficient' evidence so as to enable the court to make an assessment as to whether the costs were reasonably incurred.)

[35] *Modtech Engineering Pty Limited v GPT Management Holdings Limited* [2013] FCA 626, [37].

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

of any retainer and which demonstrates that it has been accurately and thoroughly applied to sufficient and probative source records of the solicitors, then it is no part of my function to:

(a) reject that evidence as to whole or part without very good reason; or

(b) apply one's own subjective view of what the legal work is "really worth", divorced from the reality of the commercial context within which the work was carried out and the expenses incurred.

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

The Productivity Commission report from 5 September 2014 found that solicitors generally charge on a time basis and law firm partners typically charge more than $600 per hour, while associates charge around $400 per hour.[37]

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

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

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

<u>Proportionality and Legal Costs</u>

In the Mickelham bushfire class action Emerton J described the legal costs in the proceeding as high relative to the Settlement Sum.[38] However her Honour went on to explain as follows:[39]

[37] Productivity Commission, Access to Justice Arrangements (September 2014) 115-116.
[38] *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [89].
[39] Id, [109]-[111].

> Section 24 of the *Civil Procedure Act 2010* (Vic) requires reasonable endeavours to be used to ensure that legal and other costs incurred in connection with a civil proceeding are reasonable and proportionate to the complexity or importance of the issues in dispute and the amount in dispute.
>
> In *Yara Australia Pty Ltd v Oswal*,[(2013) 41 VR 302] the Court of Appeal held, in effect, that that the concept of proportionality in s 24 is forward looking. For each piece of work, a practitioner must consider whether the cost of the work is in proportion to the factors in s 24(a) and (b), namely the complexity and importance of the issues in dispute and the amount in dispute.[at 313 [36]] Hence, when assessing the expected benefit, the Court's analysis must focus on the expected realistic return at the time the work being charged for was performed, not the known return at a time remote from when the work was performed. The question is the benefit reasonably expected to be achieved, not the benefit actually achieved.[*Foley v Gay* [2016] FCA 273, [24]]
>
> As a result, the fact that legal costs may be high in absolute terms or as a percentage of the Settlement Sum is not a proper basis for concluding that legal costs are disproportionate.[Ibid] It is necessary to consider whether, at the time the work was being performed, that work was not justified having regard to the complexity or importance of the issues in dispute or the amount in dispute.

Proportionality of legal costs has also become an important consideration in the Federal Court.[40] In *Foley v Gay,* Beach J observed:[41]

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

[40] *Foley v Gay* [2016] FCA 273; *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330.
[41] *Foley v Gay* [2016] FCA 273 at [24].

The assessment of legal costs could be improved by altering the current approach, which focusses on assessing costs in comparison to the expected realistic return at the time the work was performed and asking if, at that time, the costs were proportional to that expected return.[42] This approach is problematic for a number of reasons. In the first instance, the expected return is difficult to determine and, presumably, would have to be continually reassessed at each stage of the proceedings in order for the court to determine that the costs of the work performed were proportional to the expected return at each of the stages. This is a cumbersome and onerous task for both the lawyers and the court to undertake, and one which no judgment to date that considers proportionality has undertaken. The judgments, instead, merely object to using the actual result achieved as the focus of the proportionality comparison.

The result is that proportionality as determined by a denominator of comparison of the expected rate of return is similar to or the same as a consideration of fairness and reasonableness. Indeed, it would be very difficult for an expert witness asked to opine on costs to know what the "expected realistic return" was at the time the work was undertaken. What would likely follow is simply recourse to the well-worn fair and reasonable test.

Another cited reason for the "expected realistic return" comparison is that lawyers are paid on an hourly basis, not through a contingency fee, and are not "co-venturers" with the applicant or funders.[43] This assessment, however, must be questioned. Lawyers acting without litigation funding will typically act on a conditional fee basis, giving them a keen interest in the outcome. Indeed, with an uplift fee they have a clear interest in increasing the work they undertake. Where lawyers are paid by a litigation funder, so that they are not exposed to the risk of no recovery if the claim is unsuccessful, this still involves the lawyers investing their time and resources in the class action in the hope that they can carry out the necessary work so as to earn a fee.[44] Moreover, even when the lawyers are being paid on a time basis by a funder, they may receive a success fee, or agree to part of their fee being held back until a successful outcome is achieved.

A possible solution is to make the denominator for comparison the actual result achieved as an outcome. This actual outcome is clearly identifiable and known and does not require the complex assessments and calculations as does the "expected realistic return" denominator. The actual outcome, instead, is the actual recovery that the proceedings have achieved for the group members. It is the access to justice in quantifiable terms that the lawyers have facilitated. This comparison, then, would be using actual data, rather than expecting a difficult and possibly unquantifiable denominator and then falling back on a fair and reasonable test anyway.

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[42] See *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [109]-[111]; *Foley v Gay* [2016] FCA 273; *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330.

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

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

Litigation Funding Fee Criteria

The legislation should be amended to include a general power of the Court to set and review litigation funders' fees with the aim of ensuring that they are fair, reasonable and proportionate. Giving the Court a clear power to review and set funding fees would be desirable as it would remove any uncertainty as to the Court's ability properly to undertake this task.[45] The main criteria for determining the fee should be: (a) the fee is commensurate with the risks undertaken by the funder and (b) that the fee is proportionate to the outcome achieved. Guidance can also be taken from the list of factors set out by the Full Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*,[46] which directs the court to consider:

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

Unlike the settlement factors referenced above, which are the result of 25 years of development, these and other such factors with respect to funding fees are only now being considered and developed by the courts. A desirable outcome is a set of general principles that provide guidance as to an acceptable level of fee.

Assistance to the Court

To assist the Court in determining that the costs amount payable to the lawyers should be approved it has become common practice to supply an affidavit from an independent costs expert who is able to opine as to the reasonableness of the costs and disbursements incurred by the lawyers for the applicant.[47] The Courts place significant reliance on the evidence of the independent costs expert

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

[46] (2016) 245 FCR 191, [80]. See Michael Legg, 'Ramifications of the Recognition of a Common Fund in Australian Class Actions: An Early Appraisal' (2017) 91 ALJ 655, 666-669 (discussing relevant factors).

[47] *Courtney v Medtel Pty Ltd (No 5)* (2004) 212 ALR 311, [59].

but it is the judge who must find that the legal fees and disbursements are reasonable.[48] The judge will also consider the general circumstances of the litigation.[49]

The above approach to legal fees has the advantage that they require court approval and thus justification must be provided. The downside is not that a review of legal fees is conducted by a costs expert, but that the costs expert is retained by the lawyers seeking the fee award. The expert may become dependent on the lawyers for repeat work, which is unlikely to continue if legal fees are substantially reduced. Adversarial bias in relation to experts, including selection bias whereby an expert is chosen because their views will support the party's case, has been of long-standing concern amongst the courts.[50]

As funders seek a return for themselves and group members are ill-equipped to act as contradictors, then court approval, with the assistance of expert evidence, appears necessary. However, an expert appointed by the funder to opine on the funder's fee is problematic for the same reasons explained above ie the danger of selection bias (an expert who will agree is chosen) and adversarial bias (the expert will want to support the person appointing them).[51]

The process for legal fees could be improved without any increase in cost if the Court appointed the expert and the expert owed their allegiances solely to the Court.[52] The Supreme Court of Victoria has moved towards this model in relation to settlement distributions by appointing special referees to review costs.[53] For litigation funders there have not been expert witnesses to date and so requiring them would be an additional cost. But as litigation funding is usually the largest transaction cost in class actions[54] some form of independent review would be justified.

Another source of assistance for the court is to appoint a guardian or contradictor to create the adversarial contest that is often missing in a class action settlement and to give the absent or unrepresented group members a capable voice on the settlement.[55]

An example of a contradictor being used was in *Willmott Forest* where the court directed that counsel should be appointed as a contradictor to represent the interests of non-client class members. The lawyers for the applicant provided the Contradictor with all necessary information, including confidential information, and the cost of the appointment was shared between the parties.[56] The Contradictor originally put on detailed submissions opposing settlement approval.[57]

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[48] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [30]; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [35].
[49] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [31]; *Taylor v Telstra Corporation Ltd* [2007] FCA 2008, [73].
[50] See, eg, *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 58, [57]; NSW Law Reform Commission, *Expert Witnesses – Report 109* (June 2005) [5.5]–[5.13].
[51] Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 601-602.
[52] Id, 608-610.
[53] *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731; *Downie v Spiral Foods Pty Ltd (Ruling No 3)* [2017] VSC 7, [4].
[54] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148, [72].
[55] Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 611.
[56] *Kelly v Willmott Forests Ltd (in liq) (No 4)* (2016) 335 ALR 439; [2016] FCA 323, [4].
[57] Id, [53], [112], [216].

When the settlement was recast and there were still concerns about legal fees the Contradictor was appointed to represent class members' interests in relation to the reasonableness of the costs charged.[58]

However, there are limitations to the efficacy of the contradictor strategy. As shown by the facts of *Willmott Forest*, class may be divided by any number (multiplicities) of interests – so that there may need to be a number of contradictors depending on the facts. Moreover, the appointment of a contradictor will not of itself cure any underlying breach of fiduciary duty.

Fiduciary Duties

At a minimum, there should be education of lawyers that they may owe fiduciary obligations to group members and understand how those duties may arise. This may go so far as guidance from professional bodies or the courts (practice notes).

Confidentiality

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

The class action settlement cannot be treated like other litigation where the persons affected are present and wish to have the resolution of their dispute kept confidential. Class actions have a representative capacity and resolve numerous persons' claims, primarily the claims of group members who are not before the court. Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals. Class actions are not simply disputes between parties about private rights.[59]

Improving Court Approved Notices

The Federal Judicial Center in the United States developed illustrative class action notices to demonstrate how lawyers and judges might comply with Federal Rule of Civil Procedure 23(c)(2)(B), which says that class action notices "must concisely and clearly state in plain, easily understood language" specific information about the nature and terms of a class action and how it might affect potential class members' rights.[60]

To develop the notices the Federal Judicial Center undertook research into past notices and problems with comprehension, created class action notices and forms which were then tested on non-lawyers and made available for public comment. The Federal Judicial Center also drew on expert assistance such as linguists.

Further, the Federal Judicial Center created a Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide which provides guidance through the following questions[61]

[58] *Kelly v Willmott Forests Ltd (In Liq) (No 5)* [2017] FCA 689, [4].
[59] *Madgwic v Kelly* (2013) 212 FCR 1, 21 [91]; Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282-84.
[60] https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction
[61] https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf

- Are the notices designed to come to the attention of the class?
- Does the outside of the mailing avoid a "junk mail" appearance?
- Do the notices stand out as important, relevant, and reader-friendly?
- Are the notices written in clear, concise, easily understood language?
- Do the notices contain sufficient information for a class member to make an informed decision?
- Have the parties used or considered using graphics in the notices?
- Does the notice avoid redundancy and avoid details that only lawyers care about?
- Is the notice in "Q&A" format? Are key topics included in logical order?
- Are there no burdensome hurdles in the way of responding and exercising rights?

To date in Australia the development of effective notices has been ad hoc and the result of courts reviewing notices put forward, and critiqued, by lawyers. The Full Court of the Federal Court has recognized that notices are important because they seek to "ensure that class members can make informed decisions concerning their rights".[62] Further, this means that clarity and simplicity are essential.[63] However, a more comprehensive approach to notices that draws on experts in plain English, linguistics and design to test and design truly effective notices should be pursued.

The call for a more comprehensive approach is not a criticism of the efforts to date, but rather an attempt to reinvigorate the focus on notices by the courts and the legal profession. An example of an Australian class action where exemplary efforts went into designing notices was the Palm Island Class Action.[64] Mortimer J observed:[65]

> the form of the notices is designed to be eye-catching and understandable to a wide audience that includes large numbers of young people, as well as people who may not usually spend large amounts of time closely reading written documents containing complex information.

The notices had been designed with the assistance of Dr Diana Eades, Adjunct Professor - School of Behavioural, Cognitive and Social Sciences at the University of New England who specialises in language in the legal process and intercultural communication, particularly involving Australian Aboriginal people. A graphic designer was also retained.[66]

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[62] *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98, [88].
[63] *King v GIO Australia Holdings Limited* [2001] FCA 270 at [14]-[16].
[64] Available here: http://www.fedcourt.gov.au/__data/assets/pdf_file/0020/43715/QUD535-2013-Long-Form-Brochure.pdf
[65] *Wotton v State of Queensland (No 7)* [2017] FCA 406, [4]. See also [16] (describing the notices as "appropriately eye-catching and digestible").
[66] *Wotton v State of Queensland (No 7)* [2017] FCA 406, [16]. See also *Wotton v State of Queensland (No 5)* [2016] FCA 1457, [459].

The court made orders for the publication of a long form notice on various websites and in hard copy at a number of accessible public facilities on Palm Island and in Townsville, a short form notice in various newspapers, as well as a Facebook campaign.[67] Much thought went into what was the most effective and appropriate method for distributing the notice so as to bring them to the attention of group members. This highlights that it is not just the content of the notice but how it is distributed that is important.

Chapter 8: Contingency fees

The issue of contingency fees has been addressed on numerous occasions.[68]

We recommend the discussion in Michael Legg, "Contingency fees — Antidote or poison for Australian civil justice?" (2015) 39(3) *Australian Bar Review* 244.

However, we also draw attention to *Clarke v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation)* [2014] VSC 516.

On one view the failed Great Southern class action may be seen as supporting the removal of the ban on contingency fees. However, it also highlights that contingency fees have dangers for consumers.

Contingency fees can be advantageous to clients because the lawyer only gets paid if the client wins and only in proportion to the victory. The lawyer bears some of the risk of the proceedings. They become lawyer and banker to the client. The Great Southern class action is a prominent example where the client would have been much better off with a contingency fee arrangement. The lawyers there charged $20 million using a fixed fee and achieved a settlement of $3.55 million.[69] If a contingency fee of 25% applied then the amount being paid to the lawyers would have been $887,500.

The Great Southern class action highlights that the main issue is not embracing contingency fees but instead the more difficult issue of how to ensure that fees are charged in an appropriate manner that is fair to both lawyer and client. The Productivity Commission acknowledged this issue by stating in its report:

[67] *Wotton v State of Queensland (No 7)* [2017] FCA 406; Wotton v Queensland QUD 535 of 2013, Orders, 20 April 2017.

[68] See eg Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988) [272]-[286], Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation – Discussion Paper No 3 Contingency Fees* (May 1991); Law Reform Commission of Victoria, *Access to the Law: Restrictions on Legal Practice*, Report No 47 (1992), Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System of Western Australia Final Report*, Report No 92, (1999) 133-134; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [5.21]-[5.26]; Victorian Law Reform Commission, *Civil Justice Review,* Report 14 (2008) 684-687; Productivity Commission, *Access to Justice Arrangements – Inquiry Report No. 72* (5 September 2014) Ch 18.

[69] Clarke v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) [2014] VSC 516, [135].

> The unfortunate reality for consumers of legal services is that lawyers can charge excessive fees, adopt a position that is incongruous to the needs of the client and fail to adequately inform their client under any billing arrangement.[70]

Great Southern illustrates that when a case is risky lawyers may chose a billing method that makes sure they get paid, rather than a contingency fee which exposes the lawyer to that risk. The opposite position may also apply: contingency fees being adopted for cases with low risk or for cases that are currently undertaken using conditional billing.

Contingency fees may make litigation more expensive for plaintiffs. For example the Commission presented data on the fees charged in Victorian Supreme Court personal injury cases in 2009 and 2010. For cases with recoveries over $1 million dollars legal fees equate to about 5% of the recovery.[71] Compare that with a contingency fee of 25%. If contingency fees are greater than what is charged through time-based billing then transaction costs for the compensation of injuries will increase. If that happens then the plaintiff has less funds. Does that mean that compensation payments will increase, or does the injured individual have to make-do with less, or is society to make up the short-fall in some way?

In the UK this concern about the adoption of contingency fees was responded to in three ways:

1. increasing the compensation to be paid in personal injury cases by 10%.
2. requiring that the amount payable pursuant to the contingency fee agreement is reduced by the amount of legal costs recovered from the opponent in the litigation. In England, as in Australia, the loser usually pays the winner's legal fees.
3. placing a cap on the percentage that could be charged as a contingency fee.

The fact that regulation was needed in the UK to ensure that clients are adequately compensated suggests that this is a real area of concern. If lawyers use contingency fees to feather their own nests then there are some very real and very serious implications for the rest of society. The problem of cost in the civil justice system is made worse.

Another key protection for consumers is that the current regulation of legal costs includes the ability of a client to seek the independent review of a bill of costs. The review of costs determines if the costs are fair and reasonable. Contingency fees would presumably operate within this regime but to do so additional information is needed. Traditionally records of work done and time expended are considered. However a contingency fee is not based on work or time.

The fee review system would need some way to determine what a reasonable percentage for a particular case is. Experience with uplift fees in Australia and contingency fees in the US is that lawyers usually charge the maximum allowed – if there is a cap they charge the cap amount. One response, recommended by the Victorian Law Reform Commission in 2008 was to make lawyers continue to record time and tasks so that a time or task based fee could be compared with the percentage actually charged. However, this does not take into account the risk of the litigation, in particular, the risk of the lawyer not being paid. The Productivity Commission devotes a chapter to

[70] Productivity Commission, *Access to Justice Arrangements – Inquiry Report No. 72* (5 September 2014) 614.
[71] Productivity Commission, *Access to Justice Arrangements – Inquiry Report No. 72* (5 September 2014) 617.

protecting consumers of legal services but does not consider how contingency fees would operate in this system.

The Great Southern class action highlights that lawyers can choose fee arrangements that are to their advantage. Rather than being an endorsement for contingency fees it suggests that consideration needs to be given to how contingency fees may be misused and the mechanisms for guarding against such misuse.

Schedule 1 - Examples of Legal Fees

Allco Settlement Distribution Scheme - 2017[72]

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

DePuy Hip Replacement Settlement Distribution Scheme - 2016[73]

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

GPT shareholder class action - 2013[74]

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

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

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

[74] *Modtech Engineering Pty Ltd v GPT Management Holdings Limited* [2013] FCA 626, [47].