University of New South Wales Law Research Series

RESEARCH PAPER #3: CLASS ACTIONS AND LITIGATION FUNDING REFORM: THE VIEWS OF CLASS ACTION PRACTITIONERS

PETER CASHMAN AND AMELIA SIMPSON

[2020] *UNSWLRS* 73

UNSW Law
UNSW Sydney NSW 2052 Australia

E: unswlrs@unsw.edu.au
W: http://www.law.unsw.edu.au/research/faculty-publications
AustLII: http://www.austlii.edu.au/au/journals/UNSWLRS/
SSRN: http://www.ssrn.com/link/UNSW-LEG.html

Research Paper #3: Revised version, 1 December 2020

Class actions and litigation funding reform: the views of class action practitioners

Dr Peter Cashman[1] & Amelia Simpson[2]

Contents

[1] Barrister, 3 Wentworth Chambers; Adjunct Professor of Law, University of New South Wales.
[2] Solicitor; Research Assistant.

As part of the current research project, we asked all current practitioner[3] members of the *Federal Court Class Action Users' Committee* and all members of the *Law Council Class Actions Sub-Committee* to agree to personal interviews with the authors. In order to encourage candour, we proposed that a modified *Chatham House Rule*[4] would be adopted.

In July and August 2020, we conducted interviews with 30 members of the abovementioned committees. We take this opportunity to thank these participants for making time available, for their frankness and for their insights into the operation of the class action regime in Australia. Members of these committees were appointed on the basis of their extensive experience and expertise in

[3] Users' Group meetings are attended by sitting members of the Federal Court and 'practitioner' members, who include former judges of the Federal Court. Interviews were not sought with any current sitting member of the Court.

[4] Used originally by participants at meetings in 1927 at Chatham House in London, the so-called *Chatham House Rule* provides that information disclosed during a meeting may be reported by those present, but the source of that information may not be explicitly or implicitly identified. The traditional 'Rule' provides that a list of participants at the meeting is not to be disclosed other than to participants themselves.

class action litigation. That experience and expertise was evident in the insightful, considered and candid responses to our questions.

We do not propose to identify those who agreed to be interviewed but a list of members of each of these committees can be found at *Annexure 1*. We used standardised open-ended, non-leading questions. The list of questions is located at *Annexure 2*.

In summary, the issues encompassed whether there are any problems in respect of:

- the way in which the *current class action regime* is working
- the way in which commercial *litigation funding* is working
- the transaction *costs* incurred in conducting class actions
- the *time taken* to resolve class actions
- *claims* being brought that *lack merit*
- *defences* relied upon that *lack merit*
- *ethical issues* arising out of the conduct of *plaintiff firms*
- *ethical issues* arising out of the conduct of *defence firms*
- *ethical issues* arising out of the conduct of *litigation funders*
- *ethical issues* arising out of the conduct of *counsel*.

In respect of each area where the interviewee considered that there is a problem, we sought to elicit their views on possible *solutions* to the problem. Although we raised each of the issues on the list of questions with each interviewee, on occasion we also discussed other matters which we raised or which were raised by interviewees.

In this Research Paper, we outline the views of those interviewed. Some comments have been summarised or paraphrased. Others have been set out verbatim. A draft was previously provided to each of the interviewees. Where particular information provided was likely to identify the interviewee, we have sought to avoid this by changing the wording, whilst retaining the substance. Where particular lawyers, law firms or judges were referred to or criticised we have removed the identity of the those referred to, unless the matter is on the public record, including by way of a reported judgment.

1. Perspectives on the way in which the *current class action regime* is working.

1.1 General comments.

For a number of those interviewed, problems with the class action regime were considered to be negligible. To the extent that such problems exist, the courts were considered to be already empowered to resolve them effectively, as demonstrated by the emerging jurisprudence in respect of multiplicity of claims.

However, numerous participants viewed different approaches of judges as a practical difficulty for legal practitioners acting in class actions. For one interviewee, this difficulty does not represent a significant problem. It is overcome as lawyers gain experience appearing before particular judges and learn their specific requirements.

Uncertainty in the current operation of the regime was the problem most commonly identified by participants:

> The main problem at the moment is what I would characterise as the degree of instability. Different courts are doing quite different things and the regime feels unsettled, in a way that it hasn't felt unsettled for a long time. There are issues around CFOs, competing class actions, the issues that arose in the context of the car cases about closing the class, and all of those things, make what I think is a fairly complex regime which enjoyed a long period of stability and at the moment it feels unstable.

> Broadly speaking I think the regime works pretty well, but I think there are three or four main issues where the uncertainty has the effect of driving up the price of litigation.[5]
>
> The class action regime has become far too politicised at the moment. The regime was working fairly well to begin with, and a lot of uncertainties have crept in as a result of that.
>
> I don't think funders per se are a class action problem but it's the uncertainty, not only around CFOs, but what you do with multiplicity of proceedings and whether that's a legislative change or whatever the High Court might tell us in *Wigmans*.[6] Inconsistencies in rules and approaches by judges leads to undesirable forum shopping, the uncertainty around multiplicity of proceedings, and the uncertainty around CFOs...

In particular, uncertainty around common fund orders and class closure were raised as two significant problems for the current operation of the class action regime.

The 'present politicisation' of class actions was regretted by legal practitioners working for both plaintiffs and defendants.

The issue of conflicts of interest loomed large as an issue and is considered in detail below. As one interviewee observed:

> It's easy to overstate its significance and it may be just insoluble. I think it probably is. The problem is this: as in any litigation, there end up being conflicts of interests between those who conduct it on a professional basis, that is the funders and the lawyers, and those whose interests are at stake. That happens in all litigation, as soon as you get into a settlement negotiation, the lawyers have their own interests, the clients have theirs. It becomes a little bit pointed in a particular way in class actions. The interests of the funders in a funded class action and the interests of solicitors in an unfunded class action are very much in avoiding the risk of the case being run and failing. Their interest in that outcome is often much more pointed than the interests of group members, perhaps because as individuals they have so much at stake that failure of a class action is a significant concern. For the group as a whole that is another matter, but for individual groups members it may not be much of a deal. Whereas for the funders in a funded class action or for the lawyers in an unfunded class action, the risk of the case being run and failing is very significant and goes directly to their business model, which depends upon so much as possible avoiding that consequence. The dynamic that is sometimes operating when you get into the final stages of negotiated settlement of a class action is that the defendants who understand this dynamic, simply, their strategy is to drive the settlement numbers down to their lowest point at which counsel for the applicant can say in good conscience that it is a reasonable settlement. In other words, there is a tendency that is present in class action settlements that is not present to the same extent in an ordinary commercial dispute, for example, for settlement outcomes to be at the lower end or even at the bottom of a range of what is reasonable. That is not to say that's always the case by any means.

In general, interviewees considered that the regime was operating well.

> There have been some outstanding results achieved in class action settlements. A signal example is one that went through the Federal Court recently in relation to the contamination by various substances in the Northern Territory and NSW, where the settlement sum was highly satisfactory. It was a very, very good settlement.
>
> There is a certain subclass of lawyers and funders who fall into starting things without sufficient thought and there have been a few settlements which have been

[5] The issues identified were: multiplicity of proceedings, class closure, common fund orders and how the new Victorian contingency fee system will operate.

[6] *Wigmans v AMP* (High Court of Australia, S67/2020, notice of appeal dated 1 May 2020).

disproportionately in favour of funders and lawyers, but they are very much the exception rather than the rule. I think generally the system is working pretty well.

I don't think there really are [major] problems with the way in which the class action regime is working. A lot of the problems that people talk about at the Parliamentary inquiry are kind of a little bit made up. You've got to look at who's talking about the problems, you know – it's the big end of town. You're always going to have some bad examples like the *Banksia*[7] case in Melbourne is a pretty bad example of things going wrong, but overall if you look at the types of plaintiff who have been compensated over the years – in product liability cases, in cases where local councils are getting compensated for money they lost after the financial crisis, toxic foam, stolen wages, you look at all those things and you think, wow, a pretty good result for these people who would not have seen any money had it not been for class actions.

There are different kinds of class actions, some of which I think are very beneficial and to be encouraged. I have in mind in particular product liability-type class actions and the relatively new phenomenon of industrial-type class actions where people who have been physically injured, or in the case of the industrial-type class actions, large groups of workers who have been very deprived of their award entitlements and so on over a number of years by large corporations, have an opportunity to recover amounts due to them. In relation to those class actions, everything is to be encouraged.

The great benefit of the current regime is the close court supervision. Problems tend to get presented to the court and the court tends to solve them. There are things at the margins that need to be worked through but not really problems with the regime in as much as they are problems with how our system of justice works more generally, for example, the current uncertainty around multiplicity fights and how they are to be resolved, and the current uncertainty around the reach of s 33ZF in the context of class closure orders, and the approval of notices around mediation and registration. Those are live issues and there is uncertainty, but they are not from the structure of the regime so much as from the different views of different judges in different courts that need to be resolved in some way.

Notwithstanding general support for the way in which the class action regime is working, interviewees identified various problem areas.

1.2 Economic losses of a relatively small kind.

More than one participant suggested that class actions involving relatively minor losses are problematic:

The real concern I have is that we do have a lot of class actions that are very big, they cost a lot of money and they take up a lot of court time, but at the end of the case, I am not very sure that the consumers have suffered any loss. People might have suffered a few hundred dollars loss or a few thousand dollars each, it is not worth litigating over and the only people who make any money out of that sort of class action are the lawyers or the funders. Where we have economic losses of a relatively minor kind, the mere fact that you can aggregate several hundred thousand people and say it's a big case, I'm really not sure the public should be spending so much time and money on litigation which is really not a large sum of money even for an ordinary person; we are talking a few hundred dollars or what have you. I think that sort of thing is a problem.

Don't get me wrong, if anyone was actually injured or suffered material loss I would understand and support any ability to give them access to justice, but I do think if your case

[7] *Laurence John Bolitho v Banksia Securities Ltd (Receivers and Managers appointed) (In liquidation) & Ors,* (Victorian Supreme Court, S CI 2012 07185, commenced 24 December 2012) (*Banksia*).

> is "I had something in my car that I did not know about and it has now been replaced free of charge and I'm still driving the car" I think the whole song and dance of trying to claim hundreds of millions of dollars, I wonder to whose benefit that really is. I don't think it is ultimately for the benefit of people who are buying cars. Fundamentally, the only thing that is going to happen is that the cost of buying a car is going to go up, the cost of insurance will go up, and the court's time is going to be wasted. If you look at it from a broader societal perspective, I don't think society is going to win out of that sort of action. Overall, I am very supportive of the regime but I do think there do tend to be abuses.

This perspective can be contrasted with the view of another participant:

> Even if it's for a small consumer claim, not everyone has the resources of well-heeled lawyers and amounts of hundreds of dollars can be very distressing for a lot of people.

1.3 Transaction costs are too high.[8]

> Too much of the proceeds are going to funders and lawyers. This is a continual problem.
>
> Where matters are done on spec, plaintiff law firm fees can be 'phenomenally' or 'heart-stoppingly' high, and class members are insufficiently protected as there is no one to hold the law firm to a budget.

1.4 Interlocutory disputation.

> Cases get bogged down a lot in what I will call procedural skirmishes, particularly where we have multiple class actions. I don't have a solution to that, but I do think that it is a problem because it inevitably seems to cost everybody a lot of money and takes up a lot of time, I think unnecessarily, in the progress of the class action.

1.5 Common fund orders.

In the aftermath of the decision of the High Court in *Brewster*[9], there is uncertainty as to the availability of common fund orders (CFOs). For a number of those interviewed, this represents a serious problem for the class action regime.

Uncertainty was said to be a key problem, particularly with relation to CFOs. While there was a period of stability in which litigation focused on the merits, recently there has been a return to the 'procedural mess'.

Practitioners were increasingly comfortable with this financing structure and its use in consumer class actions in the Federal Court. CFOs led to increased competition, meaning more funding was available at lower commission rates, and there was downward pressure on legal fees. This was of benefit to consumers. However, it did result in problems of multiplicity. It was anticipated that competition will no longer occur after *Brewster* and a number of firms will stop conducting class actions. Even large plaintiff law firms will have to reduce the numbers of class actions they conduct. This means that people will not be able to obtain redress for wrongdoing.

Interviewees expressed dissatisfaction with uncertainty arising from varied Federal Court positions on the availability of CFOs under s 33V.

> There are manifold issues with the current operation of the class action regime, including uncertainty around the availability of CFOs which leads to uncertainty as to how to close out a class action, creates problems for those involved on the plaintiff side (making it difficult for funders to price the risk) and gives defendants an opportunity to make mischief.

---

[8] This issue is considered in detail below.

[9] The High Court held that the Federal Court and NSW Supreme Court were not empowered to make CFOs by s 33ZF of the *Federal Court of Australia Act 1976* (Cth) and s 183 of the *Civil Procedure Act 2005* (NSW) respectively: *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 (*Brewster*).

> There's still a view that some hold that they are available under s 33V. Whether that holds might depend on the status of the case; you might have a greater chance of getting one on a matter that was already underway than you would on a matter which was about to start. That level of uncertainty is pretty unhelpful and that would be a useful change.

The Federal Court appears to be finding ways through the uncertainty generated by *Brewster.* However, inconsistency in judicial approaches means that this is 'a bit all over the place'.

> The current uncertainty as to whether you can have a common fund order made on settlement, for example, is going to become a very significant problem when it comes to trying to settle cases. In the Federal Court, judges have gone in all sorts of different directions on whether or not they'll make an order to that effect on settlement, so how do you go about negotiating in a mediation in that context? We have no idea where the Supreme Courts stand on those issues. The range of views held by different judges is extraordinary.

Unsurprisingly, funders are going back to book building as a result of this uncertainty. This increases risks, costs and delays.

Uncertainty about the availability of CFOs is 'regrettable' as it has meant that funders are less likely to fund class actions where the bookbuild is challenging. Book building is particularly challenging in securities class actions and consumer class actions.

> There are problems for funders at the moment due to uncertainty: do you revert to bookbuilding? Close the class? Take a chance on getting a common fund order at the end? That makes it very difficult to price the risk. It is having the desired effect on litigation funders. We are now going back to the bad old days of just getting a number of the larger shareholders in shareholder litigation and signing them up and those are the ones that go forward, which are the ones that business screamed about previously in limited 'opt-in' class actions.

> Even if s 33V empowers non-contractual-based commission payments at the end of the case, it's still very uncertain how the court is going to assess what that payment should be. In *Vocus*,[10] where the funder got burnt, a book had been assembled that was material but it was still less than half of the total losses. Where only one person has signed up under the funding agreement, that is where the contractual commission may be only a couple of hundred dollars, I can't see the court saying that the accumulated contractual commission is fair compensation for the funder in that circumstance. A couple of hundred dollars in return for a couple of million dollars in fees, and who knows what exposure.

According to one interviewee, the High Court 'messed up' litigation funding in *Brewster*, because they did not seem to understand how funding equalisation orders work and their application to matters with one applicant and an open class. The Court did not turn their minds to this in the judgment.

Prior to that decision, the market for litigation funding was said to be functioning well. Commission rates were decreasing to competitive levels which appeared to reflect the risks involved:

> Everything was functioning quite well, because the commission rates were going down to competitive levels, to 15% for shareholder class actions which was about right, and then you've got the product cases which were in the 20-25% range, which I think was working well. If you think about it, for a product case 25% commission is right on the money, and because shareholder cases are less risky, 15% sounds right.

[10] *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579 (Moshinsky J).

However, the situation prior to *Brewster* was not universally viewed as satisfactory. One interviewee considered that while *Brewster* is unhelpful and confusing, the situation before had involved too much inconsistency in decision making by Federal Court judges. This led to 'erratic' outcomes:

> There should be a set of clear criteria in relation to funding arrangements which are consistently applied, and CFOs are one way to do this: some justices in the Federal Court have been reliant too much on their own experience and not enough on evidence in making decisions, which makes it too erratic. There can't be a situation where you go before a certain judge and happen to get lucky and get that judge, and get that outcome, and go before a different judge and get a completely different outcome. It's not their court, it's the Federal Court and it should be consistent across the whole platform for everybody to come along and engage with it. It should not be that you get substantially better outcomes with one judge than with another judge because they have their own particular views about class actions and what's fair and reasonable. We need better criteria and consistency in that regard and the CFO is one way to do it, provided that it is set with due regard to evidence and that might include, for example, market rates for funders.
>
> There is uncertainty around the ability for the Court to make orders in relation to commissions under s 33V. The case law in recent months has led to some guidance, and there was a degree of uncertainty under the old common fund rules, however, it is still very uncertain as to how the courts will assess payments.

CFOs were viewed by some as good for competition. CFOs also had positive consequences in terms of the increasing interest and willingness of litigation funders to consider taking on consumer and product liability claims.

Other interviewees were more critical or ambivalent:

> I have not finalised my views on common fund orders. I do worry that it is an incredibly lucrative market for funders and they have taken advantage of that process. But that's commerce, isn't it?
>
> Before common fund orders there were benefits to bookbuilding. The funder would ensure that there was a decent book to make the action worthwhile.
>
> I never really was convinced by CFOs. They always struck me as a bit of a jurisprudential thing that didn't seem to have a reason for being. That was my initial instinct, but I allowed myself to be convinced that saving bookbuild costs was a benefit. I think there is something to that because in some types of claims, you do see that is quite prohibitive and difficult; some employment claims or claims where the sum of money is very small, such as a bank fees class action. It's hard to imagine how you could ever book build a case like that in any comprehensive way and the expense of doing so would be high, compared to the value of the claims that are book built. I guess it solves that problem and maybe group costs orders will solve that problem again, but in ordinary shareholder cases I was never really convinced that there was much of a need for it.
>
> Multiplicity occurred mostly because of the availability of CFOs, and so they are less of a problem after *Brewster*.
>
> I'm not a fan of CFOs, but admittedly they did, as a result of *GetSwift*,[11] lead to the auction system and a rapid reduction in the standard tariff for funding, that was a good thing.

One interviewee was not in favour of common fund orders. However, they recognised that there is merit in funding being sorted out at early stages of litigation so that the parties all know where they stand. The interviewee thought that CFOs were bringing some benefits to class actions:

[11] *Perera v GetSwift Limited* [2018] FCA 732; (2018) 263 FCR 1 (*Getswift*).

> I've never really been a fan of common fund but I do think that if we're going to have common funds, I think there is a lot of merit for it being done up front so everyone knows where they stand in relation to funders getting on board for a likely amount. I don't think courts should be give the discretion they currently have to adjust the returns to funders and class members in quite the way they are doing it. I think there is merit to a discretion, but I don't understand the science they're applying in how they are doing this. I would like to see some more discipline around that.

Others viewed court scrutiny over funding through CFO procedures more positively.

CFOs were said to be the 'single most effective mechanism for court oversight of litigation funding yet devised and it's a more effective mechanism than anything the regulators will be able to come up with or implement'. They resulted in competition in the funding market and involved assessments by judges who were best placed to scrutinise funding arrangements, being in charge of a number of class actions and often extensively experienced in class actions in their pre-judicial careers.

> There should be a change to the law to allow CFOs. Where all litigation funding agreements require approval at the commencement of class actions, that may be a solution which would allow you to put a CFO in place. I'm in favour of CFOs. The approval of the funding agreement at the commencement of proceedings might be a vehicle with which to overcome the CFO process.

1.6 Multiple competing class actions.

A majority of participants viewed multiplicity as a problem affecting the operation of the class action regime.

According to one participant, multiplicity issues are perhaps the biggest problem in class actions. However, this is not a problem with the regime itself. Rather, it is a reflection of the invention of CFOs and the competition this generated among firms to race to the door of the courts which has gained its own momentum. The cat is out of the bag, and it will now be difficult to get it back in again. Previously, firms would step back once a law firm had brought an action on a given topic:

> The larger firms in particular try to use their claims record in class actions and their resources to justify being given exclusive carriage of the proceedings. My sense in the past, up until 2008-9, was that once a firm issued a class action in respect of a given topic, other firms would politely step back from it to a large extent and not try and compete. There were very few examples of competition during the first fifteen years of class actions. My recollection is that in *Esso Longford*, there was some competition there, in the first *OZ Minerals* case and then *Centro*, but after that there weren't many until CFOs became available. And now they're the order of the day.
>
> Another thing that I don't think is working is the clustering of cases around corporate governance claims, but it is starting to get into the product liability space as well, in cases like *Bayer*,[12] for example.

Multiplicity of actions is a 'nightmare' for defendants and their lawyers. It was said to be one of the main reasons for the exorbitant costs arising in class actions and it prevents sensible discussions of how the case should be managed and run which are possible when only one firm is involved.

Concern was frequently expressed in relation to the practice of multiple overlapping and competing class actions being commenced in respect of the same controversy.

[12] It is assumed that this is a reference to the Roundup class actions in the NSW and Victorian Registries of the Federal Court: *John Fenton v Monsanto Australia Pty Ltd* (NSD1971/2019) And *Kelvin McNickle v Huntsman Chemical Company Australia Pty Ltd & Anor* (VID243/2020).

> 'There's nothing to be said for multiple proceedings on the same controversy except perhaps an argument about group members having the choice of their own lawyers. I suppose there is something to be said about that, but it is a small virtue that is creating a lot of procedural costs and waste of time.'

Multiplicity issues are 'an area that causes a lot of …wasteful expenditure…and delay that might be able to be improved.'

However, overlapping claims were also viewed as merely an 'adjunct of competition'. It was suggested that multiplicity of claims should not be prohibited. They were said to bring benefits including lower prices and not to represent a significant problem as long as there is consistency in the resolution of overlapping claims by the court. There was a suggestion that this may be gradually resolved with time.

> Even in the Federal Court for example, different judges have completely different approaches to the ground rules and how they go about dealing with it. While it's meant to be dealt with on a case by case basis, it sort of feels at the moment like it's being dealt with on a judge by judge basis. That should hopefully settle down as there are a few more cases that go through that particular process.
>
> Multiplicity is always going to be an issue that needs consideration but once the cases and parameters are developed, you wouldn't see as many judgments because people would have thought "based on where things are and based on the parameters and judgments we don't have a hope of winning this multiplicity dispute," whereas now it is up for grabs because no one really knows what the principles are.
>
> Competing class actions are a real problem, but it is one that has been sorted out gradually. The AMP case[13] is coming up before the High Court. There is in-fighting between plaintiffs in that case - it has been going for two years and basically nothing has happened, because plaintiff competitors have been fighting. That is not typical. I suppose that it is just a big case with a potential large quantum. Multiplicity fights have involved a ridiculous degree of persistence and bloody mindedness. The contention that the first-past-the-post should effectively get the gig is a stupid idea. It would not work at all and it would lead to ill-conceived matters being put forward. Considerations of the interests of the group members are the best guidepost currently available for the resolution of multiplicity issues.

A number of participants identified inconsistency in how multiplicity disputes are resolved as a significant problem.

Uncertainty associated with the resolution of multiplicity disputes was said to have 'had a chilling effect on competition in the funding market and ultimately group members have been disadvantaged by that.'

The current way of dealing with competing class actions was said to be 'completely unsatisfactory'.

> A particular problem is the uncertainty engendered by inconsistency in the approaches of judges to multiplicity. Because of this uncertainty, a race to court occurs, in which large plaintiff law firms file after a smaller firm has investigated the prospects of a class action and filed, with the larger firms claiming that they should get carriage because of their capacity to run the matter on a no win no fee basis, even where they do not yet have a client in the matter. The outcome will depend on which court you are in and which judge you are before and on which day.

The conduct of a number of [identified] plaintiff law firms was criticised where competing class actions were pursued, including where one law firm participated in a case management conference

[13] *Wigmans v AMP* (High Court of Australia, S67/2020, notice of appeal dated 1 May 2020).

when it didn't even have a client, and in another instance where multiple competing actions and appeals have delayed the progress of the matter by years.

The most significant recent problem in the class action regime was said to be how to deal with multiplicity in 'a principled and pragmatic way'. Something more is needed than the courts merely exercising their general powers, 'notwithstanding their enthusiasm for doing so'.

For those who viewed multiplicity as a problem, there did not appear to be any easy solutions:[14]

> The competing class actions issue is a difficult one, and I think we still have a way to go in working out the optimal way to deal with that situation.
>
> There are problems with the beauty parade. The Act does allow multiplicity of proceedings, I don't know what the magic bullet is for that.
>
> I've thought a lot about multiplicity and I don't have a solution. Over the past three years I have been involved in about five or six different instances of multiplicity, which have all been resolved in different ways.
>
> In my view the multiplicity problem was solved with *GetSwift* when the High Court refused to grant special leave to consider the correctness of the Full Court's decision in that case. I suppose it will become solved again depending on what the High Court has to say about it in *Wigmans*. I thought the *GetSwift* judgment was pretty good in terms of preserving these matters for the court to decide based on what's in the interest of group members and the interest of justice more generally. That struck me as the best approach. Any hard rule along the lines of being first to the court would encourage all sorts of unfortunate behaviour, as indeed we saw in *GetSwift*. You would see people in shareholder claims stepping on the event window by announcing claims during the event window, or in extreme cases announcing investigations into claims while shares were suspended and maybe even filing claims while shares are suspended just because they want to get in first. You would see a rush to Victoria. You don't need to file a statement of claim to commence the proceedings, you just need to file a general endorsed script, so [it is] an easy way to win the fight if you've only got to type up a one page document as opposed to a detailed statement of claim.

One interviewee made a number of considered observations about how to resolve the multiplicity problem:

> (1) Thought needs to be given to whether or not it is a matter to be resolved by a docket judge. On one view, it ought not to be resolved by a docket judge, it should go to someone else.
>
> (2) I see no reason why defendants should play any role in a multiplicity dispute other than them making some submission. The notion that defendants are able to participate in a multiplicity and listen to warring plaintiff parties talk about things like how much the litigation is going to cost, why they have structured a claim in a particular way, the litigation risk that they foresee, it is bluntly, manna from heaven for a defendant lawyer.
>
> (3) If we are going to keep going down the current path of having a judicial officer determining multiplicity disputes, there are factors which the judiciary tends to treat as being equal, which are not necessarily so. These are difficult considerations, but they are considerations that ought to be confronted rather than assumed to be equal. One of the most important things in considering competing representative proposals is objectively to consider things like who is going to be representing the applicant and group members. Historically, the judiciary has tended to think that if they are two reasonably good law firms, then the judge will treat that integer as being equal. [We] know that there are significant

[14] Some thoughts on reform are set out in section 3.7 of this Research Paper.

differences amongst equals. Although it is an unedifying task and can be difficult, that is part of what the decision maker needs to do. There is a big difference between a proposal which sees a commitment from an experienced senior partner at a plaintiff law firm and a real commitment by that person's team, i.e., we are not just on the ticket for the purposes of the multiplicity action but we guarantee that we will be in the matter from day one until the resolution point. There is big difference between that sort of proposal and the proposal that is more high level and general, just that law firm "x" is in it, for example. There is a tendency just to focus on objective matters. I can understand why people focus on objective matters, such as the budget at the time of the multiplicity action, the funding commission calculable at the time of the multiplicity action on the assumption of a particular result. But history tells us that is not how litigation works. If you go back to cases like *GetSwift* which opened this all up, at that point in time, two of the three firms were indicating for they thought the matter could be done for 3 million dollars or less, that bears no relationship to historical analysis, and, of course, it bears no relationship to what actually happened in the proceeding. The notion that every law firm/funder combination is going to produce basically the same litigation outcome is also an assumption that sits uncomfortably with experience. Some lawyers will produce a better result than others. Those sorts of intangibles are, in my opinion, converted into equals. While I appreciate that they are far more difficult than objective matters based on assumptions, … my own view is that if someone is able to tackle those you might end up with a better result on multiplicity actions.

(4) More generally, we can learn something from what has been going on in the US for many decades before this became an issue in this country. The notion of having coordinating counsel and of resolving disputes without bowling over a number of the beauty parade participants, if I can put it crudely, is something that makes sense. In the US they've been able to balance the reality in complex class actions that the people who are interested in advancing the class action and the people who are able to - it does not necessarily have to be one person only. They have been able to balance that reality and in a way that doesn't have some detrimental effect on competition as the Australian judiciary has dealt with it. Funnily enough, the Australian judiciary would have been attempting to do the very opposite of that which as a practical matter may have been achieved. We can learn a lot from them.

(5) A question will arise as to whether or not this is a matter that is better determined by someone outside the judiciary. I don't have a lot of sympathy for that view. Judges more than anyone else are credentialed to tell the difference between the strengths of different proposals. It is after all a subject matter that many of them would be very familiar with. Where you are assessing the strength of the case, the strength of the team, the strength of the funding proposal, who is better placed to do it? Is that the role of an economist or some sort of specially appointed referee? I am not too sure that any of those people would have better credentials than others. Some people might say at least it protects the judges. There is some force in that. There are not too many judges, if you take a look at the Supreme Courts of NSW and Victoria and the registries of NSW and Victoria, which together must deal with north of 80% of the class actions filed in this country, there aren't too many judges. One issue that legitimately arises for consideration is whether those judges should be protected from the need to make these sorts of decisions because once they pick one firm, they may be criticised or open to accusations of bias. That is another issue that arises.

(6) I don't think there's an easy fix to multiplicity issues but right now, they are very difficult because with uncertainty about whether or not CFOs can be made. How do you assess whether a class action brought by law firm "a" and funder "a" with a partly built book is better than one without a partly build book which came on a little bit earlier with law firm "b" and funder "b"? It is just treacherous.'

1.7 Multiple jurisdictional class actions.

A further complexity occurs where multiplicity disputes involve different jurisdictions.

> Another problem that I have is multiple jurisdictions, where class actions are brought in both state and federal courts. This is a difficult one to resolve. If they're brought in one jurisdiction then you can have a protocol like they have in the US, about marshalling them before one judge or joining them together or something, but when it goes across jurisdictions, it's very difficult and very inefficient and I haven't quite worked out in my mind a constitutionally satisfactory way of dealing with it.
>
> Forum shopping and inconsistency in the legislation, rules, and judicial approaches between State Supreme Courts and the Federal Court present a problem with the way in which the class action regime is operating.

1.8 Class closure.

There was said to be a lack of clarity around class closure following *Haselhurst*,[15] whether it is possible and, if so, how this should be done. This leads to uncertainty as to how settlement discussions should be approached and whether there should be a form of registration prior to negotiations. Defendants want finality – to end the dispute once and for all. Plaintiff law firms want to understand the claims and not to contend with information asymmetry regarding unknown members of the putative class, and potential duties owed to them.

In a number of [identified] cases, class closure orders were sought by defendants for the obvious purpose of limiting the number of claims against them:

> Class closure arguments by defendants are a cynical exercise to minimise the number of those in the class, irrespective of whether those individuals are aware of their claims. Arguments on conflict raised by defendant law firms are merely a pretence to shut down claims.
>
> In the past there's been a process under the opt-out regime where you've got this opt in to register and then everyone else's rights are extinguished if it settles. It is a real conundrum. It is contrary to the opt-out regime, but it has enabled, in our experience, eventually, a settlement for reasonable sums and you do get to resolve the matters. I don't know how it is going to progress. Do we settle at large? Are we back to the old *Aristocrat* days, where you have a settlement which is contingent, and a bunch of dough set aside to sign up anyone who hasn't already signed up and if there is any leftover it goes back to respondents? It worked but it was a lot messier. What insurers want is certainty. It was not ideal, but it was working for them. There was this process (it would not necessarily be a bookbuild) whereby there would be sufficient interest to issue the proceeding, to apply for the CFO, you'd have registration, everyone else's rights would be extinguished. Going back to the idea of facing ten closed class actions, and maybe an open one at the same time, that's not appealing either.
>
> The current uncertainty is further complicated with where we have ended up on class closure following the two Court of Appeal decisions from a few months ago. It has just made a mess of things in terms of how things are supposed to work with any certainty for our [corporate] clients.
>
> The recent decisions in the Court of Appeal of NSW[16] to limit the ability for the parties to agree or the Court to order interlocutory class closure with extinguishment consequences is problematic. We have not seen the full extent or nature of the problem yet, but it puts

[15] *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; (2020) 379 ALR 556 (*Haselhurst*).
[16] Ibid.

parties in the position of having to revert to old approaches to mediation which really leave, if it commences as an open class, an open class on the table and requires the parties either to settle in respect of every putative group member, which is often not practical, or make educated guesses around the boundaries of a global settlement with overs and unders to accommodate potential participation and that can lead to false starts and sometimes the conditions of settlements not being achieved. Although, that is based on experiences in limited cases like *Aristocrat*[17] in those pre-class closure days.

1.9 Limited classes.

I don't like closing classes. I don't like a class action where you can shut some people out. I think all actions should include those who fit within the category of injured persons, not by reference to who retains a solicitor or who retains a funder or anything like that. That is just a more efficient way of dealing with it and gives certainty to the defendants who often are worried about whether the defined class if settled leaves them open to other actions.

1.10 Orders in respect of common questions.

There has been considerable interlocutory controversy in a number of cases in recent years over the types of issues that may be characterised as 'common questions', including in the Vioxx litigation,[18] the pelvic mesh litigation[19] and the Volkswagen litigation.[20]

One interviewee commented that they were encountering practical problems and 'interlocutory skirmishes that were not happening five years ago - simple things such as the timing and function of *Merck orders* - suddenly *Merck orders* are a big topic over the last couple of years.'[21]

1.11 The lack of involvement of class members in decision-making.

For one interviewee, there is a problem with the extent to which class members participate in decision making in the course of the litigation. They had been involved in a couple of cases in which group members had objected to the approval process. It was suggested that it has never been done as successfully as in *Banksia*. Most complaints were said to be related to the overall settlement amount, rather than the slice of the pie they obtain.

1.12 The docket system.

It was suggested that the docket system as it is operating at the moment has disadvantages, in that the resolution of the matter may be delayed because of the judge's availability. It was proposed that there should be a system to shift a matter to a judge with earlier availability.

1.13 Threatening the commencement of class actions.

One interviewee commented that there is real, significant damage done when a class action is threatened, but not followed through with. Class actions magnify the threat. It was suggested that, while there are a lot of plaintiff law firms that do not threaten class actions idly and do follow through, there are some others which make the threat of a class action but only litigate a small number of the cases which they threaten.

---

[17] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2008] FCA 1311; (2008) 67 ACSR 569.
[18] *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26.
[19] *Gill v Ethicon Sàrl (No 6)* [2020] FCA 279.
[20] *Cantor v Audi Australia Pty Limited (No 3)* [2017] FCA 1079
[21] Authors' note: So-called '*Merck orders*' are orders specifying the 'common questions' to be determined at the initial trial of the applicant's case (see *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26). The power to make such orders in the Federal Court is to be found in ss 33ZF and 37P of the *Federal Court of Australia Act 1976* (Cth). See generally the decision of Lee J in *Dillon v RBS (Australia) Pty Ltd* [2017] FCA 896 at [66]. See also Gregory Drew, 'Recent Developments in Financial Services Class Actions in Australia' (Address, International Bar Association Conference, 10 October 2017) 11-12.

> The threat of a class action takes money off the share price of the company, which causes detriment to investors and it can also cause all sorts of other problems for the company. There does not seem to be any sanction for irresponsible threatening of class actions.... It's one thing to say I'm going to bring a claim for ten thousand dollars, it is another to say ten thousand of us are going to bring a claim for ten thousand dollars.

It was proposed that there should be some form of sanction where class actions are threatened irresponsibly. However, this problem was said to be perhaps insoluble.

2 The role of judges and the court.

Whilst most participants were complimentary about the manner in which class actions were managed by the various courts, a number expressed concerns about various matters, including 'cultural differences' between courts and different approaches of individual judges.

2.1 Differences between courts.

One participant suggested that there is a cultural difference between the Victorian Supreme Court and the Federal Court. The class action procedure in the Supreme Court was said to be less streamlined and more old fashioned than that in the Federal Court.

The experience of one interviewee in the Federal Court in Melbourne was positive. The process was described as 'very streamlined'.

There was a concern that the Victorian Supreme Court is insufficiently resourced to deal with the coming influx of class actions. It was suggested that there are not enough judges and they are not experienced enough in class action jurisprudence.

Another interviewee considered the Victorian Registry of the Federal Court to be generally successful in the management of cases. Judges in that Court were complimented on their capacity to cut through unnecessary and irrelevant satellite fights and interlocutory warfare. In other courts, the environments are more challenging and lead to higher transaction costs, such as through defendant strike out and declassing applications.

The commercial division of the NSW Supreme Court was complimented for its efficiency.

Frustration was expressed at the delay in the introduction of a class action framework in Western Australia.

2.2 Positive views about the role of judges and the courts.

In general, interview participants expressed positive views about the role of the courts. The courts play a crucial role in exercising supervision over litigation funder commissions and lawyers' fees. The situation was said to have greatly improved over the past 15 years as the courts have become more active. For example, in *Banksia*[22] the Court shone a light on the abuse of process that had occurred. This does not always happen. However, it is becoming more common for contradictors to be appointed and this is a positive trend. Although there are issues with the costs associated with the appointment of a contradictor in some instances as this can 'cost a fortune'.

The *Banksia* litigation was said to demonstrate that the court is able to manage ethical issues relating to the conduct of funders, solicitors and counsel through existing mechanisms such as the appointment of a contradictor.

Banksia shows that the court is willing and able to manage problems with the operation of litigation funding, as well as ethical issues concerning lawyers in class actions. The court is able to identify

[22] *Laurence John Bolitho v Banksia Securities Ltd (Receivers and Managers appointed) (In liquidation) & Ors,* (Victorian Supreme Court, S CI 2012 07185, commenced 24 December 2012).

problems and also provide future guidance to practitioners in the field that will hopefully curtail practitioners from considering acting contrary to the best interests of group members. Funders and lawyers were said to be 'on notice' that unethical conduct will not be tolerated by the courts.

One interviewee praised the urgency and rigorous approach of the Federal Court under the influence of Justice Gordon, while she was a member of the Federal Court, and the benefit of clear and certain timeframes for trial dates within a certain period from the first case management conference:

> You would turn up to the first case management conference and you would feel absolutely confident that you would be set a trial date in 12-14 months depending on availability. The parties were just told that they had to work back from that, and anything that needed to take place in terms of discovery or expert evidence would just need to fit within that timeline. It's something that she was absolutely rigorous about, and just for that particular period it was really, really effective. You could tell that there was a strong dynamic within the court, where other judges were either modelling that behaviour or replicating it at least in part.

The current judicial overload, unfortunately, was said not to allow for this same degree of expedition. This results from a problem of insufficient resources at the court level.

2.3 Criticism of the role of judges and the courts.

Some interviewees identified problems with the role of the courts.

The key issues were said to be the material areas of uncertainty in terms of how cases will be managed. Different judges take different approaches and there is no clear guide to what will happen in certain areas of case management.

> It is often really hard for judges to work out when to curtail the unnecessary interlocutory battles. Some of the defendants will take every point and take every point from the beginning. Judges don't need to put up with that. They should be doing even more than they are to get the parties to determine the real issues in dispute and either hear them or settle them.

One interviewee contended that the interpretation of the law by the court may be unexpected and appear to controvert the protective purpose of the legislation. Some judgments were criticised for being wrong, brief and ill-considered.

According to one interviewee there is a need for judicial decisions to be made with alacrity. It was suggested that judgments could be more concise, particularly in the Federal Court.

Costs associated with delay could be resolved by the courts:

> The days of knowing you'd get a trial date in two years are well and truly over, and it now feels as if, in every court, you just get in there and you go one step after the other and cases can end up taking a lot longer and end up costing more, just by virtue of that.
>
> The problem with excessive costs is largely also a fault of the court. The court can actually put an end to the shenanigans, by setting a trial date and saying come what may, unless you bring a death certificate for two or more people on each side so that the case can't go on fairly, the case will go on a set date. That will discourage vast sums of money being spent on interminable and often largely irrelevant interlocutory fights. I understand that the parties will never do that themselves. I would treat that as a failure of the judges who supervise these cases. Some of them come from a background where they engaged in exactly the same thing. I don't think they see it as being as bad as I see it.

It was suggested that more proactive judicial control and management would improve problems of cost and delay.

One interviewee commented that there is a 'cabal of judges' in the class actions list in the Federal Court who are capricious and 'shoot from the hip', and the situation would be improved if class actions were before a broader range of judges.

Another participant referred to the original arrangements in the Federal Court when Part IVA was introduced and where Wilcox J dealt with many of the cases and there was lobbying by defendant law firms against Wilcox J and the initial spreading of the work to other judges: 'the wheel appears to have come full circle. There now appears to be an inner circle of judges dealing with class actions.' However, it was noted that this made obvious sense given their experience and expertise in this area.

3 Suggested reforms in relation to the class action regime.

As noted above, where interviewees identified particular problems they were asked for their views on possible solutions. Many constructive changes were suggested.

3.1 Pro-forma orders.

It was suggested that consistency might be improved by the introduction of 'some pro-forma sets of orders that are utilised for the standard aspects of the class action process that are applied across the board'.

3.2 Common fund orders.

Many of those interviewed suggested that the availability of Common Fund Orders would be an important reform to the class action regime. Interviewees proposed that the courts should be provided with an express power to review and set legal fees and litigation funding commissions, and the legislation should provide direction to the court on how to review the fees to ensure that they are proportionate to the risks undertaken, work carried out, costs incurred and the outcomes achieved. This solution was said to have 'the benefit of really strengthening court oversight of what litigation funders are doing.'

> Having a book provides funders with contractual certainty. Where there is no large book, for example, where almost half of the commission is uncertain, the price of funding commissions will be driven up. If funders are uncertain about whether or not they will obtain a CFO, they will demand higher commission rates. Certainty will not necessarily lead to greater overall profits for funders, as while they may fund a larger number of outcomes which end up being successful, the amount obtained from each will be lower. Group members will receive more overall. The more certainty that funders can be provided, the lower the prices will be. It sounds like a favour being done to the funders but their profits might not necessarily be any higher or lower in a more certain environment because while they might get more outcomes, the amount that they will get out of each outcome will be lower. The amount that ultimately goes to group members in individual proceedings and certainly in aggregate will be higher.

For one interviewee, the problems around the availability of CFOs would be solved by some form of certification and a distinct legislative provision for it. The issue of certification is discussed further below.

3.3 Implementation of law reform recommendations.

One participant urged greater consideration of the recommendations for reform made by various inquiries and law reform reports on class actions, rather than imposing what may be counterproductive reforms.

3.4 Initial certification.

Certification was suggested by one interviewee as a 'positive step' for the Australian class action regime. It was contended that this reform would not signify dramatic change, as it merely involves

the application of the s 33C requirements, ensuring adequacy of representation of the representative party and consideration of financing. Certification would resolve issues with multiplicity of claims which put the court on the back foot (vide Justice Beach in the *Bellamy's* class action). Certification also enables court review of funding issues earlier in the proceedings, and this is particularly important in a legal setting where CFOs are available at early stages of proceedings.

However, other interviewees commented that they were not in favour of certification.

Certification would entail consideration of procedural requirements and not concern the merits of the claims. It was said to be erroneous to suggest that certification will deter unmeritorious claims, as certification would occur at an early stage of proceedings. To touch on the merits would, in effect, signify an application for summary judgment before orders for discovery and any consideration of the evidence.

3.5 Assessment of damages in shareholder cases.

Another substantive issue identified is the need for reform around the assessments of damages in shareholder cases. It was suggested that this may be of even greater importance following the adoption of contingency fees in Victoria.

3.6 In shareholder litigation: conduct of cases by the party with the largest pecuniary interest.

One proposed solution is the adoption of the 'American procedure where the plaintiff representative role is offered to the party with [the] largest pecuniary interest in the outcome.' This was said to have the benefit of ensuring that the plaintiff is motivated, familiar with the litigation process, and better able to keep an eye on the lawyers and costs. It could also resolve issues around multiplicity.

However, this proposal was not favoured by other interviewees.

3.7 Dealing with multiple competing class actions.

It was suggested that one possible change to address issues of multiplicity might be for the court to require the plaintiff law firm to identify the seven class members that give the court jurisdiction. While this is only a small hurdle, it would at least prevent law firms from commencing an action and winning the beauty parade, before finding someone to instruct them.

> This would mean that you can't start an action, run the beauty parade, win on it, and then turn around and say, "now will someone please instruct me?" We have both seen that happen several times.

One interviewee proposed reform, along the lines recommended by the ALRC, which would require a first in time commenced proceedings to pause while the court invited and then regularised any competing proceedings.

> 'It is a pretty radical suggestion, and it won't actually tell the court how to make its decision. It does not help on the important question of "what is the right criteria?" but it would at least resolve those matters in the first few months, rather than at the moment where this can take some years to resolve this in respect of one case.'

Further amendments to the cross-vesting provisions were suggested so as to move effectively and presumptively any subsequently commenced proceeding into the jurisdiction in which the first case was commenced. The interviewee also proposed lead plaintiff provisions that the ALRC did not pick up.

Another interviewee adverted to the constitutional difficulties in dealing with competing class actions in different jurisdictions:

> Where there are multiple competing class actions in different state and federal jurisdictions there is an obvious constitutional problem. No state parliament has the power to confer

> jurisdiction on a Chapter III judge and I don't know that it would be possible to just transfer cases to one judge for pre-trial purposes, as under the US MDL provisions- which only apply in federal cases in any event. A way around it, which may not be a satisfactory way around it, is that each court (I think every court in the country) has power to outsource, to appoint a person to do a whole bunch of things, including in some jurisdictions to decide the case – and one solution – it might not be satisfactory because it's not a judge – but one solution might be for every court where there's multiple cases involved, to appoint the same person to manage them along the US line. But they won't have a judge in control, it would have to be a leading silk or something like that. That might work and it might work well enough. In other words, if you get a really smart lawyer, it doesn't matter if they've got the title judge after their name. Maybe it's not as desirable as shifting it across to courts. However, that would be one way of dealing with the jurisdictional problem.

Constitutional issues arising as a result of multiplicity issues arising across jurisdictions and the need for some form of 'multi-district litigation' (MDL) procedure were said to be surmountable. It was proposed that there should be a set of criteria developed which are consistent across the courts, which contemplates the growth of the market, and cannot merely give the carriage of a matter to the cheapest law firm or the first to the door of the court.

3.8 Express power to order class closure.

Several interviewees suggested that the unique provisions in the Victorian *Supreme Court Act*[23] should be adopted in other class action jurisdictions in relation to class closure, to prevent issues such as those arising out of *Haselhurst*.[24] It was contended that, in the absence of express power, the courts will likely be more reluctant to order class closure in future.

However, class closure was considered by some interviewees to be undesirable except in some limited types of matters, such as securities class actions in which securities are held by custodial nominee companies where this does not reflect who actually owns the shares. It was suggested that it might also be helpful in pharmaceutical cases, as these also involve an unknown group. Registration of claims allows for resolution of the matter by defendants and is supported by some plaintiff lawyers. This was said to be a 'non-ideological improvement' that could be made. A clear legislative provision regarding this would be helpful, rather than just relying on 33ZF or 33V.

> Previously, in recent years everyone relied on the *Treasury Wines* appeal in the Federal Court.[25] It seems to serve a simple explanation for why registration processes were appropriate in shareholder litigation. You would think that would be a problem in analogous situations where, even in *Vioxx*,[26] where there was no national register of who has taken Vioxx or who has had a heart attack. You would need at some point a registration system for those kinds of pharmaceutical cases. It is interesting where there are parallels between pharmaceutical cases and shareholder class actions. They are otherwise very different, but both involve an unknown group. You arguably need a provision to allow for that.

The Victorian Supreme Court has a provision that provides the Court with an express power to require a group member to take an affirmative step in order to receive compensation. There was said to be a strong case for that provision to be introduced in other jurisdictions which promote class actions.

---

[23] It is assumed that this is a reference to s 33ZG of the *Supreme Court Act 1986* (Vic) which empowers the court, on the application of a party or on its own initiative, to set out any step that a group member is required to take to be entitled to any relief, payment or benefit.

[24] *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; (2020) 379 ALR 556.

[25] *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296.

[26] *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447.

> It is not that that order will always be appropriate, far from it, but at least it is in the court's arsenal of powers.

3.9 Uniformity in class action procedures across jurisdictions.

It was suggested that the class actions regime could be improved by consistency in procedures across jurisdictions. Different legislative wording resulting from drafting styles was said to be 'not helpful'. This would also help to resolve MDL issues, as procedural advantages would be taken out of the equation.

> National consistency would also make it easier for an MDL style solution, because there won't be arguments as are likely to occur in one matter that is now before the court, in the *Uber* class actions[27] in Victoria which seek to bring a claim in respect of all parts of Australia. Due to concerns about limitation periods they have filed parallel class actions in NSW and Queensland. There will be issues now about whether they can be cross-vested and the court will have to consider procedural difference and procedural advantage in NSW over Victoria. If the laws are the same, that won't happen.

Uniform rules and legislation would be one solution to the present inconsistency.

> You'd still have inconsistency between the application of those rules between State and Federal Court judges, but you have that in any event between judges of the same court. I don't think you'll ever overcome that, but uniformity of rules and practice notes and legislation would be useful.

3.10 Security for costs.

One participant proposed that security for costs provided by funders should be given in traditional forms of cash or a bank guarantee, not ATE policies and enforcement costs, or deeds of indemnity. This was said to be unsatisfactory, especially where the insurer is based abroad or the other party to the deed of indemnity is based abroad.

3.11 After the Event (ATE) insurance costs.

It was suggested that ATE insurance costs should not be at any stage a disbursement that could be claimed on a party-party costs assessment.

3.12 Settlement approval.

> The court's role in approving compromises was once upon a time little more than rubber stamping. It has increased its oversight much more than in days gone by, but it still effectively has its hands tied, except in those very rare (always expensive) cases where the judge appoints an independent person to help work out what the real issues are and what a fair settlement is, bearing in mind that no one is really taking care of the interests of the class members. I say that not in a pernicious way, but I regard it as difficult for plaintiff and defendant when they both have a common cause that the case settle on the proposed terms, to provide or act as a real informer of the court, so that the court gets that there might be a second view, not a joint view forward. I think that the defendant should play an active role in settlement, giving the judge their view on merits, risks, and so on, which is either not done at all or rarely done. There are probably solutions but they're all costly.

3.13 Fixed costs.

One participant suggested a fixed costs regime:

> That means event-based costs, so that you get $100,000 up to the issue of a case, another $100,000 through to discovery and then another sum of money for the trial, regardless of

[27] *Uber Technologies Incorporated & Ors v Andrianakis* [2020] VSCA 186.

> how long the trial goes, with some discretion of the court to adjust the figures but not much. It is a model which has enjoyed remarkable success in Germany ... The consequences of having a fixed costs model based on events means that costs are certain. There is little argument about it. Certain and predictable, except for an overriding discretion. And that has meant in Germany that plaintiffs and defendants insure against costs. The costs of litigation are eventually borne by [the] whole community because everybody takes out a policy. Costs are an across the board problem. It's magnified in class actions because they're so expensive, but I would adopt that model for every piece of litigation.

4 Perspectives on the way in which commercial *litigation funding* is working.[28]

4.1 General observations

Experiences with funders were varied, with most interviewees having positive experiences with funders.

One interviewee had not experienced any problems with litigation funding. It was said that there is sufficient capital to fund class actions and funders have not crossed the line in relation to the potential conflict between their interests and those of the group. There is a degree of competition in the market.

Another interviewee commented that 'by and large it works quite well' as long as all parties are clear that the lawyers' obligations are to the representative plaintiff and the group. British based funders were said to take a more hands-off approach in comparison with that taken historically by Australian funders.

One interviewee reflected that they had only had one negative experience involving a funder hampering settlement negotiations in the course of their career. While funders want to be informed of the progress and strategy of the action, they have not 'unduly impeded progress'. However, in the view of one interviewee, some funders may have an overly inflated view of what a matter is worth, and this can be challenging at mediation. It was suggested that there has been an improvement in the conduct of funders over time.

Increased uncertainty was said to lead to worse outcomes:

> Because there is so much uncertainty on the availability of funding and around class closure, more time is being spent on funding arrangements and this leads to delay. The conditions attached to funding are changing. There is inconsistency in the responses taken by funders, with some resorting to bookbuilds and others willing to fund matters in the expectation or hope that they will obtain a CFO at the end of the litigation.
>
> There is considerable uncertainty, in terms of the risks that litigations funders are prepared to assume and their unreasonable rates of commissions, based on that uncertainty. The three areas that, from my experience, occur in recent times are the issue of how the court will deal with multiplicity of proceedings; whether claims can be extinguished by use of a registration system in appropriate matters, like the *Haselhurst*[29] decision; and most obviously how the issue of common funds will be dealt with and whether a retained book is necessary for a case to become economically viable, or not. The fourth issue is not really in that uncertainty area, but we are going to see a lot of action in this space and I think there

[28] For a detailed analysis of the relationship between funders and law firms, based on qualitative data obtained from interviews with employees of funders and law firms, see Vicki Waye, 'The initiation and operations phase of the litigation funder - class action law firm relationship: an Australian perspective' (2018) 60(2) *International Journal of Law and Management* 595.

[29] *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; (2020) 379 ALR 556.

will be uncertainty going forward, as to how the contingency fee environment in Victoria will evolve.

For litigation funders the landscape is very unpredictable and so that makes it more difficult to provide litigation funding. The lack of clarity around CFOs and class closure impact litigation funders as much as anybody else. It causes a lack of predictability in their business and in the outcomes of their business, which is difficult and problematic for them, and in turn, therefore, for group members. For the people we act for, the driving out of litigation funding and the increased unpredictability has knock on effects for consumers, in that less funding will be available and the terms of litigation funding will become less beneficial and less consumer friendly. What we've seen over quite a long time is a modification or an improvement in the terms from a consumer perspective and I worry that what's going on at the moment with unpredictability and politicisation will just drive out funders and result in the old days of there being very many fewer options of funders for consumers to use and less favourable terms.

The market was said to operate to fix or address the problems that are commonly raised in relation to litigation funding. Commercial realities make it unlikely that the fears of funder misconduct will eventuate. Funders were considered to be cautious and conservative in their decisions to fund litigation because there are significant risks involved. Notorious examples of poor results where funders are involved do not reflect the majority of outcomes in funding litigation.

There is 'a relatively high level of sophistication' exhibited by the vast majority of funders operating in Australia. The success rates of cases involving litigation funding can be explained by the funders requiring high chances of success before actions will be funded, and not a phenomenon of greenmailing of companies to pay out large sums. There has been a great deal of instability in the class action regime and funders have demonstrated their resilience. It is anticipated that funders will find new structures to continue to operate in the market, such as moving to law firm financing and portfolio financing, or even offering legal services so as to take advantage of the MIS exemptions for law firms and group costs order availability. Many funders with an international presence will be familiar with these structures from their operations in other countries.

It was suggested that 'some funders are more professional than others. Some of them are more opportunistic than others.'

I am a bit loath to say it, but there is a range of standards of quality of litigation funding and while I think for the most part the good ones don't need to be regulated, I think the conduct of some of the bad ones is a little concerning and it is worth reflecting on ways that, without overburdening with too much regulation, I think there are things we could think about doing that aren't too burdensome to perhaps improve regulation of some of the less reputable ends of the market. I'm reluctant to say that it needs too much regulation because there is plenty of the market for funders that works perfectly well.

There are some funders who are less scrupulous than others in terms of managing their conflicts but, again, I don't think that's the majority. I think most are pretty good at stepping back when they need to. They have a tendency to exercise too much control, but most of them are pretty good when you do stand your ground and push back. That is something to be managed by the lawyers as well. I am aware of one matter where the lawyers have just buckled to pressure from funders. That is a problem. There are lots of conflicts that have to be managed in class actions and I think everyone recognises that. The system is only as good as the people running these cases. When everyone has proper regard to their duties it works well and I'm not sure that further regulation would improve on that.

We have, long before it became fashionable, called for some sort of modest regulation around the litigation funding arrangements. I am not quite sure that to treat them as a MIS

> and to require AFSLs are necessarily the right vehicle, but up until the steps taken by the Federal Government recently it has been a totally unregulated world. Some of the operators are reputable, well-organised and do a decent job but others have been much more shady in many respects and it does create a whole lot of exposure and does drive so much of what's happening here. We are not opposed to it, but we do think there is some need for a level of regulation and order.

Banksia was not viewed as typical of funder and lawyer conduct. *Banksia* has also drawn attention to the reasonableness of a litigation funders return in class action litigation, particularly in light of the expert evidence in that case.

Funding rates were said to be a matter of concern:[30]

> There are plenty of cases where we would say the result shows a horrible, disproportionate skew to distribution of whatever available funds might sit in front of the class at the end of the matter to lawyers and funders. There is a wide spectrum of outcomes but there are plenty of cases where the legal fees and funding commissions seem to be disproportionately taking whatever's sitting there available for class members. This perhaps suggests that the matter never should have been brought in the first place or it should have been run a very different way. It is one of the many conflicts in all of this but the longer and more complex and more costly a case is to run for the class side of the equation, the more fees can be taken out of it at the end of the day. That problem has been there forever.
>
> I get concerned when I see the rates for litigation funding. It's no secret that in the last three or four years the commission rates that funders have been prepared to offer meritorious claimants have gone down quite a lot, though I do get concerned when I see cases with commission rates in [the] high twenties and thirties. There doesn't seem to be any good reason for that and maybe that's something that should have been the subject of negotiation. But I can only say that as an outsider looking in. The person best placed to express a view about that I would have thought would be the judge who gets to see all relevant material and no doubt will give consideration to the funding rate.

However, there is a divergence of judicial views as to whether the court has power to change the contractual funding rate, although clearly the court has power to decline to approve a settlement where this is considered unreasonable.

> The profits of litigation funders may at first glance appear to be substantial. However, they do not always win and their losses can be significant.
>
> The judgment in the *Murray Goulburn* case[31] is extremely thorough. The judge required the funder to put on a lot of evidence to justify the reduced amount he had originally proposed. Like most things, context is important for any sort of large number.

Participants noted that there is an issue as to which types of claim get funding:

> I have seen a few quite meritorious tort-based claims that can't get funding and I don't know how that could be fixed, but there is a certain class of proceeding which is meritorious but that funders don't want to touch. It is a shame that there isn't some way of assisting those meritorious claims. Realistically, it is very difficult to do cases of this size on spec by anyone but the [very large firms]. I have had a few experiences recently where good cases are run by firms that aren't really up to it when they are doing it on spec and they are not getting prepared sufficiently and they are not being given the best attention because they are not funded.

[30] Funding commissions are discussed in greater detail under 'Transaction costs'

[31] *Webster (Trustee) v Murray Goulburn Co-Operative Co. Limited (No 4)* [2020] FCA 1053.

> Funders have been disinclined to fund product liability or personal injury claims although the previous availability of common fund orders led to an increased interest in this area. However, one particular aspect of the risks being higher, that I think is difficult for funders, is the causation issue. I suppose in shareholder litigation we're still waiting for an authority on market-based causation, but there's nothing like that in personal injury claims.

From the perspective of defence lawyers:

> On the defence side, you spend a lot of time immediately identifying with claims who the insurer is and then you know which law firm they are going to appoint and then you do have reservations about the force with which they deal with some things, because they are totally beholden to the insurer. The same, of course, applies to litigation funders.
>
> There are not many problems visible to me on the defendant side, in the sense that once appropriate security is agreed, I don't think much about the funder except when it is time to seriously consider resolving the proceedings. I don't have practical concerns about the involvement of the funder in the proceedings in a day to day conduct and carriage sense. I have never felt the progress of the case was stymied or stultified by the input of funders – in fact, they often bring a commercial and efficiency consideration to the case on top of what the lawyers for the group members are doing. My concerns about funders are probably confined to areas of competition where the resolution of competing claims results in a consolidation or a joint litigation cooperation agreement. I don't have visibility over the agreement between the funders as to how they are working together in the proceedings and I have to negotiate separately with funders for security and this is a little less efficient. It is also probably more than one voice in the negotiation room that I have to persuade but these are not insoluble problems. I support modest regulation of funders, through licensing.

Competition is to be encouraged:

> At the moment, it is working well in the sense of there being a huge amount of competition in last the two years in particular that has led to pretty substantial price drops. That is an area in which litigation funding is working very well.

Increased competition in the litigation funding market was said to have brought about benefits such as 'sorely needed' funding in areas where funding was not available just a few years ago. A number of interviewees expressed the view that without third-party funding, many cases would not be viable as they could not be brought by firms on a 'no win, no fee basis'.

4.2 Positive views about the role of litigation funders and their input into litigation strategy.

It was suggested that input from funders should be viewed as beneficial, as two minds are better than one and funders often provide impressive ideas which add value to the litigation. In some instances, funders may get too involved and require a lot of time from solicitors, but this was not considered to be a significant problem.

As many interviewees noted, funders have an interest in the litigation and will attempt to express their views. They were generally considered to provide valuable input and do not insist upon their ideas being followed.

For one interviewee, at no stage had they felt that they were being pressured by any litigation funder into settling or compromising the claim. The interests of the class members were considered to be paramount in all of their class actions and the funder had not had any adverse impact on this.

This perspective was shared by other interviewees:

> I've rarely encountered cases where there is not tension at some point between funders and lawyers, with slightly different emphasis or agenda at different stages of the proceedings. But only in a couple of cases, of which I am aware, has that tension actually had an impact

> on the conduct of the action. For the most part, the funder is pushing back on costs wherever it can, trying to get to mediation as soon as possible, and taking a pretty hard commercial view about the prospects and value of the case for the purposes of mediation. I don't regard those things as necessarily negative. Sometimes it is a useful thing to stop the lawyers from drinking the Kool-Aid. Particularly when lawyers and applicants are effectively at no risk, there is a danger that the Kool-Aid can become intoxicating. Having the money there, reminding everyone that there is a lot at stake and there is a need for hard questions to be asked about whether the costs are necessary, what are the prospects and what kind of offers we should be looking at in mediation. I think that is something that funders should be doing and it is not something to be deprecated. In terms of the cases where the funder's anxieties have adversely affected the litigation, I can actually only think of one instance and that was a matter where the solicitors, frankly, had done a pretty poor job and the funder perhaps could be criticised there for not realising earlier what a bad job the solicitors had done .

It was suggested that more control may be exerted by funders who are not as experienced. Repeat players are said to be aware of their interests and those of class members and where there is a risk of conflict, this is managed by lawyers and counsel. The practice of the interviewee is to tell funders to obtain independent advice as soon as a conflict appears and funders were said to accept this.

> In terms of historical matters, I was reminded this morning of a case some years ago, where one of the very big funders lost its nerve and was probably inappropriately forceful in communicating to the lawyers that it wanted the matter to be settled. That was a very big funder, early in the class action era, and it was directed at a large firm which was very young in terms of the development of its class action experience.

The contention that funders exercise excessive control over the conduct of the litigation was rejected by more than one interviewee. It was noted that lawyers who are aware of their obligations are able to manage this. However, it was suggested that funders are entitled to have some input on the conduct of the litigation (unlike the English model), as, inter alia, this helps reduce costs. The role of funders was largely supported. Allegations of excessive control exercised by funders were rejected, although this depends on the funder, and the person within the funder:

> Some funders are very hands on and in some cases are off with the defendant trying to negotiate. At least those who do so usually know what they are doing and are smart. You've just got to keep your eye on them and know where you stand. Some funders are made up of trial lawyers and they are pretty good. Others are more traditional and hands off. Some are too hands-off.
>
> In terms of influence or control over litigation, the better litigation funders generally understand their duties in that respect. Whilst their interests might go in a slightly different direction at certain points in time, I think they understand their duties and that, if they depart from those duties, they won't be able to operate in the market for the long term. For the more reputable ones, that is not such a worry, but I think that there are others who are less reputable and perhaps that's more of an issue in some parts of the market than others.
>
> I can't point to more than a couple, or less than a handful of cases, where I felt that the funder had a negative influence. For most part what they do is bring in an element of hard commercial realism which can otherwise be lacking and, when its lacking, that's a greater problem.

4.3 Negative views about commercial litigation funding.

A number of interviewees expressed concerns or criticisms in relation to the role of litigation funders.

Some suggested that funders exercise excessive control:

The interests of funders were said to feature too prominently at settlement negotiations. Funders are too often placated by plaintiff lawyers because of their desire for repeat business and funders have a lot of say in the market. However, the larger firms are able to push back a bit.

> They have much too much power and in the practical real world for the most part either make 100% of the decisions or at worst maybe 70-75% of the decisions. In settlement discussions or mediations, funders are unduly influential or controlling. It is completely wrong. There should be strict constraints on the role that a funder plays in how the case is run and how the case is settled and on what terms it should be settled. If the real world position is that the litigation funder is the effective and substantive plaintiff, largely because they've got the most to gain out of the action (which is substantially true in most cases, at least in percentage terms) then they should bear a proportionate share of the loss, so that it's a business model in which they are business partners, or a joint venturer with the group. Joint venturers share profits and losses proportionately. If it's effectively their case and they're running it as their case and everyone is running it as their case, then they should run greater risks than they do.

The opacity around the determinations of risk and fee levels by funders was a further subject of concern.

The proportion of fees which go to funders in some matters was said not to appear to correspond to the risks they undertake, as illustrated by comparison with lower percentages covering risks in after the event insurance. This risk to profit ratio was contended to be hard to justify, particularly in circumstances where funders often take out after the event insurance, such that they are not liable for the adverse costs.

> In terms of the litigation funding market, I think they make an awful lot of money for not doing very much. I don't have access to the internal figures so I may be wrong, but I get the impression that there is an awful lot of money being made by litigation funders and I don't really see what they add. Obviously, they provide finance, but they don't actually do any work. It's really a question of whether somebody could provide capital at a cheaper rate. I struggle to believe that that's not possible in this world. At present, term deposit rates on offer are less than 1%. I don't think it would be too hard to find investors out there in the world today prepared to invest in litigation funding and get a return much lower than the funders are getting at the moment. It's too expensive, unjustifiably expensive. Some of the funders are very good but there are some funders who really shouldn't be in the business of funding litigation. They don't have the capital, nor do they have the experience. What ends up happening is that you have a funder that does not really have enough capital of their own or enough experience to know their way around the traps of litigation, that end up making decisions which are necessarily driven by their own financial circumstances and not in any way by the interests of the group members. That fundamentally undercuts the purpose of the regime. You really need to have a situation where, if you have well-capitalised funders with experience and sound management, they will be able to make decisions which are far more likely to be of benefit for the class members' case, rather than settle the matter on terms which are probably not as good as they could get because they are in a cash squeeze and can't afford it any longer. I think if you are going to say to someone, I will fund your litigation, you have to have sufficient capital to see it through without compromising their position 13 months later because it cost a few hundred thousand dollars more than you had budgeted and you really don't have the money. That is a problem that arises with a lot of the smaller funders. Whether that is a need for particular capital requirements or a licensing regime etc, there needs to be scrutiny of their level of capital and ability to see the case

through and also some scrutiny in terms of who is actually managing these organisations; are they fit and proper people? Most of them are, but I do think we need to be careful.

The view was expressed that it is not clear that courts are currently well-placed to supervise litigation funding, as courts may not have sufficient knowledge or expertise on reasonable fee amounts for third-party funders. One suggested solution to this problem may be to require funders to put on evidence to justify the reasonableness of the amounts they claim, as this would gradually bring about greater transparency and broader access to information about the risk calculations made by litigation funders.

4.4 Regulatory reform.

Many interviewees expressed a great deal of frustration about the current Joint Parliamentary Committee inquiry and the politicisation of funding reform:

> I'm extremely sceptical of what the Federal Government is up to. The current Parliamentary Inquiry is a political inquiry, not being run by experts. They've got the numbers on the committee and it will come out with a thesis that there should be less cases delivering more money and I don't see how that's going to work. If the aim is to increase the amount of justice flowing then litigation funding and the uncertainty around it should be reduced. If the aim is to benefit defendants, then you should say that. Class actions are a really good way of resolving the imbalance between corporate Australia and the punters. It works. I'm sceptical about the process that everyone is engaging in at the moment. The regime is pretty functional, but there is not much incentive to try to bring everyone together and have proper conversations about it.
>
> I have been shocked by the nature of that forum. I was naively thinking there might be some actual debate about the issues, but I was wrong. It is unedifying. As one of the Committee members admitted, the Committee members are not going to be able to grapple with these issues in a forensic way. Unfortunately, some of the submissions are just clearly political plays as well, so it is just a mess.
>
> There's been media recently about the problems of the current Government politicising this area and not listening to independent voices as much as they should or even, indeed, inquiries that have gone before. I think it's a problem that they are wasting money on yet another inquiry to try to get to a different answer, because they don't like the ones that the properly constituted ones have given them. The knee-jerk law reform in relation to the continuous disclosure regime is inappropriate and dangerous.
>
> It is pretty weird, politically and ideologically, to see a conservative Government trying to solve costs by reducing competition and making it a bit harder to compete. It is a matter for regret that this has become a politicised issue. There's not really a particular political aspect to shareholder claims. On the one side you've got listed companies and on the other side mum and dad investors, institutional investors, large mutual funds and super funds. There are not really politically organised interests in the traditional sense that you would see in a personal injury claim. It is an error to see it as just an issue that confronts listed companies, because there are lots of other kinds of class actions you can bring for lots of other kinds of people other than investors. The class action regime has that beauty to it that it's very flexible. For example, you can run a class action saying that taxi drivers got screwed over by Uber, which the Victorian Court of Appeal says raises sufficient common questions to be run as a class action.[32] There are lots of other class actions like that, for example the sexual abuse litigation.

A number of participants did not support further regulation. For example, one interviewee stated:

[32] *Uber Technologies Incorporated & Ors v Andrianakis* [2020] VSCA 186.

> I'm in the camp that while the system is not perfect, I don't think further regulation is the answer. I think it is actually working pretty well, all in all, and to the extent that there are problems with individual cases, there are probably fewer problems of that nature in class actions than there are in other types of litigation, I would imagine. There is so much at stake and most of the people involved are pretty good at what they do.

It was suggested that the new funder regulations may lead to a reversion to more closed classes. This was said to be problematic when combined with the absence of mechanisms to order the closure of classes at interlocutory stages. Defendants will not be able to obtain finality through settlements without a class closure mechanism and this will be worsened by more actions being brought on behalf of closed classes.

> I'm not in favour of regulation, because I think there is more than enough evidence to show that regulation is not a solution to all problems. Just look what the banking inquiry revealed in one of the most heavily regulated areas we have. I support ASIC's view. I think case by case overview by the court is a far better way of doing that in terms of both funding terms and security for costs. I don't think there's a problem. I think regulation is not going to assist at all, requiring capital will limit the number of players and favour Australian entities. I do think there is a potential issue – and it hasn't really got a lot of focus – about the tax consequences of not requiring a domestic location. There's money earned by funders through the utilisation of Australian court processes and procedures and other Australian related things, but I'm not sure whether they pay tax on that here. But that's a problem which you have with private equity and floats as well.

Reform in relation to the tax payable by funders was supported:

> The point that any profits earned by funders, that they should pay income tax on that profit in Australia, is something that no one would object to and it would garner great sympathy. But that's a tax issue, … it's related to the funders, but in terms of the funding market operating in Australia, I don't think it needs to be regulated. I don't think regulation is going to solve anything and I think requiring capital here favours the Australian funders and would limit opportunities and the court is the best-placed mechanism on a case by case basis to oversee security and funding terms.

For others, additional regulation was viewed more positively:

> I don't see a lot of difficulties with the funding process that can't be addressed by a modest level of ASIC-based regulation, requiring them to have an appropriately framed AFSL, for example, not treating them as MIS which is bizarre, but an appropriately framed AFSL that requires them to satisfy prudential requirements that are in everyone's interests. Apart from that and the availability of rigorous court oversight there are not any particular problems.

> AFSLs make sense to me. Omni Bridgeway wants it because it has an advantage, maybe it sees merit in it. But it seems to me that at least it provides some legislative basis to impose conditions and duties that otherwise the law has not developed and should develop. Personally, this is where a governance committee for class actions seemed to be a better solution because that is a way to disempower the funder's role in those negotiations and no deal gets put through unless the governance committee is satisfied and that committee has representatives from the big end of town and the small end of town. It has its own separate legal advice, yes that's a cost, but I expect it is a well spent bit of money to proceed that way.

Additional regulation of funders was not opposed by some interviewees. However, a number considered that application of the AFSL and MIS regimes to litigation funders will create further disincentives for funding investment in the short to medium term. It was argued that the result of the uncertainty and new regulation will be that some class actions are not filed and some are not

subject to competition. People will not be able to vindicate their rights and class actions will become more expensive as more cases involve bookbuilds. This additional cost may be passed onto defendants and lead to further increases in their insurance premiums. It was suggested that these potential consequences have not been properly considered by those supporting the regulatory changes.

It was further suggested that the AFSL requirements will increase costs, and this will be passed onto the consumers. It may lead to some funders exiting the market, lessening competition and leading to adverse outcomes for consumers.

4.4.1 Prudential regulation of litigation funders.

For one interviewee, concerns over prudential regulation can be adequately addressed by due diligence of solicitors, security for costs measures, and after the event insurance.

Others supported the introduction of a licensing regime including capital adequacy requirements.

It was suggested that there is a 'looming problem' where litigation is funded by a special purpose entity that is not sufficiently solvent to indemnify the plaintiff against the significant adverse costs exposure involved. The defendant in such an action may seek to bankrupt the plaintiff and make an example out of them. It was contended that capital adequacy requirements could address that.

4.4.2 Disclosure of funding arrangements.

One plaintiff lawyer interviewed stated that they had not seen any evidence of inadequate disclosure by funders.

According to another:

> The court adequately regulates disclosure by funders. The court is provided with an unredacted copy of every funding agreement and are empowered to raise any issue with that. Notices are also subject to adequate scrutiny by the court.

Class members were said to be adequately protected:

> There seems to be this suggestion that there's a lack of regulation around disclosure or that group members somehow need protecting from plaintiff lawyers or litigation funders. Those arguments are all being made by defendants or those sympathetic to them. I've spent my entire career having defendant lawyers speaking very gravely to the court about how deeply concerned they are about our clients, and it sort of beggars belief. You get used to it after a while, but the idea that you've now got a Government listening to defendant lawyers and their clients and those related interests purporting to do the same thing, it's the height of hypocrisy.

4.4.3 Managed Investment Scheme reforms.

The imposition of the MIS regime was almost universally opposed by interview participants.

> The MIS regime will make it very difficult for class actions to be funded and the system will take a long time to settle down.
>
> The MIS reforms will lead to problems for the class actions regime.
>
> The imposition of the MIS regime is 'ridiculous… ill-considered and really a mindless reaction to an American lobby group paid for by Murdoch. It is incredible.'
>
> I can't believe they are pressing ahead with this, at the behest of the anti-class action lobby. Particularly because through the Parliamentary Inquiry it has now come out that when Treasury prepared its regulatory response to the earlier exemption it agreed with the exemption and thought the MIS regime was totally inappropriate for class actions. It is incredible. I am flabbergasted.

> The new regulations will create a bit of satellite litigation and need a bit of time to wash through.
>
> I am concerned at the way in which the upcoming MIS regulations will operate, but more importantly, the increased costs and time that will be borne by group members as result of satellite litigation that flows from that.
>
> Transaction costs are going to increase very substantially as group members, lawyers and funders are required to register funding arrangements as MIS, and to meet the costs of compliance. That is a concern for a few reasons, but in particular because of where those costs will be borne. Will they be passed on directly to group members? Presumably not, because the court would ultimately not approve them, but will they just result in higher commission rates and fewer people offering to fund? That really makes that problem worse.
>
> On the defence side, I'm worried about whether the full-blown MIS provisions will be a 'square peg, round hole' type proposition, but I have not worked through those yet. Most funders would have supported a licensing requirement. We don't have a lot of examples in our market of truly excessive or dishonest conduct by funders. For me, it is more about getting clarity on how they are working and once I have security, I am okay.

Most interviewees preferred the view that funding arrangements were not *Managed Investment Schemes*:

> *Multiplex*[33] is a controversial decision, and the two judges who looked at it who did not view them as MIS were the more experienced in class actions with deeper understanding than the two judges who considered that they were MIS. This is a live question. The reforms of the Government may cause havoc in the courts, for the parties to litigation and for ASIC, with the end result that this trouble is for nothing once the High Court finds they are not MIS. In *Multiplex*, there might have been an application for special leave to the High Court but it was not pressed as the Government intervened to exempt them.
>
> In terms of regulation, I think there needs to be some form of regulation. The avenue the Government is going down is a little bit bonkers and this idea that you can just use *Multiplex* to regulate it – it's just a completely different system, it doesn't involve people reaching a hand in their own pocket and spending their own money. ASIC's going to have a horrible time trying to regulate this thing. There is this whole debate about this where everyone just assumes that *Multiplex* applies to this type of litigation. I don't think that's necessarily true. That was a case of a closed class action where everyone had signed the funding agreement. It's rare for cases to be run on that basis anymore. I think it's more likely than not that the Court will find that they're not a MIS, and that *Multiplex* does not apply.

4.4.4 There should be a publicly funded option.

One mooted alternative to commercial funding is the creation of a statutory fund:

> My own view is that there should be a public option. I like the idea of having a public option which would enable the selection of cases that are really in the public interest and drive down the overall price in the market offered by private operators. Some competition from a publicly funded organisation would actually be beneficial.

Another interviewee commented that 'a statutory fund is a really good idea. We want class actions to go beyond shareholder class actions and do some real good, and I think that is really important.'

[33] *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd (No 2)* [2009] FCAFC 182; (2009) 76 ACSR 323.

A further interviewee commented that there is a lot to be said for a public fund as it may direct attention towards the areas that are not being litigated because the criteria for accessing that funding could relate to the kind of claims being proposed.

4.4.5 Other suggested reforms in relation to funded cases.

For one participant, governance committee requirements, such as those contemplated by Justice Finkelstein in *Centro*,[34] would be a positive development. As noted above, it would protect class members and prevent funders from exercising excessive control over the litigation. This disempowers funders and would involve input from a committee that represents both the big and small ends of town and separate legal advice. Though this structure would be costly, it would be money well spent.

Another interviewee expressed opposition to the discretion currently exercised by the court to adjust returns to funders and class members. While there is merit to a level of discretion, the reasoning behind their adjustments is often unclear. This should be subject to greater discipline.

There was support for reform of how funding commissions are regulated:

> I don't have a problem about funding generally, but I have a problem with how the range of fees or commissions is set. I don't think they're set by any relevant market standards. I think it's a bit like the banks who all get together and by coincidence happen to charge the same interest rates on my visa card, and other credit cards. These are typical oligopolies doing exactly what competition lawyers and industrial organisation economists warn against and the judges don't get it; they haven't got a clue. One day someone should go up there and explain to them how competition is meant to work. I remember when Allan Fels was in charge of the ACCC and liquidators had their scale of charges. Fels said if you stick by this scale of charges, I'll prosecute the lot of you, including the organisation – insolvency association - which promulgated it, because it was blatantly illegal. But the Federal Court is doing exactly the same thing. They've in effect got a scale and if you fit within the scale, that's your approved rate. No economist would buy that. You can't prosecute the Federal Court for doing it, but you can prosecute outside agencies for using that sort of yardstick. That's a great vice but I suspect only economists get that.

There was also some support for the capping of funders' commissions by statute to remove any debate from the equation. Others opposed the introduction of caps.

5 Perspectives on the transaction *costs* incurred in conducting class actions.

Most interviewees were of the view that transaction costs were a problem in class action litigation. In some instances, this was said to be attributable to procedural requirements. On the other hand, a number of those interviewed expressed the view that such problems were characteristic of complex litigation generally, rather than class actions per se.

5.1 General observations.

Costs are a 'perennial problem':

> I think there's a whole range of reasons for that. I don't think there's one problem or solution to how much they cost but there's a lot of small things that could go into addressing that to some degree.
>
> Class actions are expensive beasts to run.

[34] *Kirby v Centro Properties Limited* [2008] FCA 1505.

> Transaction costs are definitely a concern – costs of getting to settlement or judgment and then the costs post-settlement or judgment sum and how that's been administered.

The costs accrued are partly attributable to the complexity of the litigation:

> Class actions are very expensive to prosecute and defend, sometimes necessarily so. They invoke significant issues, they affect huge numbers of Australians and sometimes people overseas, and the issues are usually pretty complex.
>
> There are problems with the transaction costs incurred in class action litigation. It is very expensive litigation. In part, that is because it's big, complex and defendants generally, well almost always, defend it vigorously.
>
> The costs associated with interlocutory arguments are always significant. Parties cooperate to an extent but there's very limited ability to agree on all issues. The contests over discovery, over interlocutory steps like class closure, over multiplicity, over the order of the time table and the amount of time given to the parties, the list of issues, maybe the appointment of a joint expert; these things are always contested. I am not saying that to blame anyone, but those costs are all significant. I think the courts run them very efficiently, but the size and shape of these things make them very slow-moving beasts. If we could get the discovery piece right, if we could reduce that burden, it probably would be the best thing we could do - the lowest hanging fruit. The rest is tricky, because I do think that the parties should be able to fully argue their respective positions. I am not even a big fan of court appointed referees and experts. I think there is something in the opinions and the judge being able to choose between them. Other than the obvious comment that the costs are excessive, the costs are very high, I don't think there is an enormous amount of unavoidable costs that are occurring outside of the discovery stage.

Transaction costs were described by one interviewee as 'exorbitant.' However, this was said to be reflective of the costs of complex litigation more generally and should be balanced against the access to justice opportunities brought about by class actions.

The assertion that class action costs are comparable to other complex litigation was disputed by some interviewees:

> Class actions are really expensive. I do a lot of big commercial litigation defence work. Class actions are reputed to be like other big commercial litigation, but they end up being very expensive. It's the multiplicity of actions that tend to really be the contaminant in terms of considerable costs.

Costs were said to be increased by uncertainty:

> The uncertainty in the landscape certainly gives rise to an increase in costs, as people test the boundaries of the High Court's decision in *Brewster.* This will occur, at least in the short term, until clarity is provided about these issues. It has also led to delay in the resolution of class actions, as more time is spent on interlocutory skirmishes around the current uncertainty.
>
> Uncertainty drives prices up and creates a lot of work that is ancillary to the fundamental questions that class actions are trying to answer. Practice leaders spend more time on the architecture of cases than on the fundamental case theory. If uncertainty was lessened, costs would go down and cases would get on faster.

There were a number of problems identified with reference to specific transaction costs:

> ATE insurance is outrageously expensive, where an effective monopoly is operating. My recent experience is that you can't get it even if you are prepared to pay the exorbitant premiums, but that may have changed recently.

A second participant similarly commented that the premiums of ATE are high and do not appear to correspond to the merit of claims.

> In some cases, you would be paying a premium of as much as half of the indemnity under the policy, once aspects such as the deeds of indemnity are factored in. This does not correspond to the risk that an adverse costs event will occur; plaintiff lawyers have a record of not being subject to adverse cost orders. The price should be lower, and this may occur with the introduction of contingency fees in Victoria.

According to another interviewee, the price of ATE is going down.

5.2 Views that costs are not a significant problem.

One interviewee did not believe that there are issues in relation to transaction costs of class actions, stating that costs are increasingly coming down as a result of increased market competition and increasing sophistication of clients in the shareholder class actions context.

Other interviewees suggested that costs are proportionate:

> Although there might be a lot of money involved, you have to ask yourself, when the costs incurred are spread over the number of group members affected, it might have been three million dollars in costs, but in respect of the three thousand group members, all of that work was done at a community cost of 1000 dollars per head. That's not a bad return. There are three thousand claims that were resolved by the proceeding. Not favourably perhaps, not well, but they still went away. There are big costs involved but we're dealing with large numbers of claims and the whole system is justified on the assumption that people are entitled to bring those claims and if you don't do it in one proceeding you need to adopt as your comparator the assumption that otherwise those claims are brought as separate proceedings. Every time you do that analysis you are driven back to the conclusion that the costs are really not that grotesque.
>
> In terms of transaction costs generally, if you are running these things and you have experience doing them, a part of the point in running them is so that you can litigate the claims of many people in a way that is cost effective. They can certainty be managed and ultimately it is something the court controls in any event.

5.3 Views that there are problems with costs.

5.3.1 Costs generally.

For a significant proportion of those interviewed, transaction costs were considered to be a problem. The legal fees and funding fees incurred in running class actions were said to be concerning, as this reduces the compensation available for group members.

> It still takes millions and millions of dollars to get these class actions to the end of their life and that is not necessary.
>
> Costs are the major problem. Insurers advance the defence costs before there's a finding of liability and it is 10, 13, 20 million dollars down before you even get to position where there can be a sensible discussion about settlement.
>
> Costs are excessive.
>
> Class actions, in terms of interlocutory processes, interlocutory skirmishes and procedural arguments, are the most expensive litigation that's running at the moment. It's in the business model of plaintiff and defendant practitioners to do that because they make vast sums of money from it. But if you put aside the description of class action, you have one, two or three plaintiffs running a suit. One, two or three plaintiffs running a suit shouldn't take years with millions of dollars spent on interlocutories. I think that's partly the problem

> of the parties because it's in their business model to do that. It's in the lawyers' own personal interests to do that.
>
> From the cases I've been involved in… the costs strike me as so out of proportion with costs that I've seen in all other pieces of litigation. I don't think that class actions are so different. It's an action: it's a tort claim, it's a contract claim, it's a constitutional claim. People have been running these cases reasonably efficiently for a long time.
>
> Costs are definitely a problem. I think that's probably the key problem. Costs escalate very rapidly and the way that some cases on the plaintiff side are managed is not very efficient. There can be a lot of replication of work and ideally things could be run more efficiently with leaner solicitor teams and maybe using the junior bar a bit more. They are usually complex cases and in some of the larger firms you can have junior people doing work that's too advanced for them, has to be redone by more senior solicitors, and then it gets to counsel who does it again. And everyone bills along the way.

A number of interviewees referred to particular aspects of costs in class actions.

5.3.2 Legal fees.

One participant suggested that it could be argued that commercial legal rates should not be charged in the class action context, as they often result in exorbitant costs. This was said to be particularly problematic in relation to actions in which amounts recovered are relatively smaller and a substantial proportion of the amounts recovered will frequently be eaten up by transaction costs.

Frustration was expressed at situations where parties pursue matters to the point of trial, only to settle at this late stage. Costs are legitimately incurred but are very high, and this is then deducted from the amount recovered by group members.

It was suggested that one question that needs to be addressed is how to get some control over the defendants' costs or actions and that there should be greater consideration of how to exert influence over the conduct of both parties.

Judicial scrutiny of discovery and pleadings through case management procedures was said to have not been overly successful. It was contended that there is a need for innovative thinking in this area.

> Market discipline might be brought to bear on the conduct of defendant solicitors through requirements for disclosure of costs in defending matters. The application of cost budgeting procedures outlined in Lord Jackson's report on class actions could provide a further mechanism to lower legal costs. However, its appropriateness for complex litigation such as class actions is unclear.

Solicitor costs generally were subject to criticism:

> I think solicitors are the problem with gilding the lily on fees, where you have these armies of people working on these cases generating vast amounts of billable time.
>
> These are expensive proceedings and all the lawyers involved in them charge at top dollar. It is the case that a lot of lawyers frankly are not worth what they charge, that goes for both barristers and solicitors, but that's just the market. You can't blame class actions for that.
>
> In a recent [specified] case, we would go to directions hearings and there were 18 lawyers in there, doing what? There were five or six solicitors from a firm with a partner all taking the same notes, and they had a senior counsel and one or two juniors doing what?
>
> I'm hoping one of the benefits of the COVID-19 experience is that we will move to a more efficient way of dealing with directions hearings. There is literally no justification for that sort of thing, directions hearings where very little is happening, you could see $250,000 being spent in a morning just by having these armies of lawyers there. As senior

> practitioners looking at this, you've just got to look at this and say is this an efficient use of the court's time and the client's resources, and the answer is of course not! It's bizarre beyond all measure.
>
> Legal costs spiral for many reasons, including significant amounts charged for time spent on tasks performed by a paralegal which are essentially administrative in nature, and incentives for lawyers to do as much work as possible through the billable hour structure without regard to proportionality.

Some counsel fees were said to be very high:

> Counsel costs are an interesting part of this too. I would be curious as to the extent to which, or whether we have seen some change over the years in the proportion of costs that are going [towards] counsel costs – whether firms are taking more in-house or briefing out more. Some of the barrister costs now - there are silks now charging 30 thousand a day, and three to five thousand dollars an hour in conference costs. That's very valuable advice and they do a great job, but it is bloody expensive. It was not that long ago when barristers SC costs per day were not that much greater than my costs and all of a sudden, they just seemed to triple in a very short period for the really senior guys.

Junior counsel, however, were said to be more affordable.

> Clients perhaps are unaware that there is probably a large amount of work which should be done by junior barristers at cheaper rates, but which is in fact done by solicitors.

The role of solicitors appearing as advocates was raised:

> In the past, it was not uncommon for solicitors to appear in many cases as junior counsel or to handle interlocutory and directions hearings, which reduced costs overall but increased costs recoverable by the firm. This doesn't seem to happen much anymore.

It was suggested that the conduct of *both* parties frequently drives up legal costs. Legal costs are said to be increased in circumstances where plaintiffs plead very broad cases with lots of causes of action. Conversely, where defendants admit nothing and try to fight every point, even those which lawyers know cannot be defended on the facts, legal costs are increased.

Costs incurred by plaintiff law firms were criticised. One interviewee expressed the view that plaintiff law firm costs were 'astronomically high' and much higher than defence costs.

Another commented that the costs on the plaintiff side are 'concerning'. There was said to be insufficient competition among plaintiff law firms in Australia, in comparison to other countries.

On the defendant side, there was said to be more competition leading to downward pressure on price. Partners at top tier law firms acting for defendants often work for much lower hourly rates than partners at plaintiff law firms, including the less prominent ones, whose fees are also subject to an uplift of 25% in some cases.

This concern was expressed by a number of interviewees:

> In my view costs are just outrageously high for a whole variety of reasons, which don't reflect very well for the way these cases are run on the plaintiff side. We charge a lot on the defence side, but … it's not a parity. It's usually substantially less. We have a client who has a close look at what those charges are and, in most cases, exercises some degree of budgetary control. They are usually experienced, large corporations who have in-house departments with budgets and apart from that exercise of discipline, and you usually have insurers involved who keep a close eye on things. There are a number of check points there.
>
> Plaintiff law firms' hourly rates are sometimes very high.

In the words of one interviewee:

> Plaintiff lawyers are generally very capable but are they really worth far more than the best lawyers at Freehills, Mallesons and Allens? If I say that to most people, they would say what do you mean? And I would say, well, they charge significantly more. Why is it, for example, that the ASX top 50 might be able to command competitive rates out of those who represent them on the defendant side such that lead partners (with 25+ years' experience) will do work for hourly rate of a figure that starts with a seven or six, and yet at plaintiff law firms, particularly the prominent ones, and perhaps more concerningly also some of the less prominent ones, the headline rate will be significantly higher than that, in some cases north of a thousand dollars and in some cases it is subject to an uplift of 25%? What has happened is that in most cases where somebody is charging at a headline rate of north of a thousand dollars with an uplift rate of 25% on success, their final rate is $1200 or $1300, whereas you might have top-tier defendant firms at $650? When you lay it out like that, you have a problem. Why does it happen? … It is not only insurers that force the defendants to pay less. On the defendant side, the level of competition is higher. That is the reality of it. You have eight or ten law firms competing with each other vigorously. The net result is that there is downward pressure on price. In the context of the plaintiff side, the reality is that it is not nearly as competitive. There is one very dominant law firm there are two medium sized fish and there are small fish. The competitive pressure for a matter that you originate and you own yourself, is next to zero. If you look at it from that perspective you can well understand why either group members or other stakeholders or influencers in this space say something has gone wrong.

Others commented:

> Large plaintiff law firms do an excellent job but they have lost sight of a degree of efficiency. I don't think it's deliberate. I think they rack up a lot of costs because they are trying to do a really good job, but there is a little bit of over-servicing, particularly at the junior level.
>
> I'm often surprised by the size … of the level of costs incurred by even the very best and most responsible law firms in conducting class actions. I appreciate that there are layers of costs that apply in class actions that don't apply elsewhere in relation to the group and so on.
>
> I often wonder whether class action litigation doesn't suffer from the absence of a costs-conscious client who is sophisticated and highly motivated to interrogate bills and keep them low as the process is happening. It's just not the same for the court to come along afterwards and get a costs referee's report or a costs consultant's report on the nine million dollars that was too high for a case that ended up being tried over three weeks. When I say nine million dollars for a case that was tried over three weeks that seems to me a lot of money. These issues are very difficult to address ex post facto; they need to be addressed along the way. I don't know of any mechanism for doing it, but I emphasise again, I am not an expert in the costs of civil litigation.
>
> There is a problem with the way in which costs are generated by plaintiff firms. Once they are satisfied about liability they just spin the wheels.
>
> What makes it more odious is that it is couched in the rhetoric of access to justice.
>
> Where the plaintiff law firms are funded and they are having their costs paid by a litigation funder as they go, there is no incentive on either side to advance the matter quickly. None.

However, the costs incurred by plaintiff firms were also viewed as necessary and proportionate:

> Legal fees are high. However, this rate comprehends the cost of doing business and the fact that the firm may have to weather losses from cases done on spec and where large amounts

of costs are written off. Those cases are lost, not necessarily because the case was without merit when it was commenced or run poorly, but as a result of external circumstances that cannot be controlled such as an unfavourable decision by an appeal court on a regulatory action relevant to the class action.

5.3.3 The conduct of plaintiff law firms.

There was a concern that cases are sometimes being run by plaintiff law firms at great expense and for considerable periods of time with unclear mandates from class members. In at least one class action which is currently being litigated, there was said to be a real question as to who is really interested in the matter from a class perspective, as there does not appear to be any meaningful or viable compensation outcome for any individuals apart from the lawyers and funders.

5.3.4 The conduct of defendants and their lawyers.

The conduct of defendants and how cases are defended was said to drive up costs:

> There's the perennial tendency of defendants and their lawyers to take every point and then to appeal them when they lose them. Those things do add to the costs.
>
> It is often the strategy of defendants for the costs to the plaintiff to become an intolerable burden.
>
> If our goal is to protect the interests of group members, which seems to be a very important legislative goal of a regime like this, group members aren't really protected from defendants wanting to run things in a gilded Cadillac kind of way. They're not protected at all really. Defendants are able to run cases however they want, with whatever resources they want, with whatever regimes for the protection of sensitive documents they want, however costly those are to everyone. That's not really something the court seems to concern itself with.
>
> [Identified leading defence firms] are very good and very accomplished, but they start off with this broad investigation. Discovery involves a trillion documents, they say they have to interview hordes of lay witnesses, get in lots of expert advisors and witnesses, and they have to go through the step-by-step process before they can even sensibly assess liability. That is the constant message that we hear from defence counsel. Insurers ask "why can't we get an estimate of quantum much earlier? Why can't we narrow down what the real issues are in the case? Let's have a discussion about that".

Defendant costs were said to be excessive in comparison to plaintiff costs:

> The costs of plaintiff law firms in some actions, when considered by those incurred by defendants, are reasonable. For example, in [identified case], those of the defendant exceeded plaintiff costs. Much of that was incurred because of unnecessary dispute on questions of liability, manoeuvring, manipulation and game playing by the defendants, where liability should not really have been an issue, as [liability] had been admitted in another jurisdiction. The defendant put the plaintiff to proof on an issue that they were aware that they would be able to prove eventually. The focus of that litigation should have been on damages.
>
> When a defendant wants to cooperate early in trying to resolve it, those costs can be kept under control. But sometimes there are issues with proportion and costs. Costs can get out of proportion to the damages involved. Sometimes the costs, while large, are in proportion to the damages involved and that is less of a problem than when costs get out of proportion to the damages involved.
>
> It is in one sense odd that the costs of the applicant need to be approved by the court but the costs of the respondent don't. You have a gradual trend, which is a bit patchy but seems to be in the direction that costs in cases are supervised on an ongoing, regular reporting

basis, either by a referee or by a cost consultant. There is all this action [on] one side of the ledger and you don't really see anything on the other side of the ledger.

An interviewee commented:

> Class action litigation is too expensive. There's no incentive on a defendant to rein in their costs unless they've got a particularly frugal defendant, and there's no incentive on the insurers to rein in costs generally, because they're a bit like liquidators – there's a pot of money and they don't care who it goes to; the defendant's costs or the plaintiff in damages, and if it runs out, well it runs out. Unless you've got a funder who's conscious of those things and lawyers who are sympathetic to those things, the costs on the plaintiff side get out of control as well.

One practitioner explained:

> The fact that an insurance policy includes defence costs does not provide a lack of incentive to control costs. This is because you want your policy to respond as fully as it can. Across the insurance period say it's a year, yes there is this big class action to deal with and the policy responds to that, but if there's any way that the policy can be used to respond to another claim that might arise, there is a necessary pressure to try and control costs.
>
> You can imagine a tower of insurance with different layers. If it's the first layer of insurance, which is say 15 million on a class action which is likely to go up to 200 million on settlement, well, they know that they're going to have to write a cheque and kick it in. I find most clients control the costs all the way through. I don't see blank cheques. In everything I do, they want monthly budgets and they measure against the budgets. They keep a very close eye on what you are doing.

5.3.5 Expert costs in securities class actions.

> The other thing that worries me is (it's becoming a sort of self-contained industry as well) in the securities class actions – the experts and the amounts that I have been told they charge, I find staggering. They give the same evidence – the same group of people giving the same evidence. They feed in different facts. The charges are unbelievably exorbitant, and nobody says a word about them. Nobody does anything.
>
> It is staggering what experts in securities actions charge and I don't know how they get away with it. It's like a whole industry which has been allowed to develop and it seems to be getting worse rather than getting better. Nobody seems to care about it at all.

5.3.6 Discovery costs.

> I don't have a good solution to the problem, but I am troubled by the enormous cost and time associated with discovery. This remains an enormous problem in most class actions that I've been involved in and that I've observed. I have seen courts move away from and then towards, and then away from again, discovery by categories. I have seen almost no attempt judicially to restrain the sorts of discovery requests that are made in respect of the defendants, particularly in the corporate governance space where you could have a disclosure issue but that is also exposing issues about the underlying business of the entity involved (engineering, construction, whatever). There must be a better way to focus the discovery in a case so that it is truncated and the costs are limited because at the moment the parties are groaning under the weight of that process and it is probably the largest factor contributing to the two to three year average that it is taking to resolve these claims. I don't have any simple solutions, but it is rare for the courts to draw a line on an expensive discovery request that is put forward by an applicant on the basis that they don't want to hold the applicant away from information that they might need to prove their case. Inevitably that philosophy leads to a boiling of the ocean, whether it is a change of the order

> of evidence, discovery versus witness evidence, or deploying other techniques which are more controversial, we probably need to think outside the square a little bit in terms of that process. Unfortunately, a level of documentary discovery is critical, but cases are boiling down to four to six folders of documents at the end of the day, that are the crux of the issues, and yet, discovery is 50-70 thousand documents. The balance needs to be recalibrated and, of course, the proceedings can't be resolved until the court approves them as fair and reasonable, and I get that the record needs to be established. I am not suggesting something radical like no discovery, but the proportionality issue is just not working in practice.
>
> In [a number of specified] matters, what has cost most and takes up the largest amount of time is discovery [detailed example cited]. It is just the most unbelievably time consuming and costly exercise.
>
> In one of the class actions in which I was involved there was a security for costs application. They said discovery was going to cost millions of dollars. There was an affidavit from somebody in a [specified] firm estimating (probably pretty accurately) that the cost would be around 25 million dollars. That was totally unacceptable.

Discovery was described a 'often the work of junior lawyers' and this was said to be 'unfortunate, as it is incredibly burdensome and not an incredibly healthy phase of the case'.

> There is a problem with discovery with large numbers of paralegals working full time on it without turning your mind to whether it is necessary or not, it's just a revenue generator.
>
> Slater and Gordon got pinged for the costs they were charging on discovery work.[35]

It was noted that discovery costs may spiral out of control because of the way the case is pleaded:

> That is largely because the plaintiffs have not pleaded their case in a specific way. They don't know what their case is yet. The result of that is that the proceedings take a lot of time. We have had a multitude of tranches and categories of discovery which is exhausting. Because the plaintiffs' lawyers have not actually figured out what their case is, they have pleaded so broadly. For instance, in a shareholder class action, they will plead a two-year time period. Everyone knows in a non-disclosure or misleading and deceptive conduct case, there is a point just before the so-called corrective disclosures where the board probably has been crossing its fingers thinking this will all fix itself and then it doesn't. There's a point when the plaintiffs have a really good case, but it just gets lost in the two-year period they plead. Then the defendant has to put on evidence from that whole time period, and review documents from that whole time period. It's just madness.

Discovery costs were criticised for leading to higher and disproportionate costs. It was suggested that the efficiency of discovery might be improved through procedures to require evidence to be given from people with actual knowledge of the documents kept by a party to a matter, with the aim of identifying relevant key documents for production as an initial step. United States rules, providing for depositions by those who have control of documents and mandatory disclosure of documents of which parties are aware, were also suggested.

In terms of obtaining information and ascertaining the truth, it was suggested that depositions of people with relevant knowledge about substantive issues would be a much quicker, cheaper and more efficient method than the review of voluminous documentation.

A few participants suggested that discovery costs are improving:

> The shape of discovery is changing, as more technology becomes available. Discovery is becoming a cheaper exercise; it's less of a manual exercise. It involves more senior people,

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

and technological support, and in that context the costs around discovery are changing. More is spent on technology, less is spent on humans manually reading documents and so on, but I think overall those costs are being brought down and that is generally a good thing.

People are trying to use TAR[36] and other forms of AI to make the discovery part cheaper, that will continue to be an improvement and bring costs down, but some of the costs are pretty surprising.

There is an increasing role for technology in large document heavy cases that could save quite a lot of costs, and duplication and repetition of work.

5.3.7 Funding commissions.

Transaction costs related to funding were criticised:

> Transaction costs are increased by having a funder and a lawyer.
>
> In recent years in commercially funded cases there appears to be a lack of concern about expenditure and a lack of control by funders over expenditure, in some cases; those who put up the capital and those who manage the funding have different commercial imperatives.
>
> Funders commissions can be very high.
>
> The lawyers should get paid their normal rate. The funders in effect are like an insurance company or a finance company, providing money so that the action should go ahead. They should get a reasonable return on that, but why do they get 30 to 40 percent of the outcome? I don't understand the principle. If they invested one million dollars, they should get a return of one million dollars and something for risk. What is the economic principle that justifies getting 30%? The answer is simple: greed. They are motivated to achieve the highest that they can get away with.
>
> I am not sure if it is still happening, but there was a time when funders used to charge a fee which was in effect a percentage of the legal fees. I think that is a bad practice because it creates a joint incentive between lawyers and funders to increase the costs because they both benefit. You really want to have a situation where the funder and solicitors are on opposite side of fence as far as costs are concerned, the funder is trying to drive them down not up. That is an issue. Inevitably, what tends to happen is, and it is understandable, and I am not sure what you do about it, but funders develop a close relationship with one or two solicitors, at that point they are both benefiting financially out of their relationship from case to case. That increases the difficulties and conflicts of interests that can arise. That is not a problem limited to class actions but it is a particular difficulty that is cropping up as these relationships become longer term and more important to the law firms than perhaps they once were.
>
> There is a problem. I am most concerned with the market forces problem of different deals done within a class, where large funders get funded for 20 cents in the dollar and the mum and dads are hit with 45 cents in the dollar because their buying power is less. Within the same class you are getting people with differential returns.

One interviewee raised concerns about the fees charged by those administering some litigation funding arrangements which may be sought to be recovered on top of commissions payable for the benefit of those providing the capital invested, with the added problem that the ongoing payment of such fees or commissions may introduce an incentive to prolong the case and to increase costs.

[36] Technology Assisted Review.

Other interviewees said that they had not had any experience of funding structures in which managers are provided with payments on the basis of how much money is invested. However, should such a structure exist, this may cause problems. For example:

> Where those managing the funding are paid a management fee this is an incentive to spend more money on the case but in cases in which I am involved funders are parsimonious with expenditure, and rightly so.

Remuneration structures were said to often drive bad behaviour. It was suggested that approval of funding agreements at the commencement of litigation could address these concerns.

> In terms of the transaction costs of having funders around, although they do add a layer of costs to the overall transaction, that is a necessary, unavoidable or desirable cost. Because what funding does do is open up the field to other firms to run class actions, in a way that they would be scared off if they had to run it themselves on a 'no win no fee' basis and for which they could not otherwise get funding. One of the transaction costs of funding is effectively reflecting the payment that society pays for enabling law firms to get access to the resources to be able to run class actions. That is a really important thing. The transaction costs associated with having a funder involved are costs that pay for access to the resources for particular firms, opens up the market to larger number of competitor firms and the funders introduce a hard-nosed commercial air which would otherwise be lacking.
>
> Funders play an active and meaningful role in scrutinising the solicitors' bills on a monthly basis because the funder has no assurance that it is going to get reimbursed for them, and they do kick up about costs that they think are getting out of hand. The plaintiffs rarely have the wherewithal to do that, but the funder has the skills and interest to keep appropriate pressure on the solicitors to stop them from milking the file.

5.3.8 Settlement distribution processes.

The costs incurred in the implementation and administration of settlements was identified as a problem area.

> Other transaction costs arise out of having the lawyers run the distribution process. That seems to be a rort.

Particular criticism was made of the high costs incurred in the administration of the bushfire settlements in Victoria.

More than one interviewee suggested that the role of legal practitioners in administering settlements should be reconsidered.

> In terms of other transaction costs, on the administration side, … I have not been overly concerned about that, in that to be frank it's somebody else's problem. It's not my client's problem on the defence side. As a matter of policy, I do often raise an eyebrow when I see some of those transaction costs. They have to be reduced and increasingly the best way would be the use of some sort of accounting firm or some other organisation that is not as expensive as lawyers to administer some of the more mechanical ones.

Lawyers were said to charge high administration fees when administering settlements. By way of contrast, it was noted that in the United States, it is common practice for independent trustees to be brought in at the administration stage. It was suggested that this may ameliorate the situation.

5.4 Possible solutions in relation to transaction costs.

5.4.1 Greater judicial control.

It was suggested that more active case management by the courts would have an impact on the level of transaction costs.

> [In a particular case where the costs became excessive and disproportionate to the damages in issue] if the court cared about it, the court could have asked for information and done something about it. There's a lack of power for courts, or a lack of willingness and perhaps a lack of power, for courts to control litigation to ensure that costs remain in proportion to the issues at stake. In terms of judicial control, there needs to be a more express conversation around what's at stake in the litigation from an early stage so that courts can calibrate their case management to keep it all in proportion. Sometimes judges do things as well that create expense. They actively require and do things, particularly allowing defence parties to do things that might drag those costs into an area that becomes out of control. Obviously, plaintiffs are not immune entirely, it has to be a question of keeping track of everyone. But I think issues of proportionality need to be brought into the discussion at an early stage, in terms of the ability of courts to control and keep it in proportion.
>
> The courts should stop the defendants taking points.
>
> Costs could be reduced through greater pressure on defendants to take a more practical route to ensure that the primary issues are dealt with. This may be better for defendants themselves. For example, in *Myer*[37], the defendant obtained a favourable decision. This could probably have been obtained after a year, with the pleadings being clarified and closed and less discovery. This would have cost them less than they paid their lawyers to conduct that case in a recalcitrant way.

It was suggested that the courts need to do more to facilitate early determination of separate issues. For example, large costs can be incurred in matters in which the defendant pleads a limitation period defence which may apply to a section of the class. It was argued that earlier determination of the application of the limitation period to the class as a separate issue would assist the parties to ensure that costs remain in proportion.

5.4.2 Earlier assessment of claim value.

Several interviewees stated that earlier assessment of quantum or claim value would accelerate resolution of cases and decrease costs.

It was suggested that the court should require defendants to cooperate more on the early assessment of claim value.

> In many instances, defendants contend that the case cannot be settled until the claim value can be determined. Following the decision of the NSW Court of Appeal in *Haselhurst,*[38] the class cannot be closed. This has implications on how claim value is assessed, as defendants will refuse to settle before this is determined and the only way that this may be assessed without class closure is through greater cooperation from defendants. This might be achieved by a registrar assisting the court to identify claim value and there will have to be some discovery involved.

5.4.3 Greater feedback to the courts on areas for improvement.

Greater feedback to the court on areas where improvements could be made was suggested.

> The system has to be open to more change. There are definitely improvements to come.
>
> We really need to be proactive with the courts to reflect back to them what as a profession we see as being the efficiencies forced on the system and developed in the course of the system. I love the video conference directions hearings: they are efficient, and they are over and done with. There is an enormous saving of time; it may not be great for junior counsel

[37] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.
[38] *Haselhurst v Toyota Motor Corporation Australia Ltd* [2020] NSWCA 66; (2020) 379 ALR 556.

> or lawyers at law firms that can bill for these things. The Americans have been doing it for years and just can't believe how long we spend on some of these interlocutory applications.

5.4.4 Costs budgets.

Disclosure of costs budgets were also proposed as a means for greater judicial supervision and control of costs.

> In the UK there's a process where people put their budgets to the court [at] … each stage and have to ask for increases. I'm not saying I completely endorse that. It may well be something that is a good thing and that would work but there would be other people who would say it has other problems. One might be that it would constrain plaintiffs, who would be at the mercy of defendants who could throw out their budgets by engaging in unnecessary interlocutory skirmishes. It might be counterproductive in that sense.

Another interviewee was in favour of both parties disclosing cost budgets at the commencement of matters or at various stages in matters:

> I think that might lead to an equality of arms. There was a recent case where no one appreciated the amount that would be spent on discovery. Two million dollars was spent on discovery. You need to be able to address those sorts of issues early on, such as through a costs budget, and any significant departure from the costs budget has got to be drawn to the attention of the other party and the court. I'm not in favour of you being limited to those costs budgets, but I think that would provide a better mechanism for controlling costs in what is, too often, too expensive litigation.

One interviewee expressed reservations about costs budgets as a possible solution: 'It is just wild guesses, frankly'. It was suggested that more clearly defined pleadings by plaintiffs and less onerous discovery would reduce costs.

5.4.5 Greater use of security for costs.

> Another way that we are trying to put some pressure on the plaintiffs in terms of costs is through security for costs, including through requiring funds rather them just an ATE policy. Security for costs applications are a way for the court to be informed of the likely costs in proceedings, as detailed evidence is provided in support of these applications.

However, it was suggested that this may lead to higher costs in other areas:

> One of the things that makes funding expensive is the risk of adverse costs and providing security for adverse costs.

5.4.6 Independent review and assessment of costs.

Independent review and assessment of costs was raised by several interviewees.

> The other thing that has become more prevalent in the last few years, is the *GetSwift* type model of the court requiring or the plaintiff offering regular reviews of their costs by an independent assessor. I don't subscribe to the view that [one Judge] spouted from time to time that the independent costs assessors appointed under the previous model had become a cottage industry and were not sufficiently rigorous in their work. The costs assessors whom I dealt with in my actions were [x, y and z] and one or two others. They wrote very rigorous, very good quality reports, which were informative, the costs of the reports were proportionate to the scale of the exercise, and invariably resulted in some significant reductions in costs and you ended up with a number that felt like it was about right.

While the Federal Court has shown an interest in recent times in engaging more with its supervisory jurisdiction with respect to legal costs, it was noted that this is largely dependent on costs consultants that are engaged by the firm seeking to have its costs approved. It was suggested that

this does not lead to meaningful scrutiny of whether the costs are reasonably incurred or fair, in an assessment carried out for the benefit of group members. In at least one case to which the interviewee referred, the assessment merely led to a negligible amount being deducted from what was a substantial bill, and the judge was incredibly surprised about that.

> I don't think the court is properly engaging with the question of the costs that it is approving as reasonably incurred. I'm not sure that process is being engaged with as much scrutiny as it might be in the interests of group members.

For one plaintiff lawyer interviewed, independent review was successful in moderating costs:

> Ultimately on the plaintiff side, the work you do and how you structure a case is always done with one eye towards what would be acceptable to a cost consultant or a cost referee, so you don't see on the plaintiff side partners and senior associates doing a first-pass discovery review, because that discipline exists. Maybe the answer is that the discipline needs to exist on both side of the ledger.

5.4.7 Depositions and the ability to take evidence earlier.

> The use of depositions and the ability to take that sort of evidence or engage in that sort of procedure at an earlier stage more freely would certainly front-end load understanding of the issues as well as facilitate pressure for settlement.

5.4.8 Earlier judicial pressure for settlement.

> Courts have generally relaxed about pushing parties to an early settlement. That is also something that could usefully have a renewed focus, where there is a more express discussion about settlement at an early stage and not just taking answers of parties at face value, if the answers are that settlement is not suitable at that early stage.

5.4.9 Some 'indication' from the judge as to how the matter is likely to be resolved.

One interviewee suggested that in an appropriate case if the judge gives some indication of how things may result (in a manner that is unlikely to elicit an application for removal on the grounds of reasonable apprehension of bias or pre-judgement) this is likely to increase pressure for settlement. Reference was made to the approach adopted by Murphy J in the *Sirtex*[39] class action.

5.4.10 Better education and collaboration.

There was said to be a role for some education within law firms and maybe collaboration between barristers and solicitors as to efficiencies that could be achieved.

6. Perspectives on the *time taken* to resolve class actions.

Although many interviewees expressed concerns about the time taken to resolve class actions, a number were of the view that delay was not problematic.

6.1 Views that delay is not a major problem.

One participant stated that they did not necessarily agree that there was a problem with systemic delay and that delay can often be attributed to the complexity of the processes involved.

Others expressed similar sentiments:

> Delays in class actions are comparable to other large complex litigation, which is the comparator which should be used. However, there are delays relating to multiplicity at the outset of cases which can cause substantial delay.
>
> The representative characteristics of class actions are in my experience rarely the cause of significant delay. In my experience delay is caused by the money at stake and the complexity

[39] *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374.

> of the facts, and because of the parties' determination to work up the cases as thoroughly as you would expect given the money involved. They need substantial blocks of time for trials, and courts tend to list such … long matters 12-18 months in advance. There's always slippage in the timetable because lay witness statements took longer than expected or discovery review took longer than you expected or the experts took longer than you expected. That's just a reflection of people needing to do the work carefully due to the quantum of money involved. I don't blame class actions for taking a long time. I blame complex litigation for taking a long time.
>
> Class actions take a bit longer than other cases but that's for reasons intrinsic to the class actions process. I don't see any particular problems. Having to give notices, having separate applications to deal with, agreeing or the Court determining what the common questions are, they end up being highly complex pieces of private commercial litigation. They always take time.

As one participant noted, delays may be inevitable where discovery is voluminous and necessary.

In one defendant lawyer's view:

> I sometimes think these cases benefit from a little bit of time. Two and a half years to get to trial I think is probably okay. It allows for the mature development of the case and reflection. They are complex matters. If class actions proceeded more expeditiously, this would result in injustice to defendants, who have a much bigger discovery burden as they have to review all of their material as well as that of the other party, and the plaintiff is able to decide when to commence the action and carry out preparatory work before they do so.

Another commented that where cases have run for a long time, this can be attributed to the complexity of the procedure and delays inherent in the legal system.

> [The imposition of set timetables] would also lead to inefficiency and over servicing, as more resources and people are required to get through the work, and those new people often have to be read into a matter. In these really big, complex cases, the passage of time does create more mature decisions and doesn't see as much injustice as would occur if the defendant was rushed to judgment and was preparing their case under a stop watch. That also has a cost implication. The cases which I have found to be the most expensive is where it feels like we have been rushed into a very difficult timetable. That all sounds very good in theory, we're moving the case along, but the cost of a speedy timetable is that you have to throw more resources at it. You get inefficiency that can be overcome with a little bit more time. If you have to rush it and do a lot in a short period of time, you bring in a lot of extra resources, who often have to read in with the attendant inefficiencies, and you just get over servicing.
>
> Justice delayed is justice denied, I strongly believe that, but I don't think you need to rush these cases into court and if it's between one and a half years and two and a half years for a case like the VW one, I would say that's probably okay. If it's five years, it's too long.

One interviewee did not accept that there was a significant problem relating to delay. However, it was noted that the uncertainty as to how to resolve multiple competing class actions was causing interlocutory delays which were undesirable.

Delay was viewed by a number of participants as a minimal problem, which is usually well-managed by the courts:

> There are no particular problems with the time taken to resolve class actions. Most are allocated to judges who are experienced and progress the class action efficiently and

> expeditiously. There are a few instances of delays attributable to the parties or the court, but these are the exception rather than the rule.

As one interviewee noted, the courts increasingly have case managed matters in a way that has ensured that they progress to a resolution very quickly, whether that is making sure that there is a mediation early on and/or setting a trial within a couple of years. It was further observed that:

> If you step back and look at the fact that you are litigating claims for thousands of people, the overall time taken is not generally excessive but that does depend on the case and the tactics or approach of defendants or respondents in litigating them. There are some examples where it does take too long. When things go to plan, the Federal Court times are pretty good. I think you've got to be realistic. They do take a lot of time objectively, but there is a lot of work involved and most practitioners who are doing them have more on [their] plate than just that case. I know from experience that it is a lot of work to get these things to trial.

One participant made reference to the problem of delay from the defendant's perspective:

> Delay is a problem, but not always. In about 30% of cases it is a significant problem because the size and shape of the client is such that having the class action over their head is debilitating to them and their ability to do business etc, and there is not a lot of optionality for to them and very early resolution is hard because of the bar to convince the court of fairness and reasonableness, and that is assuming you can win the hearts and minds of your opponent. Commercial deals aren't really possible, so delay is a problem in about a third of cases for that reason. In other cases, we want to have an appropriate opportunity to prepare evidence and it takes the defendant a long time to do that because we are advancing ten or twelve witness statements that are 100-150 pages in length and five experts that are 200 pages in length. We need the time and sometimes it is the defendant that is actually seeking an extension in the timetable. I don't want to overstate the delay piece from us. I think the delay that I touched upon which is problematic is the regularisation of competing class actions. In at least ten or eleven current cases there is a multiplicity issue that has introduced at least months of delay, and sometimes much more. In *AMP*,[40] for example, it is still not known what the vehicle will be that will be ultimately prosecuting claims and that case was commenced in 2018. It won't be known until the High Court gives its judgment. It is theoretically possible that a decision could come down this year, but I doubt it.

6.2 Views that there are problems with delays.

6.2.1 Delays generally.

For some interviewees, the existence of a problem is clear. As one noted:

> Class actions take far too long to resolve.

It was suggested that class members might be right to question whether they would have resolved their claims more expeditiously if they had not taken part in the class action.

For others, the impact of delays varies, depending on the case.

> In some of those product liability cases, it's just unacceptable the delays that have occurred there.

In relation to securities class actions, it was suggested that 'the timely resolution is more about reducing cost and its impact on the pool than about the anxiety of the group about their issues being resolved.'

[40] *Wigmans v AMP* (High Court of Australia, S67/2020, notice of appeal dated 1 May 2020).

> Institutional investors share the bulk of the loss and have no personality, and most retail investors have diverse portfolios, and are not overly impacted by the losses related to their shares in one company. The bulk of retail investors are upper middle class or higher - it annoys them but it's not the end of the day because very few people invest in one stock which goes horribly wrong. This is different in product liability and major torts actions, where class members have been through a life-changing event and a timely resolution is far more important. However, in investment actions, class members tend to be older and to have invested large sums from their superannuation. In those circumstances, timely resolution feels more important. It is very case specific, but it's more about cost than the time in the shareholder space, and inevitably it will waste a bit of time. I'm not talking about plaintiff lawyers being lazy, I'm talking about defendants filing applications, and then we have to respond to them. The faster the case resolves, it is inevitably much cheaper.

One interviewee considered that delays are lessening. The Commercial list in the Supreme Court of NSW was said to be working expeditiously. However, it was noted that this route is less clear after *Brewster*.

Another participant shared the belief that delays to the resolution of class actions had lessened over time.

For another interviewee:

> Delays are a problem but it's improving. I think that's often that's a judge by judge matter. For all of the issues you get with [Justice x] he does try to keep things moving although he does get distracted at times. I think there should be more judges allocated to the Federal Court to deal with the litigation matters. You've got delays in delivering of judgments by [Justice y] and [Justice z] but that's an issue for the Chief Justice to deal with. In the Federal Court there's no judicial commission, and no judicial complaints mechanism – I think a judicial complaints body would be useful to deal with delays.
>
> While it would be preferable if matters were resolved more cheaply and quicker, and less attention of the court paid to the availability of counsel, this is not unique to class actions. Delay affects major commercial litigation in a similar way. The use of case management processes to speed up proceedings is beneficial. However, the use of tight deadlines may have negative consequences.

A number of interviewees made mention of particular factors that had an impact on delay, including the conduct of the parties.

6.2.2 Delay and the conduct of defendants

Several interviewees suggested that delays can be largely attributed to the ways in which defendants defend actions. As they noted, if they fight about everything, this will lead to delay. However, in the view of a number of interviewees this is not something which can really be controlled.

Frustration was expressed at the tactics of defendants to engage in 'a long and torturous process.'

> While it is acknowledged that listed companies cannot spend shareholder funds on settlements without due diligence to assure the board that it is in the best interests of shareholders to do so, there are many instances of serious misconduct alleged in class

actions in which defendants fight every point, and take a long time to agree to negotiate, in circumstances where it would be expected that negotiation would occur at a much earlier stage.

Defendants often deny every point, as is their right, but which is not in keeping with the way the justice system is supposed to operate. Often there is a war of attrition; costs are run up on different interlocutory applications; liability is strenuously denied even in product liability cases where the product in question has been found to be dangerous but where those bringing the claim are put to proof of that.

Matters which had been drawn out over several years, particularly claims relating to product liability, might result from views that defendants are more likely to be successful at appeal stages than at first instance, which were reinforced by the success of this approach in the *Vioxx* class action.

My understanding is there is a strategy, particularly in product liability claims, there is a view that you can't win at first instance so go to trial and hope you can get up on appeal.

It was suggested that, in a number of protracted cases where liability is vigorously denied, there is 'a common feature in terms of lawyers acting on the defence side.'

Satellite litigation was one issue addressed:

> We are still seeing satellite litigation by defendants to spoil litigation, but that's less than it used to be I think, and the satellite litigation that does arise, in the main, deals with more fundamental issues. So, you've got delays caused by defendants, and I don't think you can stop defendants doing that. The delays otherwise are really due to a lack of resources or discipline in the courts.

6.2.3 Delay and discovery.

It was suggested that defendants occasionally use discovery as a tactic for delay by dumping large numbers of documents.

A number of interviewees suggested that there is a need for greater efficiency in discovery. However, many noted some delay may be unavoidable. While discovery procedures in the Commercial list were said to be efficient, it was suggested that they cannot be employed in Federal Court class actions because of the information asymmetry often involved in class actions:

> It's an entirely different situation in class actions where the plaintiff doesn't know what's going on. I don't think there's an easy solution to short circuiting the ability of plaintiffs to get documents from the defendants that are relevant, apart from more rigorous interference by judges. There were particular issues in [case x] and [case y], where discovery took forever and ended up costing a fortune. In some cases, that's the fault of the plaintiff firms, because that's not normally where the fault lies, but in other cases, often times it is the plaintiff who needs discovery to build their case. In some cases, such as the pelvic mesh case, I wonder how one limits discovery. It's a difficult question when you aren't in possession of a lot of the information that you need for your case.

6.2.4 Delay and interlocutory disputes.

Interlocutory skirmishes were said to be a significant cause of delay:

> We do spend a lot of time dealing with procedural issues that do tend to delay things.
>
> When you cast your mind back at every point in the Part IVA regime there's always been one interlocutory issue of the moment which has caused delay – whether that's declassing and s 33N applications, the possibility of CFOs or whether or not these things are managed investment schemes. There's always been something. At the moment, it just happens to be multiplicity, and I'm sure that as soon as that settles down, there'll be another interlocutory issue that everybody needs to grapple with.
>
> These cases have always taken a long time. The cycle of what happens in the cases seems to change over time. 10-15 years ago, every case had a s 33N application but that's now very rare. But conversely, you didn't see many pleadings fights in the older days but they're in most cases now. Although the subject matter of the interlocutory dispute changes, the time that they add to the case doesn't really change.

It was suggested that delays attributable to long-winded pleading battles and delayed judgments on matters such as strike-out applications could be lessened.

> There are now definitely problems with delays. I have had interlocutory disputes in some of my cases that should not have been there, and we would have been well and truly in the next stage or two or three stages of proceedings henceforth, but we are not. All of this unrest, as it were, is definitely having a real practical impact in terms of delay, and consequently cost. Without a doubt.

6.2.5 Delay and the conduct of plaintiff law firms.

According to one interviewee, in a number of cases more causes of action have been pursued than were necessary; broad discovery was sought in cases that could have been resolved on the basis of strict liability causes of action and some damages claims have been inflated. This was said to have served to complicate some cases unnecessarily, increase costs and delays and erode the net amounts ultimately received by class members at the end of the day.

For another interviewee, inefficiencies 'arise where plaintiffs plead every point, suggesting that they do not know their case'.

6.2.6 Referral of matters to referees.

One interviewee was of the opinion that the outsourcing of court functions to referees is 'counterproductive and inefficient', especially where the issues farmed out are central to the matter.

> There are a lot of procedures which are incredibly wasteful, both in terms of expense and delay. One example is the referral to referees facilitated by independent counsel.

While this ostensibly sounds like it might generate efficiencies, it is the experience of one interviewee that it leads to the creation of avoidable additional costs and delays.

6.2.7 Delays in judgments.

Criticism was made of the delays in obtaining judgments, both interlocutory and final.

> If you basically have a system where every interlocutory judgment that's going to come down is going to take nine months to two years in order to resolve, then if you have a defendant that has an interest in just kicking these things down the road then they'll just do that. Again, I do think that there's a general resourcing issue in terms of court resources.

> I'm aware of some cases – not class actions – where the judges take forever to write the judgement and can take three years – the one I'm thinking of on a final judgment – even some interlocutory judgments can slow the case down. I don't want to be critical of judges because there can be a problem with expecting everyone to hand down ex tempore judgments, which can have the effect that the judge doesn't get to think about the issues sufficiently, but if you have class action cases that are taking six to eight years to resolve, then that to me is a problem.
>
> I think the single biggest concern I have is in relation to the delay in getting a judgment. This extends not just to final judgments but I'm talking about interlocutory judgments. That is the systemic weakness. Important procedural things that are holding stuff up. They are taking too long to be the subject of written judgments. Delays of six months are not unusual. I had a case, not a class action, where I had to wait two and a half years for the final judgment, and that is an extreme example. But the delays in interlocutory are too long.
>
> Judgment speed is a factor here. It doesn't keep me up at night in terms of – my clients are not sitting around saying "I can't believe we don't have a judgment yet", but in some cases there have been really egregious examples. That is problematic. A lot of judgments are occurring at an interlocutory stage and are almost ex tempore, they are case management things and they just happen, but the big decisions take time.

The pelvic mesh case was cited as an example of a case where the time taken to date is too long.

However, as one commentator observed:

> You've got to break down what is causing that delay – how much of it is reserved judgments impacting on the timetable or how much is inappropriate defensive delaying tactics… You also have to say that increasingly, some of these class actions are becoming larger and larger and more and more complex. Cases that involve global record access and multi-jurisdictional issues equally do cause some concern.

Moreover, it was suggested that:

> In the Federal Court, delays *in the delivery of judgments* at the moment can only be dealt with by the Chief Justice or possibly as a result of the Senate Estimates Committee enquiring as to how long judgments have been outstanding. If the Chief Justice has a problem with a judge who is behind in delivering judgments the person should be taken away from doing other cases until the judgments are brought up to date. This does not appear to happen but it should. We could adopt the Californian model where they stop being paid, but that might be unconstitutional, actually. It's a problem all over the place. Part of the problem also is that judges think they want to write a book about every case, 500 pages of legal analysis which will never get read again by anybody. I don't know what you do about that. That's the Chief Justice's problem. There should be a proper method. In some jurisdictions some senior judges have been quite strict. They could effectively force people to write judgments, but I just think some judges can't do it no matter what you do to them.

6.2.8 Delays in the Federal Court.

A number of interviews made reference to delays in particular jurisdictions.

> In NSW in the Federal Court we're lucky to get a judgment under two years.

> … judicial overload, the number of cases, and also, the fact that the Federal Court doesn't have a separate appellate division means that Federal Court judges spend a lot of time sitting as members of the Full Court, which erodes their ability to get on with other cases. There are, however, advantages to not having a specialist separate appellate level Federal Court. There's a different form of judicial arbitrage where people think they're going to get a different answer based upon the composition of the Full Court on an interlocutory point and I'm sure that's being taken into account by practitioners.

Particular Federal Court judges were subject for criticism in relation to the delays in class actions. There are instances in which individual judges were said to have failed to provide judgments, years after they have said that they will do so.

Other Federal Court judges were praised for the efficiency of their case management and control over defendant delay tactics.

6.3 Possible solutions to the problem of delay.

A number of interviewees suggested various solutions to the problem of delay.

One was of the view that the expeditious resolution of class actions could be brought about by earlier mediation:

> There should be more emphasis on early mediations in class actions. The courts should be encouraging people to mediate sooner. I do understand the predicament of "how do we know what is the right amount to settle for until we have got all the evidence in?" I understand that, but I am not sure that is always the case or that it always makes a great deal of difference at the end of the case. Perhaps we could try to settle them earlier. One of the causes for some of the delay is that we are now grouping together a lot of somewhat different claims. We have claimants with slightly different problems. I understand that there are economics of scale in favour of doing that, but it does make the litigation take longer. From the respondent's point of view, they are faced with several different claims which they then need to respond to. It may be quicker if the claims were more generic or if we left some of the subsidiary issues out of the initial hearing.
>
> Mediation earlier would be much, much better. In actual fact a lot of class actions, I can speak from being a defence lawyer, are low-hanging fruit, for breaches we all do know about. The courts could bring forward, after the defence has been filed, a mediation with maybe a limited order for the exchange of evidence.

It was also suggested that standardised processes could lessen delays:

> We are at a stage now where we have been doing this for long enough that there should be, in effect, a standard process; opt-out notices are going to go out at a particular point, and all opt-out notices are going to look like this. Obviously, you would need to insert different details in some parts of the form, but I am not sure why we have to reinvent the wheel every time there is an opt-out notice or settlement notice and so on. There should be a standard form in respect of these kind of things. That might speed up the process a little bit. As you know, they are pretty complicated and because so much money is at stake you can understand that people spend a lot of money on experts and discovery because they think it's worth it. I am not myself sure how you fix it, other than as I say, try to have some standardised processes.

A number of participants noted that resolving the problems with multiplicity would have a great impact on delays:

> They do need to fix this constant combatting that we now have between different class actions that seems to drag on for months and months.

It was suggested that in some circumstances, more proactive judicial supervision and strict timetables could improve delays:

> Undue delays can be avoided by more proactive judicial supervision. In the fast track which previously operated in the Federal Court for a while, you've got a hearing within four months of issue. There were no interlocutory fights, no one had time for interlocutory fights, you've got to get on with the proper preparation and reserve for fighting those things which were really important.
>
> There is merit in fixing a trial date early, not a year after the case has been going, that tends to focus the mind of both parties and reduce costs. But that works sometimes and not others.

7 Perspectives on whether there are *claims* being brought that *lack merit.*

7.1 Views that lack of merit is not a problem

The majority of those interviewed rejected the contention that there is a problem with some class actions being brought that do not have sufficient merit.

One interviewee described it as 'rubbish'. They could not think of any example of a class action being brought speculatively to obtain a settlement.

Another commented:

> It has not been my experience that claims are being brought that do not have merit, if by that you mean people are commencing cases that are hopeless or next to hopeless. I wouldn't agree with that as a general proposition. I'm sure there are some. In most of the ones that I come across, there is certainly an arguable case there.

One defence lawyer commented:

> 'The bringing of actions that do not have merit: it is not as common as the *Australian Financial Review* would like to make out. From my own experience and knowledge of … class actions, there would be none in that that I would say have been frivolously brought.'

According to one interviewee, the suggestion that class actions are brought that don't have merit 'are all talking points from America'. It was contended that 'green mail' settlements do not occur here; 'It's crazy talk. It doesn't happen.'

> Despite what you read in the newspapers, I don't subscribe to the theory that we have high number of claims in this country and the ones we do have are poorly chosen.

Yet another interviewee rejected the contention that there is a problem of class actions which are brought with insufficient merit. The interviewee had not observed such an action. It was argued that the due diligence undertaken by funders and law firms (who are often taking on part of the risk on a 'no win no fee' basis) guards against this:

> 'I know that the greenmail-type argument has been bandied around for well over a decade or more, and I have to say, I have never seen one.'

The contention that there is a problem with class actions being brought that lack sufficient merit was described by another interviewee as 'nonsense':

> I don't see any real empirical evidence for that. There's probably always some, but the class actions that end up getting air time in the courts, they might not end up being successful but they are properly framed claims, reflecting grievances that people as a rule genuinely feel. Even if it's for a small consumer claim, not everyone has the resources of well-heeled

lawyers and amounts of hundreds of dollars can be very distressing for a lot of people. This silly notion that settlements in class actions reflect a green mail effect - I don't think there's any support in logic or experience for that at all.

Other interviewees commented:

> In my experience class actions are only brought when the people bringing them have a high level of conviction about the merits of the claim. When I say the people who are bringing them, I mean the individual main applicant and the lawyers who assist them and the funder if there is a funder. The funders are out to make a buck. One thing they can't tolerate is losing class actions, except exceptionally. They tend only to bring cases that are worth powder and shot.
>
> The way litigation funding works is that there are very few hopeless cases. I advise litigation funders. They want to have a 60% chance of winning before they put up funding so it's very rare to see a hopeless case. The only ones I don't like are where they bring claims only to get the insurance money, which means in those cases nothing goes to a class. There probably are some hopeless cases but I don't regard that as a problem because I've never seen any bar one.
>
> There is not a problem with unmeritorious cases. Ultimately it is impossible to bring most kinds of class action without exposing someone to adverse costs and that really does tend to focus people's minds. Any case that touches a funder, the interest of a funder in not throwing away costs it's never going to recover and things it will never get a return for coincides very neatly with a desire that courts and defendants not be faced with meritless claims.
>
> The contention that claims are brought without merit is rubbish. Given the risks that are involved with bringing these things and the adverse costs, we just don't have the green mailing that you see in America here and with security and adverse costs, the reality is no one brings knowingly speculative claims, or claims that are relatively mixed. The majority of them follow either regulatory findings of product failure or advice failure, so I don't think there's any merit at all to the argument that claims without merit are brought.
>
> Some claims are brought that lack merit but for the most part it doesn't happen. Funders are scrupulous that they have a good chance of getting a return. The hoops you have to jump through to get funding and get things off the ground are pretty high, so I don't think that is a problem.
>
> In most funded matters, the damages need to far exceed the expected litigation costs. In most cases, to get funded broadly speaking the damages need to be ten times the litigation budget. Probably it is more likely that plaintiff lawyers are being a bit too gun-shy at the moment and need to increase their risk appetite.
>
> A dubious case can't be brought; funders do not fund matters without merit. Indeed, it is hard enough to get funding for a good case.

In respect of most class actions with lower settlement outcomes:

> It's usually because the company has gone into administration since the class action was started and it turns out not to have much insurance. Because of the state of the law where it's extremely hard for a potential plaintiff to ascertain what the defendant's insurance position is– that's an aspect of reform that should be looked at more than changing class actions. There's no point in making people run a class action against a company where you would be entitled to expect the company to have fifteen million dollars in insurance and it is a fifteen million dollar claim, but it turns out the company has five million dollars in insurance, including defence costs and there's $400,000 left by the time you get to

> mediation. That's the real source of wastage of avoidable resources. Where you've got a company without a real recoverability risk, in my experience, the actions generally settle for something that broadly reflects a reasonable assessment of the prospects of the case and value of the case once everyone has had a chance to review the evidence and gather what data they can in respect of the group-wide claim value. Sometimes something happens in the course of the case that means that the value is less than you would have liked but it's very hard to get better information any earlier than the completion of discovery or exchange of expert reports.

Even in litigation where issues have arisen around the ethical conduct of lawyers, such as the *Banksia* litigation, this was not relevant to assessments of merit. It was suggested that the settlement in *Banksia* appears to suggest that the case was not without merit.

It was noted that matters which have been discontinued were often started in circumstances where the initial belief in the facts of the case and prospects were found to be incorrect through discovery. 'Lawyers do not commence class actions believing that they are without merit.'

Where cases result in 'walk aways' or losses, this was said to be often explained by circumstances which result in a revised assessment of the merits of actions, but which do not signify that the case was badly started in the first place.

A number of interviewees noted that the strength of a class action may change through the course of the litigation. An example given was where an appeal court delivers an unfavourable judgment in relation to an action by the regulator concerning the same conduct. In these circumstances, the settlement in the class action will be compromised. However, this does not signify that the class action was without merit when it started.

One interviewee stated that they had not been involved in any action which was unmeritorious in the sense that a solicitor could not sign off on it on a proper basis, or that there are no prospects for success. However, it was noted that assessments of the merit of claims involve a normative evaluation.

Another interviewee remarked:

> There is another case that I have at the moment where I have advised a funder about the area in which the claim was brought. I thought it was very challenging at best. Someone, maybe not the same person, has brought it anyway. That suggests to me that someone got different advice from someone else who thought differently. It doesn't strike me as being fanciful, just the views are different. In other words, I think the merits issue in relation to class actions is a non-question.

Another participant stated that where there may be worse outcomes in terms of the returns to group members, this often results from funders and law firms having different assessment criteria regarding quantum. Some firms and funders being willing to risk acting in matters which are of lower value overall. It was argued that this does not mean that those actions are without merit.

The interviewee noted that there may be a small number of actions that should not have been started because those involved in running them have not worked out the costs involved and the impact on class members, particularly when the litigation is funded.

It was suggested that weaker class action claims are more likely to settle as there is greater incentive to settle. However, this does not mean that claims are unmeritorious:

> Some of them are weak, some of them are strong, there are some in between.

Class actions which have insufficient merit were said to be the exception rather than the rule.

> The reality is that there are very few shareholder claims in this country and the ones that are chosen are, generally speaking, well-considered.

> I think very occasionally that there might be class actions that lack merit. But I can think of hardly any that fall in the category of vexatious or green mail, or anything like that. I don't think we have a culture, particularly because of adverse costs. I don't think we have a system that facilitates that. Some are stronger than others. The Australian legal system, and the adverse costs risk in particular, operates to prevent the bringing of vexatious or unmeritorious claims. If this occurs, it is only very occasionally.
>
> I don't think that the evidence supports the arguments that claims are brought that do not have sufficient merit. There are some examples of some cases. There are a couple of cases where they have ended quite soon on, presumably as a result of threatened or actual strike out or summary dismissal proceedings. To the extent there have been cases, and I think it is a relatively rare occurrence, that don't have sufficient merit, you can be sure that the respondent lawyers and the respondent, acting highly rationally and appropriately, will make use of the court's procedures to make sure they are disposed of quickly. There are the costs of an action like that, whether funded by a law firm or a funder, there is investment risk involved and that operates to prevent unmeritorious claims being brought. That, certainly in this country, is a claim made without the support of actual data.

One unsuccessful securities class action was described by an interviewee as 'a dumb case, but it certainly was not commenced with any malice', rather it was commenced by a solicitor who was relatively inexperienced and was not properly supervised by their law firm.

In response to the assertion that fewer claims with lesser merit would be pursued if preliminary discovery was carried out, it was suggested that while preliminary discovery is less difficult than it has been previously, it is rarely successful. It was suggested that it is usually better for the action to be started without preliminary discovery, especially where there are limitation periods involved.

A number of interviewees noted that the contention about the merits of claims is often made in relation to securities class actions:

> I know in the investor class action space in particular, a lot of the respondents are expressing concerns that claims are brought that will destroy them or with an extortion racket or something. There are undeniably policy irrationalities about investor class actions that no doubt annoy companies that end up on the wrong end of them but I have yet to see a frivolous class action, including a frivolous investor class action. I have seen one, brought by not a top-tier firm, that I thought was an adventurous claim. But they got a very, very handsome settlement, so it can't have been as frivolous as I thought.

It was further noted that:

> 'if there were unmeritorious claims being run, the insurers that sit behind most of the big listed companies [which are] the subject of this litigation, would rub their hands together and run to trial and try to get a good precedent.'

One interviewee commented that the *Myer*[41] case shows that defendants are prepared to take actions to trial if they believe that there is a good chance that they will secure a favourable outcome. The cost of the litigation to get a good precedent would be small in comparison to the amounts paid regularly in settlements.

One practitioner who acts for defendants commented:

> On the defence side there are very few claims that I would be able to say I could successfully dismiss at an early stage of the proceedings. In terms of ultimate merits of the claim, normally, I do not see overwhelming evidence of bad actors. I see a share price reaction, for example, in a shareholder claim, with a viable explanation as to why an announcement was

[41] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.

not made earlier. I would call that a claim that I am ultimately going to prevail on. Does it ultimately have merit? There is a cause of action which is pleadable and I am not suggesting anyone who filed the claim would have done so if they didn't think it had merit but it is ultimately not a case they would prevail on. Having said that, it is a moot point in one sense because traditionally the settlement rates have been high. I do not subscribe to the view that that is because those that are settling them on the defence side think the claim will fail, although there is a risk of that that is always built in. But prevailing on your defence requires things to happen that most companies have not traditionally had the appetite for (though it is changing). Tying up six to ten senior board members in months or years of preparation of witness material and submitting themselves to reputational risk in the witness box, most clients won't do if they can resolve the exposure with a large component of insurance money. But that message has been interpreted as the large rate of settlements means that these are all good claims. That overstates the position. Having said that, I have not seen a rash of claims being commenced in a race to the courthouse which are purely speculative and which we can dismiss. The truth is in the middle. I think now what is happening in the insurance market and the attitudes generally with the respondents, … more of these claims will proceed through to trial. There is one pending judgment now[42] and a couple that will go that distance. I think we will see defences prevail. The actual standard of some of these causes of action in the corporate governance space in Australia is low, for example in a shareholder claim where you have a reasonable basis for your forecast, that is a complete defence. It is not as if you have to show best practice or that someone else would have done it the same. I didn't see that these claims resolve favourably for defendants in many but not all cases, but I am not seeing a rash of meritless (in the sense of should be summarily dismissed) claims, no.

7.2 Views that lack of merit is a problem.

A number of interviewees made refence to cases which in their opinion lacked sufficient merit. As one noted:

> High settlement rates to do not necessarily mean that claims are meritorious.
>
> The reality is that most cases settle, almost all cases settle, and that is really the theory that some lawyers and funders are basing their strategy on. The respondent gives up and writes a cheque.

One interviewee expressed a concern that some shareholder class actions lack sufficient merit. The arguments that the company's financial guide has not been met and that reason must have been known earlier and should have been disclosed, are 'kind of specious'. However, it was conceded that the 'vast majority' of class actions have real merit.

There were references to instances of class actions being run which lack sufficient merit and which eventually settle for a nuisance sum, with the approval of the court. The case against *Telstra*[43] was cited as an example.

> There are cases that are brought that don't have merit. We all accept that, cases that settle for zero or a nuisance number, which means it never should have been brought. But what's bothering me is that increasingly the pressure is going to be on smaller firms to file cases prematurely before they have done mature reflection on whether they do have a case and they can run it properly. You see the cases where they get amended five or six times because they didn't really understand the case and it's taken time to get to the right point. Cases where you don't understand the merits fully but you file the claim, and I think the

[42] *Crowley v Worley Parsons* (Federal Court of Australia, NSD1292/2015, commenced 27 October 2015).
[43] *Taylor v Telstra Corporation Ltd* [2007] FCA 2008.

certification standard is taken very lightly, it's a pretty low benchmark, but I think that's the biggest problem I see.

According to one participant, the question of whether or not unmeritorious claims are brought by plaintiff firms depends on which firms you are dealing with:

> There was certainly one plaintiff firm I was very concerned about their ethical approach to their claim. I would say, if I break it down into different areas – conduct of litigation – I get concerned about firms where they become complete zealots and they can see a justice goal and will do anything to get to that justice goal. I have had a couple of cases like that. The other aspect that I am more concerned about is around [the] time of settlement: whose interests are being put forward and first, what's being done to placate the funder, so that they get their next class action so that the funder's happy and will want to work with them again because they get a good result for the funder, and the extent to which the class members are - not quite sold out - but not getting the best outcomes. That bothers me enormously. I think I see too much of that. You have a feeling that it is occurring but of course you don't know all the facts on this side of the case. They are in conversations with the funders but to the extent that you are in the settlement discussion, you can feel it. I am concerned about the extent to which plaintiff lawyers may be giving due attention and weight and commitment to acting in the client's interests as opposed to their own fiscal interest and the funder's interest.
>
> In one of the cases the defendant ended up walking away without paying anything at all. We made it clear from the outset that that was our view on prospects. That was a matter that was not properly tested by the plaintiffs at the beginning. Those matters were all run by [an identified law firm]. They tend to get very overexcited when they see a [particular event], especially if there's a [large company] that they might be able to point the finger at, because there is an insurer sitting behind them. We dug our heels in on that one for that reason, for them to understand that there isn't always a pot of gold at the end of the tunnel.

It was suggested that this may occur more often under a contingency fee model:

> In the contingency fee world, drawing on the overseas experience, I think we're going to see a lot more of those claims brought. The goal is to capture the field. You may get knocked out but you're in a lot of a better place if you are the first person to file that claim, even if it's poorly considered. There is a strategic value in doing that (which we can talk about and say it doesn't really exist but I think it does). That's what bothers me most. So yes, I see some claims without merit, of course there's some claims. But then in any litigation pool you're going to see some examples where people make bad calls and have brought dud claims, but it's that flavour where people might have a claim but they're bringing it before they've got the structure right and for reasons that are not necessarily in the best interest of the class members but are in the best interests of those funding or those who benefit from the contingency fees.

For a few of those interviewed, the economic viability of the claim or lack of a meaningful compensation outcome was a more pressing concern in terms of the merits of claims:

> The real question that I would have is whether some of them really are economic for the actual parties. That degree of merit is something that needs to be looked at. I don't think people are commencing cases they shouldn't be commencing. But we have created a bit of a rod for our own backs in the misleading and deceptive conduct area. As you will know, if we go back in time, in effect, before we had the misleading and deceptive conduct type actions, you couldn't bring a negligence claim for pure economic loss unless you were in some special relationship with the defendant, and similarly in the product liability context you could not do that, for example, unless you had a somewhat direct relationship with the

person you were suing. What has happened with misleading or deceptive conduct is that, in effect, the entire world can sue you. This has inevitably expanded the class of persons who are going to sue, and simultaneously with that, I think we have relaxed in that context our approach to causation of loss. The government complains about actions against executives and shareholder class actions and what have you. I think the real source of the problem is the rather lax test of causation that applies in that context and the rather broad class of persons who we have said are allowed to rely on those statutory provisions which go well beyond common law rights. The inevitable consequences of that at the moment are that a lot of insurers are going out of the market for D&O, and it is very expensive for companies to get cover for the security class actions and that is only going to get worse as these problems continue. I really wonder about the societal benefits of letting people sue in this shareholder context. I am really not sure whether those class actions are, in a societal sense, meritorious.

There are not a huge number of class actions which are being run without merit. However, there is an issue in some class actions of a lack of meaningful interest in the compensation outcome for claimants. There should be a discussion of whether a greater threshold should be required to demonstrate that there are class members who want to get behind the case, before it is commenced and takes up the resources of the court and the defendant in its administration.

The current *Robodebt*[44] class action was described as 'lawyer driven litigation' and 'a bit dodgy' given that the Government is going to refund the amounts involved.

8 Perspectives on whether there are *defences* relied upon that *lack merit.*

As noted at the beginning, interviewees were asked not only about claims that may be brought without merit, but also whether the defence of some claims lacked sufficient merit.

8.1 Views that defendant conduct is not a problem area.

Many interviewees recognised the 'right' of defendants to put the plaintiff to proof.

Both plaintiff and defendant lawyers accepted that defendants are entitled to put the plaintiff to proof and it is difficult to judge the merits of defences. One interviewee stated that they had only seen spurious defences in one of the matters their firm was currently involved in.

Another commented that defendants are entitled to put plaintiffs to proof and are typically well-advised. In the opinion of that interviewee, the instances of abuse by defendants are the exception not the rule.

Another interviewee had not seen defences being run without merit, including on interlocutory issues. It was noted that:

> 'There have been hard-fought battles, but they have not been fought without merit.'

Others commented:

> On the defence side, their tactic is different. They'll make a plaintiff prove their case. There isn't a problem with defences being run that lack sufficient merit. Defendants are entitled to defend themselves robustly.
>
> On the defence side, I haven't been involved in cases where I have felt that the respondent's position is hopeless, but if I were in that position, I certainly wouldn't think that a process of trench warfare where you are hoping to smoke the other side out by taking every point and running it through is going to work. We know that our opponents are often as well-financed as we are, and if it is an insured claim, no insurance company would allow that sort of

[44] *Katherine Prygodicz & Ors v Commonwealth of Australia* (Federal Court of Australia, VID1252/2019, commenced on 19 November 2019).

conduct anyway. In those cases where I have real pockets of weakness in my defence, we are often instructed to, and our insurance group would support, actively look for ways of resolution. I think there have been some product liability claims where the argument that the defence does not have merit has probably been discussed more openly. I don't know. It's a harder one. Probably in very high-stakes product litigation that perhaps has global implications, where what is happening in Australia might be part of a global strategy, that is more complicated. In the corporate governance space, there is less scope for meritless defences to be pursued.

I certainly don't think people are conducting their defences in an improper way but one of the difficulties that class actions create for defendants is that it is just so much money. There is a question about if you are going to get sued for, on the face of it, hundreds of millions of dollars, the defendant immediately says "well, that can't possibly be right, they haven't suffered any loss, or they have not suffered that much loss. The case needs to be defended." People then need to make sure they are not defending the indefensible in terms of what happened. But, if ultimately this is about a sum of money that the funder wants, that is ultimately what is going on, the difficulty is that the defendant is not just going to hand over hundreds of millions of dollars, it has to explain to shareholders and usually its insurer, that it actually is obliged to. You have to go through a process of making the plaintiff realise that they may not actually succeed on certain points that they need to succeed on, to get the money that they are after. ... People are entitled to defend themselves. If you want to sue them for hundreds of millions of dollars then you should expect that they will defend themselves robustly and, frankly, their shareholders would be most upset if they didn't.

In shareholder litigation there is always enough doubt over loss to justify an element of a defence. While the back of the envelope is how much the share price dropped on the day bad news came out, and you can say that is the amount per share everyone has lost, the reality is never quite that simple. It is probably worth everyone trying to ascertain the loss early on to flesh that out a bit more. The only way to do that is some form of discovery. It is impossible for defendants to provide meaningful discovery for less than a million dollars of their own costs. That is kind of the costs of the parties having a sensible discussion about when the bad news was known and what the loss implication of that is. The only exception is where it has been publicly revealed that the company was aware of the information but in my experience that's extremely rare.

Class actions procedures create more points of leverage for defendants and they will take advantage of that. It is sometimes wondered whether defendants are complying with their obligations under the legislation. However, this is not generally a problem; defendants are entitled to do all they can do to defend themselves. Where defendants attempt to exploit a point of leverage such as that of class closure to avoid a hearing on the merits, this will usually be plain to the judge, who will prevent it. As to the substantive defences, defendants do all they can do in order to defend themselves. I don't see any particular issue there. They will take points that are open. Sometimes they are good and sometimes they are not so good.

From my own experience, in the last two to three years, there has been a definite increase in the frequency with which defendants make applications early on in the proceedings to stop it either entirely or in part. I find that interesting, because I think there had been a decrease in that early interlocutory warfare maybe five or six years ago. There certainly are techniques that are used by defendants to do that. Many are not meritorious and they ultimately fail. That creates delays for both parties and it is unfortunate but that is their entitlement.

Another participant suggested that defendants were predisposed to settle matters, particularly where the defence may have insufficient merit. 'There is no point in defending the indefensible and almost always you are better off settling than losing.' However, it was argued that it is a legitimate role of an advocate to fight hard to obtain the best achievable settlement for your client. It was further suggested that where cases have proceeded to trial, this is in circumstances where there have been settlement discussions, but the plaintiff lawyers appear to have made an unrealistic assessment about what the case is worth.

In contrast, it was suggested by one participant that defences are often pleaded that lack merit. However, by the mediation and settlement phase the interviewee maintained that these defences have been dropped and the real issues are the subject of sensible consideration.

> The merit of defences is not confirmed until they are tested in court, and it is not known at the outset which defences will make it through to trial.

As with the merits of actions brought by plaintiffs, this was said to be a normative calculation:

> The question of whether unmeritorious defences are run is a hard one. The defendant is always entitled to put the plaintiff to its proof. There's a lot of uncertainty in the law around continuous disclosure which defendants are still entitled to test. It was a long way from fully resolved by *Myer*.[45] It might go a bit further with the *Worley Parsons*[46] judgment which is currently reserved. The defendants are still perfectly entitled to be testing the law in that regard. What I read of the defence in the VW case made me feel pretty confident of the prospect of the applicants succeeding and some of those warranty claims, particularly those that are almost fraudulent conduct by defendant corporations, really should be settled by the defendants because their defences are weak. I can think of a couple of bushfire cases where it was clear that someone was negligent but there were legitimate arguments on the part of the defendants regarding contribution or apportionment. So no, I don't think it could be said that defences in class actions are any more or less meritorious than rates of merit on the claims side.
>
> There is still a bit of murkiness in relation to the law in relation to shareholder actions. I can see there is a bit of an argument for testing the waters there.
>
> There are reasons that defences may be pleaded initially which ultimately turn out to lack merit. The reforms and the rules that require you to put in positive traverses for your defence in combination with the court locking you into your defensive case and not allowing you to run points at trial that you have not pleaded with a positive traverse, that is probably the biggest protection. But at the end of the day, defendants are entitled to a certain degree to put people to proof for the claim and it may not be until you've actually done your own discovery that you've understood that you do not have defence you thought you had. On day one, you will hear stories from defendant corporations saying, "of course we have done nothing wrong, the research was all triple checked, no problem with it and no one ever raised issue, we are a good company". You'll get that sort of stuff on day one, it's only when you penetrate into the documents that you begin to see there were these three studies that said "x, y and z", and by the way they were circulated to a, b and c. It is only when you get into the documents that you might start to see those cracks start to emerge. That's often the start of it, what might trigger the "let's get together and have a conversation", the moment that a doorway is opened by the other side to do that. I don't believe in defending unmeritorious cases but I do have that experience, where I'm told one thing on day one, [which] may be genuine because that may be the briefing that they had. But the documents are the most persuasive thing for everybody and you've got to interpret the documents. I

[45] *TPT Patrol Pty Ltd as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.
[46] *Crowley v Worley Parsons* (Federal Court of Australia, NSD1292/2015, commenced 27 October 2015).

had a case recently where the most outrageous language had been used, and you would think that it showed a particular form of approach. But when you interview the people that wrote the notes, you begin to see that there is a culture where this term doesn't mean what is said on its face, it means something quite different. Once you get that dictionary, it looks a lot different. There are lots of cases where you don't always get the full story from the defendant on day one and it comes through in different discovery, and at that point you've got to give them advice and things happen from there. There may well be a point where you get to realise that the case should settle and the defendant is not going to win and you need to resolve it but you may be a legitimate while in getting to that because of the sheer process or sheer size of all the material and speaking to all the witnesses before you can fully assess. So, it is not done necessarily for the sake of recklessly denying on day one, it's often done for the reasons I've just discussed.

I don't think that in my experience there have been any claims that you could say are particularly without merit. Some are stronger than others but completely without merit, I would say no, and that is also the case the defences. Often with the defences, we know that if the plaintiff had actually got their act together and put a different case (which would be their best case, but they haven't figured it out yet) – I wouldn't say the defences are without merit, but it responds to the claims made against the defendant or respondent rather than representing what really went on … It's because of the pleadings.

Most class actions involve significant procedural complexity and complexity as to the factual and legal issues. Even to the extent that defences are ultimately discovered to be without merit, that is often impossible to determine without the benefit of illumination of the issues through examination of evidence, particularly expert evidence. I can't think of too many cases which are being defended where there is plainly a weak defence at an early point in proceedings that ought to suggest a different approach.

8.2. **Views that defendant conduct is a problem area.**

By way of contrast, a number of those interviewed maintained that in a number of cases the defence was totally lacking in merit.

One interviewee stated that in [a number of identified cases] the defendant's [forensic position] is 'all bullshit'.

According to another interviewee, defendants running defences without merit represent a 'significant problem' with consequences for costs and delay which is not going away.

> In one jurisdiction, some years ago, where a bare denial was not explained or justified, it would be a deemed admission. That brought defendants to heel for a while. That had a chilling effect on just putting you to proof of everything. However, this strategy for preventing defences without merit has lost effectiveness.

For a third interviewee:

> There is a problem with defences being run that don't have sufficient merit. There is a tendency to take every point and to swamp people in paper. So much attention is given to plaintiffs driving up costs but not enough to defendants. I think there are certainly massive inefficiencies on the defence side too.

Concerns about the conduct of defence firms included contentions that:

> Disputes on liability in product liability claims are made too forcefully in circumstances where it is clear that liability will be established and there are documents provided in discovery which show liability. In such matters, the dispute should be about the damages involved and how the damages should be best distributed. Defence lawyers should

> recognise the need to negotiate at an earlier stage, so that unnecessary costs and delays can be avoided.
>
> In some instances during the course of the case defence lawyers seek to have as many appeal points along the way in the knowledge that they are probably going to lose at first instance and seek to fight in the Full Court where they anticipate that these points will be given serious consideration.

The way in which 'stonewall' defences were consistently maintained by several multinational pharmaceutical companies usually represented by one particular firm in complex product liability cases was the subject of criticism by numerous interviewees.

In many instances of weak defences, it was argued that the defendants 'fight tooth and nail' and the cases can run for years:

> It depends on the firm involved, I have to be honest with you but I have to say, a lot of it is shaped by the lawyers involved and whether they want the case to keep going or not. I think that's a big problem.

Another interviewee referred to the case of *Sadie Ville Pty Ltd v Deloitte*[47] and the problematic conduct of the defendant(s) in connection with the refusal to produce audit files, which attracted considerable judicial criticism.

According to another participant:

> Defences are sometimes pursued that do not have sufficient merit. This may occur when it involves an insurance dispute about responsibility for the loss or damage. In some circumstances, the defendant may wish to delay settlement for reasons which have nothing to do with the merit of the action, for example, where they want to deal with the regulator first, or a company has a particular need for the money at that time, or because of the insurer's situation. This could be improved if incentives or disincentives regarding early settlement were strengthened.

It was suggested that some defendants deny liability and fight all issues and then complain about the costs of litigation. According to that interviewee, defendants frequently raise unmeritorious defences; insisting initially that the matter is going to be vigorously defended and then settling for large sums of money.

One defendant lawyer remarked:

> From my knowledge on the defence side, there are certain firms where clients now say to the defence firms your KPI is to delay discovery until a period of time. I don't think that's in accordance with the spirit or obligations of lawyers to the court.

In relation to one particular case, a plaintiff lawyer recollected:

> There was a challenge to the litigation funding agreement; and then it was about security for costs; and then it was about the common fund; and then it was about class closure and then it was about whether you can have a common fund at the end of the case. This has wasted two years. Even where such interlocutory applications are unsuccessful, normally only some of the costs are ordered to be paid by the unsuccessful defendants on a party-party basis and therefore this costs the class members a significant amount of money for a temporary dog fight.

Another plaintiff lawyer stated:

---

[47] *Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm*) (No 5) [2018] FCA 2066 [54]-[60].

> I'm remined of a particular case I was in … where the set of defendants took a very hard line on all sorts of procedural things. They sought to declass us, sought particulars of each group member's claim well before the common questions had [been] determined, sought to have limitations determined as a separate question, resisted discovery of all sorts of things, and then a Royal Commission happened and then they couldn't fall over themselves quickly enough to settle the thing.

8.3 Possible solutions to problems of defendant conduct.

Solutions proposed to problematic defendant conduct included closer case management by judges, a form of certification for defences and costs sanctions.

Several were of the view that this was an intractable problem.

> Things get real once trial approaches. Once you're playing around with interlocutory things, minds aren't necessarily focused on the respondent's side on what's our exposure here, how bad might this look for us if we don't settle etc? But, beyond the usual case management imperative of getting to trial quickly, I don't think there's much that can be done.

One interviewee was of the view that this should be dealt with by costs sanctions against lawyers.

> The solution is costs orders if properly directed – so that if you have a completely unmeritorious defence or a waste of time defence, i.e., make the plaintiff prove a case which you know they're going to prove in due course, I think the way to deal with that is to make *the lawyers* pay the costs. That will put an end to that practice immediately, and the courts have got power to do that, they don't exercise it very much.[48] They can do that. But all you need is costs orders a couple of times for putting forward and arguing dumb points and that will put an end to the practice.
>
> …the stakes in a class action are high and thus the difference in costs may not be important but I am sure that many defence lawyers would not want to be saying to their clients that they are paying extra costs because of their strategy.

Costs orders against defence lawyers were proposed as an adequate safeguard against 'waste of time' defences, or 'waste of time' points more generally.

Another participant suggested that a solution to the problem of defences being run without merit might be penalties for law firms where they have put up a fairly dubious defence. It was suggested that they should have the same level of exposure as a plaintiff firm that puts up a dubious case.

> Perhaps insurers should be put on the hook for costs in certain instances. However, it would be hard to visit costs on insurers. As it would be hard to visit costs on insurers, I'm sure it would be equally hard to visit costs on the defence lawyers who are running unmeritorious defences. They're normally subject of strike outs if they're that unmeritorious, although that's a high hurdle, but it would be an equally high hurdle at the end of the day – in our adversarial system, it's very difficult to stop the defendants from taking every point that's possibly available to them. We don't have treble damages and things like that. Very hard.

9 Perspectives on *ethical issues* arising out of the conduct of *plaintiff firms.*

9.1 General observations on the conduct of plaintiff law firms.

Participants emphasised the importance of lawyers understanding to whom they owe their obligations and how best to manage conflicts of interest. The extension of a fiduciary duty to group

[48] *Cook v Pasminco Ltd (No 2)* [2000] FCA 1819, albeit costs orders against the plaintiff's lawyers.

members who are not clients is unsettled law. However, it was suggested that plaintiff lawyers should recognise that they cannot focus solely on the interests of the representative parties. Where there are differences among related claims within the class of group members, it was noted that lawyers must be sensitive to the interests of other class members and whether their proposed strategies are aligned with those interests.

A number of interviewees maintained that plaintiff lawyers should ensure that representative plaintiffs are fully informed as to their role in the litigation and the possibility that they may owe duties to other class members. Further clarity in the law around this area appears to be needed.

As one participant noted:

> It is all too easy for plaintiff law firms to get lost and forget that they are actually acting for a litigant and not for a litigation funder, with whom they have an ongoing professional relationship. Some lawyers and funders are better at dealing with this than others and this ethical issue is most pronounced where the assessment of the prospects of the action are revised or there is a misstep in the original budgeting.

A number of interviewees identified lawyer-funder relationships as a challenging ethical area:

> I think that it is an environment in which it is very easy for those who run these class actions to lose sight of where their primary obligations lie and to juggle their obligations to their client with their, in some cases, contractual obligations to the funder and to deal with the reality that whilst they'll never see the client again, they will see the funder again and they will want to work with the funder again, and they will want to take matters originated by the funder again, but they need to give primacy not to the funder but to the client. That creates an ethical fog there.
>
> The other thing I think plaintiff lawyers have to be careful of, and this is one which, I don't necessarily think is people trying to do the wrong thing, but if you have a litigation funder which funds most of your cases then naturally you have more to do with them over an extended period than with any group member or applicant. They need to be careful that they don't find themselves in a situation where they're favouring the funding interests, not because of any duty, but because it's in the lawyer's interest to take care of the funder, and so they create this sort of duty/interest conflict because they are repeat players. Conflict of interest is the area which generally I find concerning.
>
> It's very important that plaintiff law firms work with multiple funders, so that they are not beholden to a particular source of funding. But it is pretty hard to regulate that. I think that it is important to take a portfolio approach to funding as much as is reasonably possible, because that reduces the extent of conflict. There's the possibility of lawyers either not doing that, which is a simple thing or really viewing the client as the funder, that possibility is certainly there. But the rules are pretty clear. Your obligation is to the client, the applicant first of all, and the group next. The client can contract instructions giving authority to a funder, that's fine. But the rules are clear and instances of naughtiness are pretty confined and the courts have enough power to deal with it and they do.

The tension which may arise for plaintiff law firms between their obligations to the applicant and group members and the funder's interests is most challenging where the law firm has contractual obligations to the funder.

One interviewee recalled that:

> In one case it was suggested to us that under the proposed arrangements the registered class members would get more than those who hadn't registered but we rejected this suggestion.

It was noted that class actions are lucrative and this leads to a risk that unethical actors may act to the detriment of class members. Poor outcomes for class members can result where there is no check on the lawyers determining the way in which the matter will be progressed.

It was suggested that there are very serious questions as to whose interests are being pursued when the plaintiff firms seek a CFO on behalf of the applicant and how that works in the context of mediation.

> For example, the plaintiff's representatives may state that they are only prepared to settle if a CFO is made, when, as we were shown in the *Money Max* case, in the vast majority of scenarios, group members will end up being worse off under a CFO.

One interviewee commented that high ethical standards amongst some plaintiff lawyers prevented abuses that might have otherwise occurred. They noted that in one case a group of lead plaintiffs wished to propose to the defendant that if agreement was reached to settle their individual cases, they would abandon the claims of the other group members in the class. The lawyer successfully opposed this.

However, there are instances of inappropriate pressure by plaintiff law firms in mediation where payment of their fees is a paramount consideration and where the interests of class members are subordinated to this.

It was suggested that there is variation in the ethical conduct of plaintiff law firms, as some law firms were said to deal with ethical issues better than others.

> It is possible that some plaintiff lawyers are not clear about where their duties, loyalties, and obligations lie. In some instances they may confuse the funder and the client. The obligations of plaintiff lawyers to group members are not clear to all plaintiff lawyers.

It was further commented that the signing up of class members may give rise to ethical issues:

> The signing up of large numbers of class members as clients in open class actions raises some issues. In a funded case, when the firm is proposing to seek a CFO at the end, then there need to be answers as to why they are telling group members that they need to sign up to the retainer agreement. If the firm is anticipating that it will be necessary to seek a funding equalisation order at the end then it becomes even more important that the firm should be careful in its disclosure to group members that in signing up to the funding agreement, the effect is potentially to increase the overall return to the funder under the funding equalisation order in a way that is likely to result in a greater deduction for the individual group members. There my view is that group members need to be told. Giving notices to group members is the panacea to most of the problems with class actions. If people don't want to do it, they don't have to as long as they understand the consequences. It may be that if there is not enough of a book built then at some point the funder will take the view that its return will not be enough and it will start to pull the pin in a way that it is entitled to do if no one is prepared to pay it for it to continue its role in the case. We're not here to wipe people's noses for them, basically, and if people want to free ride or to get the cheapest possible ride then there are likely to be consequences.
>
> In terms of firms signing up group members when the firm is going to seek a contingency fee at the end, I'm not sure how that will play because what's supposed to happen in Victoria under the new regime is… the court has made very clear, that if you are going to seek a contingency fee order, you need to do it as early as possible in the proceedings. Provided it's done sufficiently early in proceedings, everybody knows that that is the deal. Either the order will be made in which case all of the retainer agreements fall away in terms of practical relevance, and it's no harm, or if not made then the firm will need to sign people up to the retainer agreement because they will need to find some other way to fund the

> action, presumably through a funder, … they'll will need to book build, or if they are going to do it on no-win-no-fee basis, then I'm not sure if there's any harm in signing people up. If it is being done on a no-win-no-fee basis, then the only time they are going to have to pay fees is at the end of a successful action, in which case it will happen as the result of a court order, and we are talking about angels on the head of a pin at that point. It's going to happen one way or another and I'm not too concerned as to whether people have signed up to a retainer agreement along the way. I don't think it really bears on an assessment unless there was misleading conduct. Where it does become a problem is in CFO or Funding Equalisation Order situations, perhaps most of all in FEO situations, where on one view it is contrary to the group member's interests to sign up to the funding or retainer agreement because the effect is to increase the total deduction the funder stands to get from the pool at the end of proceedings.

In the view of one participant, beyond the inherent and well-understood complex conflict position for plaintiff counsel, be they solicitors or barristers, the ethical issues which arise are the same as those confronted in other procedural areas and scenarios.

Another interviewee mentioned one practitioner whom they believed conducted their practice in a way which raised multiple ethical issues. However, those issues related to the way in which that individual practitioner conducted their practice and were not an issue resulting from the class action environment.

It was suggested that further education is needed on the ethical conduct of class actions by plaintiff lawyers. It was also noted that:

> Further clarity is also needed. However, judgments in this area are rare.

9.2 Views that the conduct of plaintiff law firms is not a problem

A number of interviewees maintained that plaintiff law firms are regarded as acting generally according to a high ethical standard:

> Plaintiff lawyers may be more cautious than lawyers in other areas because they are conscious of the conflicts that may arise with litigation funders, their own interests, group members and the plaintiff.
>
> The experienced plaintiff law firms are sensible, reasonable and well-aware of their ethical obligations.

One interviewee had never seen any evidence of ethical problems in the conduct of plaintiff law firms. Another noted that the large plaintiff law firms with which the interviewee had worked prepare their cases properly.

> Plaintiff 'lawyers, and certainly those experienced in this area, take their ethical obligations extremely seriously' and are alive to potential and actual situations of conflict. Ethical issues which may arise in class action are not substantially different from those experienced in other areas.

Whilst aware that ethical problems may have arisen from the conduct of plaintiff law firms, another interviewee was not aware of them.

> Ethical issues arising for plaintiff law firms arise out of the fact that clients are often unsophisticated and not intensely involved in the matter, and conflicts arising have a particular dynamic in class actions.

However, it was the experience of another interviewee that these ethical issues are managed well by plaintiff law firms, particularly the experienced firms. This was said to exemplify the difficulties that can result in class actions conducted by law firms that don't have a reasonably sophisticated understanding of what is involved.

> There are unique ethical issues arising from class actions of which plaintiff lawyers must be aware, such as differing interests of group members and different strengths of case in the group. Generally, those with more experience are better able to identify and manage those issues. Ethical issues do not represent a significant problem. For the most part, these issues are dealt with well. However, in a very small proportion of cases, they are not appropriately handled.

The conduct of lawyers and a funder in a notorious Victorian case is an example of misconduct in the class action sphere, which is currently before the courts, and was the subject of criticism by numerous interviewees. However, this conduct was not considered reflective of the majority of the profession and this conduct was subject to effective court scrutiny. Moreover, despite the misconduct alleged in the *Banksia*[49] case, the class action itself was still run competently by the counsel involved.

According to others interviewed:

> There is the potential for problems to occur, but my own experience is that the professionals involved on the plaintiff side are usually quite attuned to that and on the whole behave exactly as they should. I don't believe there is a huge ethical deficit on either side of the bar table in this context.
>
> From my perspective on the defence side, the short answer is that the conduct of plaintiff law firms does not give rise to ethical issues. The law firms that I deal with are acutely aware of their obligations so I would be very hard-pressed finding a circumstance which has raised an ethical eyebrow for me. The areas that move into the territory of ethics, but I am not suggesting any improper conduct, I can probably only think of a couple.
>
> There are 'glitches' where plaintiff law firms do the wrong thing, however this is not reflective of the general conduct of plaintiff firms. Generally, the ongoing costs supervision is a good development and to be encouraged. The firms need to be constantly alert to the risk of inappropriate pressure to settle at mediation. For the most part most class actions have pretty experienced counsel involved, even if the firm itself is not experienced, and most funding arrangements have the dispute resolution clause. Although we all know that it's probably easy to justify anything when it comes to settlement, most settlements that I'm aware of are in within the ballpark of a reasonable assessment of the value of the case at the time the settlement is made. Communications with group members and disclosures to the court are terribly important. In my experience those are handled with great care and great responsibility. People are careful to tell the court about problems they've got for which there is not an obvious solution – they go and get guidance, and group members are told about steps that happen in proceedings and are likely to affect their interests and about which they might want to do something. That last assertion might be a little bit questionable, as there is a lot that happens in the day to day decision making which ultimately has an effect, but which is not notified to group members. But the big stuff they're usually told about – they are told about proposed settlements and the terms of proposed settlements. There's a constant ethical concern in class actions which is different from that where you have a single plaintiff, but I don't get the sense that those concerns are not being managed appropriately at the moment, on the contrary I think that they are managed pretty well.

While lawyers acting for defendants did not consider the conduct of plaintiff lawyers to be a problem or to involve wrongdoing, they highlighted areas where ethical issues might arise:

> One is in circumstances where there are competing claims and the resolution involves multiple law firms acting jointly for groups with their own funders in some way cooperating.

[49] *Laurence John Bolitho v Banksia Securities Ltd (Receivers and Managers appointed) (In liquidation) & Ors,* (Victorian Supreme Court, S CI 2012 07185, commenced 24 December 2012).

> I do not have a line of sight over how those lawyers and funders are discharging their respective obligations, for example, I don't have a line of sight as to how the law firms would partition their responsibilities to other parts of the class, or whether one law firm acts for all of the lead applicants and another acts for part of the group, how the funders are monitoring the proceedings and respecting their obligations to faithfully abide by the terms of their funding agreements. None of that has a practical impact on the case, or it rarely does. That is an area that is a little bit opaque, but I am not suggesting anything is going wrong there.
>
> There have been limited instances where I know that plaintiff law firms have been approached by, or have approached, current or ex-employees of defendants and sometimes it is unclear what discussions are being had with them in the context of their ongoing obligations of confidentiality. Again, I have never seen an ostensible abuse in that space, indeed, I have seen the opposite where plaintiff law firms have written to respondents to say that they want the employee to be released from their obligations so that they can talk to them, so I am not seeing an ethical dilemma.
>
> One minor thing, and again, I would not put this as high as ethical, but in this category of conduct - plaintiff lawyers and funders need to be more careful about what they say on promotional and website material in respect of specific cases. It is almost always badly out of date or says things that are no longer true. I am not suggesting that anyone is being actively misled but being crisp on that stuff is important because if we saying anything that is inaccurate in any shape or form we get a mouthful about it, so I think it is of concern to clients where they can see that plaintiffs have a longer leash in respect of what they can say about cases. The short answer is no, I don't see egregious conduct in this space.

It was suggested that the risk of problems arising is most acute at settlement:

> The real problems will be where someone cuts corners in the running of a class action and duds the class from compensation they would otherwise be entitled to because they get sick of running it. That doesn't seem to happen very much. While settlements happen at a reduced value on occasions, this doesn't appear to be because lawyers have gutted the class completely without the court being aware of it. Where a settlement is desperate and does not reflect the interests of the group members, the court will not allow it to proceed.
>
> There are always tensions between the interests of funders and the people being funded. It is difficult when you get to the pointy end of settlement and, particularly as I said earlier, where you have a funder that may have particular financial pressures, and they then come to the fore. You also have a group of solicitors who have spent an awful lot of time and money preparing and prosecuting the case who may only get paid if it settles. Class actions create some peculiar pressures that probably don't exist in most litigation.

One defence lawyer commented that, while the defendant is not disinterested in the fairness of the settlement, it is up to the court and group members to decide whether the split is acceptable. It was contended that there must be honest and full disclosure. It was further noted that defendant counsel often have to give opinions to the defendant company on the fairness of settlement. It was also noted that the plaintiff counsel role in providing independent assessment to the court is a reflection of the duty to protect the interests of the class.

9.3 Views that the conduct of plaintiff law firms is a problem.

A number of interviewees were of the view that the conduct of plaintiff law firms is a problem in some cases. In particular, lawyers who 'race to court' or fail to adequately prepare cases were subject to criticism.

According to one interviewee, this was unseemly and resulted in poor due diligence, pleadings that were not well considered and lawyers undertaking discovery in order to find alternate cases.

Another participant raised concerns over plaintiff firms with close relationships with funders who engage in strategies of racing to court to gain a procedural advantage where there is a multiplicity of claims. This was said to lead to negative consequences including poor due diligence and a risk that claims will be brought without merit. However, the *Wigmans* appeal[50] will hopefully lead to clarification that this factor is not determinative, and this practice of racing to court should occur less often.

It was suggested that in some instances, class actions have been filed precipitously by law firms in anticipation of the filing of competing claims by other law firms, and the hope that those other law firms will undertake most of the work related to the claim.

Lawyers were criticised for rushing to issue proceedings without fully considering the claims and without properly preparing their statement of claim or evidence. This 'incompetence' is worrying, as it means that the class action may not be successful in circumstances where it has merit. The group members are the ones who suffer.

Problems with the conduct of plaintiff law firms were said to include an occasional lack of preparation and the rush to the doors of the court to gain a strategic advantage in multiplicity disputes.

'There are a couple of firms that have not covered themselves in glory.' Matters were run badly, firms were 'ill-prepared', with large costs incurred that were not reflective of their weak prospects for success. In some instances, claims were commenced which arguably should not have been, particularly in circumstances where there is an insurer behind the defendant.

Several interviewees commented that the conduct of plaintiff lawyers in signing up class members may raise problems:

> In one [identified] case one of the firms was saying that they should be given the carriage of the class action because of their experience and because the funder had signed up a phalanx of institutional investors. Those being asked to sign up had not been informed that there were at least four other open class actions on foot.
>
> One [identified] law firm in signing people up failed to mention that there was another class action filed ten weeks before them, but asked group members to enter into a retainer with them. You should tell people that there is already an action on foot particularly where substantial progress in the other case had occurred.

Another interviewee referred to a recent case in which there was evidence of misleading and deceptive conduct in signing people up as clients in an open class action.

It was suggested by some participants that conflict issues do arise in a number of instances. It was suggested that plaintiff law firms do not consult group members sufficiently and settlement decisions are reached when this is assessed as favourable to the law firm or funder, not when it is best for the class members. This conflict was said to be a challenging issue to resolve as the court cannot be involved in the decision to accept settlement. The use of referees and costs assessors is at a late stage and it was suggested that some are insufficiently rigorous in their approach. However, it was accepted that independent costs assessments are useful and should be used by the courts. It was further noted that contradictors can draw the attention of the court to issues as well, notwithstanding that this is at a late stage.

One interviewee commented that:

[50] *Wigmans v AMP* (High Court of Australia, S67/2020, notice of appeal dated 1 May 2020).

> There is a problem with law firms in effect treating the funder as their client and prioritising the interests of the funder. However, this can be addressed by the involvement of counsel who provide a more independent perspective.

It was suggested that plaintiff lawyers, in some instances, had not prioritised the interests of class members:

> One class action was settled that had similar defendants to another class action. There was an offer to settle the second class action on very favourable terms, or reasonable terms for the plaintiffs. The solicitors did not even consider it for about a year or two, i.e. the second action had just got off the ground, there wasn't enough money to be made, and I had the feeling – I know what my accountants do – my accountants work out at the beginning of each financial year how much they're going to charge me for my work and let's say they decide and budget for earning $10,000 from me, regardless of how much work they do, they're going to charge me $10,000 or they make sure that they're going to do $10,000 worth of work. I think that plaintiff firms when they do their annual budgets approach actions in the same way; they work out how much they're going to get or how much they expect to get from a claim, and they make sure they get that or near enough to it. I understand that in business that's what you've got to do, but I'm not sure how proper it is, and I'm sure that happens. But that's not a class action problem. It is a general problem, but it manifests a lot in class actions as they tend to be probably more remunerative to law firms that run them, plaintiff and defendant.
>
> There can be a tendency in some plaintiff firms, particularly where they have a relationship with a particular funder, to be too easily pressured. There are certain firms and funders who tend to prefer their own entrepreneurial interests over group members. There is always a tension between funders who want their money in the bank and group members who have had all this work done going up to trial and have a real shot at getting 100% on the dollar. Individually, those group members might say that they don't have much to lose in running this. I think there is a real tension at that point, usually between funders and lawyers. But most firms I have worked with have been pretty good at backing up counsel when settlement offers aren't appropriate for acceptance.

One interviewee referred to the problems involved where lawyers are signing up clients in an opt-out class. It was noted that:

> In asking people to 'register' we are very careful to say to people that you don't have to sign this, but it may influence the funder in the decision as to whether or not to proceed. They are not being told that by others who are recruiting class members.

10 Perspectives on *ethical issues* arising out of the conduct of *defence firms.*

10.1 General observations on the ethical conduct of defence firms

As with the conduct of plaintiff law firms, the conduct of defence firms was generally viewed to be of a high standard.

Lawyers on both sides of class actions expressed collegial respect and confidence in the ethical conduct of practitioners on the other side of the bar table.

While ethical dilemmas may come up for respondent lawyers in the process of discovery where documents are reviewed that do not match with instructions they have received, the interviewee believed that the lawyers have regard to their obligations and advise their clients properly.

From the perspective of one plaintiff lawyer:

> Conflicts are less of an issue for them, because they've got the one clear client usually. The areas they need to be concerned about is complying with the overriding or overarching

purpose, and actually making sure that neither they nor their client act in a way that's contrary to those requirements.

A lawyer from a defence firm commented:

> What I have seen in practice is an incredible concern about taking a step that is seen to be unethical. I wouldn't be prepared to act for a client prepared to take an ethical shortcut and most of my clients are listed entities with serious reputational issues if they engaged in that sort of conduct, but they also know that really hard decisions are made every day about our obligations around discovery, document retention, the privilege of a document and where this is not clear, whether a claim can be made where we think it is privileged but we cannot substantiate anymore because someone has left. We really sweat over those micro decisions, because as professionals, I am putting on affidavits and my client is as well. Broadly, what I am seeing is defendants are taking this very seriously. They are already a defendant so their public-facing conduct is already being challenged, they are not interested in making it worse for themselves. I think since BAT back in the day, the horror headlines that that invoked, James Hardie and other instances, defendants are very careful about not making themselves part of that kind of headline.

However, another interviewee who acts for defendants expressed a different view:

> I am of the view that there are ethical problems in the way that the defence is conducted in some cases. Increasingly it's "can we burn off the plaintiffs? We will make it so untenable for the litigation funder by ramping up costs that will drive out discovery". KPIs are set by public companies to defence law firms to the effect that that they don't expect to actually produce discovery until a stipulated date, which is massively in the future, and defence lawyers are going through all sorts of positions to reach that KPI.

10.2 Views that the ethical conduct of defence law firms is not a problem.

Numerous interviewees stated that they were not aware of any ethical problems in relation to the conduct of defence firms:

> They'll put on a robust defence, there's no question, but that is like in any litigation. I haven't observed any ethical issues.

> I don't think it's as bad as I want to say it is as a plaintiff lawyer. In shareholder class actions [firm x], for example, take a pretty ethical and balanced approach. [Firm x] are the ones that I'm up against most commonly. They generally understand what their role is in the process. I think some of the mass tort litigation is more problematic. It's a much harder hitting culture in mass tort class actions, historically I can say, that means that everyone tries to beat each other up more than in shareholder class actions. [One particular firm [firm y] was singled out for criticism in in its defence of product liability cases.]

> I usually deal with the leading firms and I'm comfortable that the firms I deal with behave well. They usually have excellent senior counsel, experienced partners, and if you are well established, you are not usually hungry for food and so all of the pressures that make people behave badly aren't really there. I'm pretty comfortable that, on the whole, what I'm seeing is good behaviour. But I have to emphasise it's a little narrow. I'm dealing with big firms. There are a lot of other firms out there and they could be behaving differently. I tend to be an optimist and hopeful that they aren't.

Where, on occasion, strategies are employed by defence firms which raise ethical issues or ethical issues arise in certain contexts, these were not considered to be significant problems:

> Sometimes at the instance of particularly aggressive clients, a defendant's law firm might find themselves bringing an application which is in general terms distinctly unmeritorious,

> and perhaps which they might even regret. But I think they are mostly driven by the commerce.
>
> In relation to defence tactics, there aren't many clear rules that prevent things like cases being elongated because a company wants to deal with the regulator first, or a company wants to hang on to the money for the time being because it has a particular need for that cash, or because the insurers are all having a blue. I don't like it and I think in the big picture it's not right, but I couldn't pick out a rule that prevents it from happening. Whilst the conduct of my opponents bothers me and I wish there were stronger controls in relation to those problems that I've identified, I think mostly they conduct themselves ethically.

According to another interviewee, issues relating to the ethical conduct of defence firms do not represent a significant problem. It was suggested that for the most part, defendant law firms conduct themselves ethically.

It was noted that for both plaintiff and defendant law firms, there is an issue of incentives around costs, where the lawyer may wish to prolong a case to keep their practice busy or not try as hard in relation to settlement as they would if it was their own money. However, this problem was said to be greater for defendant firms, than, for example, plaintiff law firms doing cases on spec where their interests are more closely aligned to their client and the group.

10.3 Views that the ethical conduct of defence law firms is a problem.

The conduct of some defence law firms was the subject to criticism by some interviewees:

> I am aware of a case where a defendant firm approached a funder directly. Trying to cut out the plaintiff's lawyers, which I thought was skating on thin ice ethically. That might be something that there needs to be some kind of rules about.

Another interviewee raised the problem of defence firms, or their clients, approaching group members with a view to persuading them to settle their individual claims, without reference to or knowledge of the lawyers acting on behalf of the applicant and class members.

Reference was also made to instances where defendant companies (in the knowledge of, or on the advice of, law firms acting on their behalf) being sued by consumers made offers to resolve their individual complaints on terms which included a purported waiver of any rights they might have in the class actions brought on their behalf.

However, wanting to 'keep the case alive' was said to be one of the biggest problems.

One interviewee had experienced many instances of conduct raising ethical issues by defendant firms, where documents have not been produced in discovery, or where an unduly narrow view of a document was taken. This was said to be because the documents were harmful to their case:

> I think that happens a lot and I've seen it in a lot of my cases. And it's a forensic exercise, when you really drill down into discovery and you find that, wait a minute, there is something missing here and then you go after it and it's a really bad document. And then you work out well the law firm must have seen it, but they've decided, that's adverse to my case. I think that happens a lot.

One plaintiff lawyer stated:

> Defendants often run defences that are 'glaringly untrue', such as where claims are said to have no basis. It is hard to believe that these defences are signed off honestly by intelligent lawyers who have properly considered the issues. It beggars belief. It cannot be honest. This constitutes a breach of the *Legal Profession Act*, but this is never pursued.

It was suggested where defences are run without particular merit, judges should be more willing to support indemnity costs applications.

Another interviewee considered that it is not ethical for defendants to put plaintiffs to proof to such a high standard, as if they are prosecutors in a criminal case. In the context of civil litigation for people seeking compensation for wrongdoing which has been alleged and where the merits of the action are strong, defendants are acting poorly and particular defence lawyers should be subject to criticism for this.

According to one interview participant:

> I think the only way to deal with problems arising from the conduct of defence firms is costs disclosure and disclosure of the insurer behind - maybe not necessarily the limits, but the disclosure of an insurer, I'm in favour of that in class actions. But … with the entitlement of someone to take any defence point they want to it's very difficult to stop them taking advantage of that right.

11 Perspectives on *ethical issues* arising out of the conduct of *litigation funders.*

11.1 General observations on the ethical conduct of litigation funders.

Ethical issues related to funders centred on the risk of conflict and the exercise of control:

> Conflicts are an issue for litigation funders as well. In some ways, I see them as being a little bit like when law firms first started to list on the ASX, in that you have investors which you're trying to get a return for and the people you're funding whom you need to do the right thing by. You could couch it in terms of fiduciary duty I guess, but I don't think it's that sort of conflict. I think it's more; they're put in a position where, clearly, investors will want the highest return possible and the people they're financing … would prefer that they pay as little as possible. In terms of dealing with the group members, probably, it's just whatever contractual obligations they've got, not having problems with unconscionability, misleading conduct, or the conflict of interests obligations that are imposed through the corporations regulation; trying to comply with those laws and get the returns for the investors – that's a conflict they have to manage. The other thing for them would be how they interact with the lawyers, because they're not supposed to be putting lawyers in a position where they're breaching their fiduciary obligations or obligations to the court, but they want the lawyers to act in the interest of the funder. That, I think, can create some difficult issues.
>
> The question of whether funders exercise too much control is an interesting one. As long as you as a solicitor are awake to what conflicts are, I don't think that's an issue. To step through that, for most part and most of the time, the interests of funders and the applicant and group members will coincide, because they all share the same interest in resolving the dispute for a sum of money that puts them in better a position financially, to put it at a base level. In situations where you're trying to make a strategic decision about trying to do something that costs money but will recover you more money, if it's successful, in very basic terms, the interests are aligned. Sometimes interests come not to be aligned, you just need to be awake to when those things are to take steps to deal with those situations. That's really the challenge with funders. It's not so much a question of whether they exercise control or not. Obviously, the person who ultimately gives instructions is the applicant. One thing you get from funders that you would not get if funders weren't around is that a good funder has a good case manager who has experience in litigation, who has useful ideas that improve things if you run them by that person and has an ability to improve work product. To take an example, [x] at [funder y] has legal experience and brings that experience to bear in a way that is of tremendous benefit [to] group members.
>
> There are potential ethical issues, but I think with the lawyer being a lawyer for the lead applicant and having duties to the group members and being conscious of that, that overcomes those issues. Most of them now, if there's a problem, seem to get separate lawyers involved which I think is useful, at the funder's own expense and not recoverable

> from group members. If there is a dispute about the direction of the case, most of those disagreements have a QC resolution clause, as insurers do, and I think that's a very viable way of dealing with those conflicts/ethical issues. They're there, but I think they're being managed sufficiently well at the moment.

According to one interviewee, funders exert a subtle pressure on settlement negotiations, which do not reach the stage of requiring discussion of the operation of the dispute resolution clauses. However, in the interviewee's experience, most funders behave ethically.

Interviewees discussed the existence of possible duties for litigation funders:

> Group members are clearly vulnerable, and where funders attempt to induce a putative group member to join up to an action, or not to drop out of an action, some of the features of an ad hoc fiduciary relationship may arise. These issues may be more pressing for funders who are required to bookbuild, as exclusion clauses relating to the emergence of fiduciary obligations commence once the contractual agreement is signed, but the funder may have made representations before this stage, such that fully informed consent is required in relation to the terms of the funding agreement. However, this is untested.
>
> Imposing duties on funders may make sense. I think disclosure duty and some sort of formal regulation needs to be injected into the process. But imposing duties akin to lawyers could have adverse consequences for the regime, because you've then just inserted another layer of lawyers into the equation. Costs will go up, even though they're not directly chargeable. The funders will put their price up and they'll generate a whole lot of work. It would expand the scope of one of the major stakeholders and double the amount of work needed to service them. I think it is more a question of everyone being clear that the funder's objective is to maximise the return on their investment through the process and they shouldn't put themselves out to be anything other than a rational self-interested actor in the process, that has a good impact on the regime but is nevertheless still there to make a buck. Lawyers are there to make a buck but they also have clear obligations putting the client's interests ahead of their own. You'd have lawyers and funders arguing with each other over what is in the best interests of the group, and all sorts of arguments about whether it is better to resolve a matter quickly and cheaply or pursue the fight to win more. That would be an obvious area of debate if both were in charge of looking after the group's interests. At the moment it is clear, we can say to the funder, "fine you've got your view under your contracts," but the interests of the group are prioritised, and they will yield in those circumstances in my experience. I think funders just need to be recognised as self-interested actors.
>
> Funders also have the overriding/overarching purpose, at least I think Victoria[51] and NSW[52] have extended those obligations to litigation funders.

Interviewees suggested that there is variation in the conduct of funders:

> It probably comes down to different funders. *Banksia*[53] has highlighted a situation where there has been a failure by lawyers and funders having regard to their ethical obligations, but ultimately with funders, many of them are or have been lawyers and they do have a good understanding (although it may not be a direct requirement for them) of the obligations under the *LPUL* and the like, and they can see how regulated they are by the courts… [T]o the extent that you did have any unethical operators, they are on notice that that conduct will not be tolerated by the court and will be investigated thoroughly by the

[51] *Civil Procedure Act 2010* (Vic) s 10(1)(d)(ii).
[52] *Civil Procedure Act 2005* (NSW) s 56(4) and (6).
[53] *Laurence John Bolitho v Banksia Securities Ltd (Receivers and Managers appointed) (In liquidation) & Ors,* (Victorian Supreme Court, S CI 2012 07185, commenced 24 December 2012).

court. There will be examples which are exceptions to the rule, but in general the reputable funders do act in an ethical way.

One place where these issues might be most pronounced is in relation to settlement. There have been times where we've had to stand up to litigation funders or remind them of their obligations and so on, but I think in the end, having the plaintiff lawyers being acutely conscious of who their duties are owed to and reminding the litigation funders of that, provides an important balance.

In addition, it is suggested that the situation has improved with time.

A tiny proportion of litigation funders aren't as alive to their ethical obligations as they should be. Generally, the more experienced ones that have a reputation, and have been in the market for a while and want to stay in the market, or both, recognise their ethical obligations more keenly than some of the shorter term or more speculative participants. Over time, as those funders have become more experienced and established, they have come to appreciate those ethical obligations more keenly.

In the past, there have been issues where funders wish to minimise the security for costs put forward, and this puts plaintiff lawyers in a difficult position, as their duty is to ensure that sufficient security is put forward. However, this has not been an issue in recent years.

Greater competition has increased the quality of funders and reduced the power that funders had in their relationship with the plaintiff law firm. This has meant that the situation in relation to conflicts and consumer benefits from the terms of funding agreements have improved.

There is a risk that the current changes will lead to less competition in the funding market, and this will change the power balance between funders and lawyers with negative consequences.

11.2 Views that the ethical conduct of litigation funders is not a problem.

A number of interview participants did not believe that the ethical conduct of litigation funders was a problem:

There are not any problems with the funders that I have dealt with and I have dealt with the top ten.

I am yet to meet a funder who is prepared to put up security and fund a law firm to run a case that has no merit on the basis that they will be able to green mail a settlement. It's crazy talk. It doesn't happen.

Conduct of funders is not a significant problem. Egregious ethical infractions are rare, apart from one instance in my experience. In one case, however, a funder had a management fee that was set by reference to the budget, not the amount that had been spent, and they asked for the budget to be increased just as settlement was likely.

On the defence side I have had productive and positive experiences with funders as a general rule with some very limited exceptions that are probably more to do with the battle of litigation than they are to do with ethics. On countless occasions in matters I have engaged with and spoken directly with funders, with the permission of all involved. I have found them commercial but also cognisant of the s 33V test, the need for group members to have representation and to have recovery as part of a settlement, [and] increasingly conscious of the proportion of their recovery compared to group members. I don't see anything that goes on at the granular level of them signing up claimants, so I just could not comment. But in their court-facing posture, and it is limited, I have not seen matters of concern.

> Funders do not exercise too much control over the conduct of cases. A lot of responsibility rests on the plaintiff lawyer (the lead applicant's lawyer), and because the applicant normally is just a man (sic) off street with no real idea about the litigation process, with no idea about questioning the lawyer, the only questioning you get is from [the] funder and they have a particular view.

11.3 Views that the ethical conduct of litigation funders is a problem.

For some interviewees, the conduct of funders was problematic.

In one case referred to, a funder put pressure on the lawyers acting for the applicant to discontinue the case after having been approached directly by the defendant law firm and persuaded that the case would be defended to trial. The lawyers and applicant refused and another funder was found to maintain the action. In the words of the interviewee: 'it was appalling. It was the worst behaviour I've ever seen in a funder'.

> Ethical concerns may arise from the exercise of excessive control over the conduct of litigation by funders. In some instances, the litigation funder is making all the calls and the lawyer that's on the record is nothing more than a front for the litigation funder. The funders scupper the chance for a sensible consensus to be reached and are an obstacle to early mediation or discussion to progress the matter and reduce costs. It is litigation funders who are actually exercising too much control and/or who hide behind the litigation lawyers, who have no authority and very little influence.

However, in the view of one interviewee transparent self-interested action by funders was not necessarily considered improper:

> I have serious concerns about the role funders play in settlement discussions and in the conduct of litigation. Whether you call it ethical or not, I think the funder may well say that they legitimately need to protect their interest and they do not have fiduciary duty to the class members so it is hard to say that they are not acting properly.
>
> They're doing what everybody knows they are going to do which is acting in their own interest. It is open and transparent. In many ways that's probably the most open part of the system as we all know that's exactly what they are doing, that's what they do, and we allow this to occur. Do I consider it to be in a policy sense ethical that strangers to the litigation should be able to turn it into a business and drive and manipulate settlement discussions in a manner that produces a good outcome for themselves with what appears at times to be some indifference to the outcome for class members? That seems to be a flawed system, but I can't blame the funders for it, I can't say they're acting unethically. As a matter of principle, it seems to be the wrong way to go. I don't think *Fostif*[54] ever really contemplated that.

One interviewee stated that the firm didn't go with a particular funder in one case because of the insistence that no matter what level of compensation achieved, the company wanted a minimum of three times their investment without any capacity for watering it down:

> If we get thirty million and our costs our ten, you're going to insist on taking the lot, are you? They said yes. That is not really unethical, it is just a stupid business model.

12 Perspectives on *ethical issues* arising out of the conduct of *counsel*.

12.1 General observations on the ethical conduct of counsel.

In general, the conduct of counsel was considered to be exemplary.

[54] *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

> Counsel in NSW are considered to be competent and uphold high ethical standards.
>
> There are no particular ethical problems arising from the conduct of defence counsel.
>
> There are no ethical issues arising from the conduct of counsel which are unique to class actions.
>
> My experience is that counsel do a really good job generally in upholding their responsibilities, looking after group members and not caving in to commercial pressures from funders.
>
> I don't think there is any real scope greater than other litigation for ethical issues to arise by virtue of the structural characteristics of class action litigation. If you've got an unethical member of counsel, they will be unethical wherever they can, they will push the envelope wherever they can, if they want to mislead the court they will.
>
> Counsel have less understanding of the funding dynamics than solicitors, and this perspective is helpful for plaintiff lawyers, as it focuses them on higher-order analysis. However, counsel are, for the most part, only exposed to funding arrangements at their most conflictual and controversial. This means that they do not have a full picture of how funding arrangements work.

Counsel were described by another interviewee as 'pure as the driven snow'. While there were concerns related to relative levels of skill or diligence, or work provided late, the interviewee had not observed any unethical conduct by barristers.

It was contended that counsel can provide a helpful ethical check or balance in class actions:

> Leaving aside the current *Banksia* case, I have not been aware of any ethical problems with counsel. I have had discussions with counsel in some class actions trying to persuade them to say that the terms of settlement are reasonable when they think they're not and they won't be persuaded, in circumstances where I think it's reasonable and they've taken a harder line than me. In the cases I've seen, especially in the last five years, counsel's involvement is pretty minimal. I think it's mostly solicitors for the plaintiff and defendant, and the funder, and probably less than half cases at mediations have counsel involved at all. I think that the fact that counsel aren't involved is a problem because sometimes they bring a more detached and realistic perspective that otherwise might have been the case.
>
> There clearly are some issues here and there. But in all of my cases and experience there has been a very proper separation between counsel and funders, and even lawyers and counsel. That's healthy and useful. It's another check, if there's some suggestion that plaintiff lawyers have a relationship to maintain with a particular funder, counsel are certainly less inclined to that problem if there is such a problem. They usually provide a very independent perspective on who duties are owed to and so on.

The *Banksia* litigation[55] was considered by interview participants to be aberrant, rather than indicative of a broader problem with the conduct of counsel. That case, however, was said to be a 'horror story'.

> The conduct in *Banksia* is dishonest and probably criminal.
>
> [*Banksia*] is a classic example of barristers crossing the line, but it is a unique one.

However, some other ethical issues were noted:

[55] *Laurence John Bolitho v Banksia Securities Ltd (Receivers and Managers appointed) (In liquidation) & Ors,* (Victorian Supreme Court, S CI 2012 07185, commenced 24 December 2012).

In one instance, we had concerns that counsel may have been taking liberties and going further than their instructions.

I have seen a few cases where I think people have gilded the lily on fees, but it's very rare.

There are some defendant counsel that are a little bit too close to their client and get a little bit too much work from a particular firm.

[There are] some defendant counsel who might follow their instructors a little bit too closely and unquestioningly.

Counsel on the other side in recent cases tend to want to engage in trench warfare in cases that don't have merit and costs escalate and cases drag on. Cases being run by stonewall defendants, stonewall counsel, no concessions, no offers of mediation, die in the trenches. I have some problems with that. In some instances, there has been a refusal to engage in negotiations until the day of the trial.

The only thing I've observed is the risk of counsel becoming too close to the funder, and separate side conversations going on between counsel and the funder, with counsel implicitly knowing that there [are] further briefs in maintaining favour with the funder, at the risk of not being fearless in advice being given to their client which is the lead applicant. It's never manifested itself as an issue, and counsel are generally pretty good with their ethical obligations, but that is a risk, I think. But in terms of conduct of trials, it comes back to good advocates and bad advocates, rather than a particular problem of counsel and class actions.

Some members of counsel perhaps have not got as good a grasp as they should of the conflict position that they might be in as between advising and acting in the interests of the group member on the one hand and the funder on the other. I think that issue arises particularly around the settlement negotiation and s 33V context. When it comes to sitting down and advising about an appropriate settlement and then writing a settlement approval opinion, some members of counsel can tend to forget their primary obligation to the group members as opposed to what the funder's interests might be. That's quite easily resolved and the courts are pretty alive to it as well.

There is one repeated example. I won't name names, but I will give you the type of issue. This is very rare, but … there is one counsel who, I think, makes a little bit of a habit of asserting in applications before the court that anything that doesn't look kosher in terms of the defendant's posture, be it the production of documents or timetable issues or whatever, is something to do with the defendant playing fast and loose with the truth or trying to stultify the process or hide something. I appreciate that this can create a headline which is unhelpful, and maybe places pressure on the defendant and is good for the plaintiff's position, but what is lost in that exchange is that the defendant's legal team are officers of the court and we take those obligations so seriously. We want our careers and we don't want to risk doing something inappropriate and our instructors are almost always officers of the court as well. It is very insulting when that kind of thing is said in a fast and loose submission way. You have to have thick skin in the business, and I get that, but a line needs to be drawn. You can open fully up about the subject of the claim and say how terrible the conduct was that forms the basis of the litigation, that is fair, but when it becomes about the conduct of solicitors, that is incredibly unfortunate. If those allegations are to be made, they should be put to the lawyers in cross examination. That is very rare, but I have seen it in respect of one member of the bar and it has annoyed me for a couple of years, but generally speaking their conduct is exemplary.

Particularly in commercial class actions, I think you see more of this than in other forums, which is barristers working both sides. There's nothing wrong with that but it does create

> some interesting dynamics situations where you might explain to a barrister how a particular thing works in the plaintiff's interest, only to have that barrister use that against the plaintiff's interests for a different defendant. But that is a problem as old as time and there's nothing inappropriate in that because there's no confidentiality in particular views as to the interpretation of the law. If you have a barrister who in one case is for a plaintiff and in another case is for a defendant, they're going to express contrary views and learn from what the plaintiff and instructing solicitors have told them in one case and deploy that learning for the advantage of the insurer of another case.

Reference was made by one interviewee to a current case where it is alleged that the solicitors and counsel for the applicant had acted inappropriately, and in breach of the *Harman*[56] undertaking, in allegedly using information obtained in one settled class action (and published on the Court's website) in preparing pleadings in another. This was recently rejected by Foster J.[57]

12.2 A need for further clarity.

Two interviewees suggested that greater clarity on the ethical duties of counsel would be helpful.

It was suggested that more attention could be usefully directed to clarifying the ethical obligations of counsel in circumstances where they are only retained by the representative plaintiff, whose interests may diverge from other members of the class. An approach whereby counsel act as if they owe a fiduciary duty to other class members was preferred.

> …when I read that recent decision in relation to the judgment on MH17[58], I was struck by the statement that often counsel is only retained by the representative party, and I was thinking "wow, does that mean that the barrister is effectively only trying to do the best for that representative party rather than the class as a whole, because they don't know who any of them are and they just have this one retainer and they've got to act for the representative party?" I wasn't aware that that was the way they did it, I had always assumed that counsel would have been retained in manner consistent with the way solicitors are retained.

13 The introduction of percentage contingency fees in Victoria.

The recent legislative reform in Victoria whereby lawyers are now permitted to act on a percentage fee basis, subject to judicial approval, has been accompanied by a new Supreme Court Practice Note. The introduction of percentage contingent fees in Victoria was discussed by a number of interviewees.

> While the Victorian legislation does not prevent group costs orders being applied for at the end, the Court is taking steps to prevent this through the new practice note.
>
> It is anticipated that in Victoria, there will be blended arrangements whereby a funder will pay for the running of an action purportedly carried out on a contingency basis, the funder will receive the upside and the lawyers are left with their normal fees. One interviewee considered this to be a preferable outcome to where lawyers run actions solely on a contingency basis without the involvement of a funder, as the law firm has no direct stake in the former scenario.

The operation of the new regime was said to be still unclear:

> There is obviously quite a bit to work through in terms of how the regime will operate. The intention is to avoid lawyers getting into bed with particular funders, an outcome of that is the risk of funding the litigation is no longer dispersed across two parties with, in some cases, divergent interests, and it is centralised within one entity. That shifting of risk does

[56] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Hearne v Street* (2008) 235 CLR 125.
[57] *Jones v Treasury Wines Limited (No 4)* [2020] FCA 1131, 6 August 2020.
[58] *Dyczynski v Gibson* [2020] FCAFC 120; (2020) 381 ALR 1.

> create issues that practitioners should and can manage. The other thing is that as soon as those reforms were announced and in light of *Brewster*, a lot of the talk is about funders entering into portfolio arrangements with law firms. I don't think it necessarily removes that coupling, so to speak, if anything it potentially amplifies it in some situations.
>
> It remains to be seen what will happen with group costs orders in Victoria; there's a bit of a question mark as to how that interacts with the funding market. It's an area of law where there are a lot of innovative lawyers who have new and intriguing ideas whenever there is some new change.
>
> The new Victorian regime allows for law firms receiving a percentage cut and provides more certainty than the ability of funders to do so, and this will change the dynamic. The ability of lawyers to seek back-end funding will need to be addressed by the Victorian Supreme Court.
>
> The Victorian contingency fee structure may allow for plaintiff lawyers to continue to conduct consumer class actions through the Supreme Court, with some arrangement with funders at the back end, however, this will be difficult.

Similarly, it was suggested that the impact on issues such as potential conflicts is not yet known:

> We are meant to respect the need to act with integrity. The system relies on trust and us doing our job. But humans are humans and the bigger the number, the bigger the temptation. If it pushes the boundaries of trust perhaps further than the system can cope with? Time will tell.

For one interviewee, the new Victorian legislation is unlikely to lead to significant change in terms of the types of matters that law firms are willing to take on.

It was suggested that most firms will not have the financial capacity to take advantage of the new legislation as a result of the adverse costs exposure. There is a further risk that the interests of class members will not be adequately protected because of inherent conflicts of interest which can occur in contingency fee arrangements and the possibility that defendants will exploit the financial pressure plaintiff law firms will be under as costs escalate in the course of an action.

> Will that legislation achieve its admirable objective, which I think is to increase the scope for access to justice and make the market more competitive, so that group members are the ultimate beneficiaries? I have reservations about that. I do not think that legislation will see plaintiff law firms taking on the type of matters which they may not have taken on previously because they were too risky. I don't think it is going to open up the field in terms of the scope of litigation that is funded and access to justice in terms of the scope of cases. I fear that apart from some obvious candidates, most law firms are likely to shy away from playing in that new protected playground, either because they are uncertain about the consequences or they just do not have the financial capacity to do it. Apart from Maurice Blackburn, I wonder if there are any law firms who really have the balance sheet to be able to operate within the framework of that new legislation in a way which would see them take advantage in the context of the class actions that we are used to reading about in the papers. The adverse costs exposure is just so significant. I also have some reservations about whether that particular environment is apt to produce the best results for group members, I say that because of the inherent conflict of interest that arises as a result of the involvement of a law firm as a funder and an independent advisor, and because I worry that the defendants will be able to take advantage of the financial pressure that builds as class actions get to the stage of owing the funder millions sometimes tens of millions of dollars. That makes for a conversation at the partnership table that is so dripping with a conflict of interest, that the scope for decisions to be made which are not sufficiently impartial, is so great as to warrant concern. Those are a number of concerns that I have with the market at the moment.

It was speculated that there may be a surge of cases brought in the Victorian Supreme Court because of the unavailability of CFOs for matters which will now only be viable through a group costs order. It was suggested that financial viability 'will have more to do with this [increase] than plaintiff lawyers seeking greater profits.'

13.1 Views that the introduction of contingency fees is a positive development.

For numerous participants, contingency fees were viewed with cautious optimism:

> Contingency fees may bring costs down if properly done, particularly compared with cases in which you have both a funder and a lawyer, thus increasing the transaction costs.
>
> Despite being a defence lawyer, I think the fact that contingency fees are coming in is, again, good for the class action regime as long as it's properly regulated and managed because, with luck, it should reduce some of the transaction costs that can otherwise exist, and/or the conflicts of interest that can exist between the litigation funders and the class members. I think contingency fees should be properly managed by the courts, so that there is no gouging and fees are kept reasonable.
>
> I've read a bit about the criticism of the system that Victoria has adopted of having lawyers being able to charge percentage fees. I personally think from a competition or market point of view that it will create greater efficiencies, in the sense of keeping prices down. What needs to be done, and what's started to be done in a few American jurisdictions, is to develop a new set of rules for lawyers dealing with conflicts and potential conflicts. There should be a new set of principles that takes into account the difficulties with class actions. This is not only the potential conflict between the solicitor's own interest and the interests of the main plaintiff or the class, which is sort of the thing which has been identified by opponents to the new Victorian position. There's an equally complicated issue between members of the class who have different interests, either different interests within the group comprising the class, or different interests from the main plaintiff.
>
> Although acting for defendants I am at least open to, if not positive about, some of the ideas of how contingency fees might improve the position in Victoria. If we assume once a case has been commenced, you take out the motivational factors, there are reasons to think that it might lead to a better and more efficient outcome. First of all because compared to a third-party funded case, you are only feeding one additional mouth in a mediation, rather than the two that is often the case and so I think that is a good thing potentially for both group members and defendants. If you take the conflicts issues out of this for a second, it potentially leads to cases being settled at an earlier point in time, given that the dynamics or motivations for settlement move to earlier in the case rather than after, for example, a fortune has been spent on discovery and evidence. But I think it is a different story when you talk about the motivations for commencing cases and whether this will result in more speculative cases being commenced. That is where I see significant problems.
>
> I am not frightened by contingency fees. It depends on the firm, but I would expect that the major players, would be very careful how they conduct proceedings. There would be a lot less incentive to bill, there is a significant prospect that we might get to settlement stages earlier than would otherwise be the case.

However, it was proposed that there should be clear guidance and structure around their introduction:

> Someone should sit down and work out a set of rules which tells lawyers how to behave and what's proper, including in what circumstances they must go to court to let the court sort out some of these issues. I wouldn't want contingency fees or class actions to go away because of conflicts. I think they can be dealt with. The ultimate arbiter might have to be a

judge which will only increase costs, but I think that no thought or not enough thought has been given to the difficulties confronting lawyers and how they should deal with those difficulties when they face conflicting positions, either involving themselves or particularly within different groupings within the class they are representing, or not representing technically but whose cases they're fighting.

13.2 Views that this may not make much difference.

More than one interviewee considered that the Victorian reforms will not make a significant difference, as it will just lead to a readjustment of capital; the risks and returns of litigation are the same. It was noted that the Supreme Court will continue to scrutinise arrangements for reasonableness and fairness.

> Contingency fees create another area of competition and should be supported. However, their effectiveness is doubted, given that many firms will not have adequate capital to run the matters without funders, and the scope for the potential involvement of funders behind the scenes is not clear.
>
> Ultimately, for every piece of litigation, the risks are going to be the same, the returns are likely to be the same, and so it's just going to be a different organisation of who's bearing the risk and who's standing to make what out of the return. But in terms of the global percentage, that's still going to be driven as much by competition as anything else, with this overlay of judicial scrutiny for fairness and reasonableness, and so I don't see that making a huge difference.

13.3 Views that this is a negative development.

Others were opposed to the introduction of contingency fees. For example, one interviewee stated that this arrangement causes lawyers to lose their perspective, distorts their thinking and leads to conflict.

It is suggested that contingency fees will lead to more speculative actions threatened that are lacking in merit:

> We will potentially see an increasing number of class actions threatened which are less meritorious in order to do a quick deal. The company is put in the position of weighing up the value of a nuisance settlement versus letting the thing run and the impact on the share price.

The requirement for firms working on a contingent basis to indemnify plaintiffs for exposure to adverse costs was a subject of concern:

> Contingency fees should be viewed with 'extreme caution' where adverse costs liability for lawyers is also introduced, noting that there are no guarantees with relation to after the event insurance for plaintiff firms taking on these large risks.
>
> While the adverse costs risk can be insured, this is not mandatory and insurance is subject to the same risk more generally. The insurance market 'is not bottomless' and there is no guarantee that a firm will obtain ATE.
>
> It is not certain whether the Supreme Court of Victoria will accept a deed of indemnity as adequate security in the context of a group costs order.
>
> The idea of law firms being subject to adverse costs orders is a 'terrible' problem. Blended arrangements may not be disclosed by plaintiff lawyers, and this could extend to the insurance, which could be obtained by the funder.
>
> 'Possible liability for adverse costs is a worry for everyone that is involved in litigation with that law firm for cases often run for three to four years and are massive matters (or several massive matters). That is an issue for any firm, including our own, that does major litigation, and is

therefore exposed, not only to the ongoing costs of running the litigation but to massive adverse costs orders.'

'The adverse costs risks threat is a real one. I don't know how they will manage that internally within the partnership; that would be a bit scary but I guess the balance sheet can support it.'

Yet, the law firm was considered by a number of interviewees to be the appropriate entity to bear that risk:

> Where the firm is at risk of an adverse costs order, this may encourage a law firm to compromise the interests of their side. However, under the costs follow the event system, the firm ought to bear that risk, because this should not be borne by the plaintiff, who does not stand to make that much from the matter themselves. This risk is just something that the firms will have to manage, and it will likely be insured.

It was suggested that contingency fees may generate conflicts and increase pressures on plaintiff law firms:

> My point on contingency fees, is that this is the single most critical pressure that contingency fees are going to bring into the system. If you're a firm running a number of cases on a contingency fee basis, you've got bills to pay or cash flow issues, there's a juicy settlement there, is it the best you can get? Maybe not, but if we settle this case the doors stay open and we live to fight another day. That's not in the interests of the class members, that's just in the interests of yourself and your fiscal position. There will be people who over commit on that type of thing, and maybe they don't only do the case with the contingency fee, they're doing all sorts of other things but they are just overly committed with the contingency fee case.
>
> We're all very well aware of the infamous examples of some large firms taking on incredibly large 'no win no fee' cases, really to their credit, really staking a significant parcel of the firm's resources on the conduct of that case, and that's absolutely to be commended. The question is what changes if that firm, in addition to having their capital outlays on the line, are also potentially betting the farm? If the case goes against them there's an adverse costs order that could wipe out significant sections of their business.
>
> It creates a problem as effectively you have the law creating a conflict of interest. If the statute creates it what does that mean for equity in terms of how one deals with the fiduciary obligation? I don't have the answer to that but that is a good question for an equity lawyer.

One interviewee suggested that defence tactics are likely to change under the new Victorian system. It was suggested that law firms may be more disposed to settle when the downside of an adverse judgment or the reality of ongoing and much heavier commitment to the litigation dawns on them, and defendants may try to exploit this. It was noted that this risk will need to be managed in Victoria.

This concern was echoed by a second interviewee:

> There's another potential problem. I can anticipate a scenario where a law firm has assumed the risk of adverse costs, and they either win or lose but it goes on appeal, and the defendants says "we'll let you off your liability for costs if you walk away." That would put the firm in a very difficult situation. Query whether the firm's answer to that is to send a notice out to group members, saying "this is the offer that has been made to us, we are the only ones on the hook here, and we propose to accept it unless sufficient of the group members come forward, not only willing to take over the conduct of proceedings but also to indemnify the firm against the costs going forward." That is still a terrible position of conflict but at least they've told group members, and they could go to the court and say, "look,

> we've done all that we can. No one's willing to come forward to take on the matter in our place, we propose to accept the offer, may we please?"

Support was expressed for a comprehensive framework for the management of conflicts of interest which may arise. In the absence of this framework, this will be left to the court to deal with through the settlement approval process.

It was contended that the introduction of contingency fees, combined with potential exposure to adverse costs, may also have a negative impact on competition. Interviewees speculated that contingency fees will allow the larger firms to, effectively, self-fund. It will also lead to a greater concentration of class action work among the few biggest firms who can afford to take on the massive adverse costs risk exposure involved. It was considered likely that those firms will obtain ATE insurance.

> The result of the adverse costs liability risks under the Victorian regime will mean that many firms are deterred from running actions on a contingency basis and fewer class actions will be conducted.
>
> Very few firms are able to carry the financial burden that such cases involve.
>
> The risk of adverse costs will limit the appetite of firms to engage in the market. That is a very substantial risk that some firms just won't be able to take on. If you do get situations where a firm is able to take on the risk and there is a multiplicity fight and a beauty parade, you are centralising power within the much larger firms that can point to bigger balance sheets in such a fight. In the absence of CFOs in the Federal Court, coupled with additional transaction costs and requirements that will be implemented from 22 August, [this] will reduce competition and centralise market power within a few firms.
>
> The fact that the Victorian legislation provides for the solicitors to be at risk of an adverse costs order is going to continue to scare firms out of the market. That was another one of my objections to it. One of the positive developments of funders coming into the market was that you had firms with traditional commercial pedigrees being prepared to act on the plaintiff side in class actions. If firms are required to take on the personal risk of an adverse costs order, against which they may not be able to insure themselves, it seems to me that in those traditional commercial firms, their non-class action partners are going to be outright reluctant to expose themselves to the risk of adverse costs orders, in order that the class action partners can run a class action on a contingency fee basis. It's going to have a chilling effect on competition between plaintiff side firms.

For one interviewee, indemnities from law firms for adverse costs were viewed as 'highly problematic' as they may incentivise a risk-averse approach and settlements which are against the interests of class members. It was suggested that there may be a greater need for transparency and disclosure of plaintiff lawyer's arrangements to the court.

This concern was shared by another practitioner.

> Historically, in 'no win no fee' work, solicitors were at significant risk. This is comparable to that under the contingency fee model. The impact of adverse costs risks might depend on the firm, but it may lead to plaintiff law firms being more risk averse.
>
> It would be difficult to avoid being sensitive to that when it came to settlement negotiations I would have thought. You are more likely to be risk-averse and accept settlements when you might otherwise want to push on.

Another participant postulated that the effect of this consolidation of market power may be that some already extremely well-paid law firms receive even more money.

> Those lawyers are very capable and their work enables people to access justice where they otherwise would not be able to.

However, the interviewee suggests that concerns expressed over the 'slice of the pie' obtained by lawyers warrants further scrutiny.

13.4 Other issues in relation to the Victorian reform.

A number of other issues were raised in connection with the recent Victorian reform.

13.4.1 Lawyers sharing fees with funders

On the question of whether lawyers acting on a percentage contingency fee basis could share fees with a litigation funder financing the action there were divided views. It was noted that historically, there was a prohibition on lawyers in Australian jurisdictions sharing fees with non-lawyers, for example their spouses, accountants, or patent attorneys. A similar prohibition continues to operate in the United States. In the United States funders do not class action litigation directly because the lawyers are ethically prohibited from sharing fees with lawyers.

One interviewee was of the view that the (US) prohibition on sharing fees with non-lawyers will likely not be a problem for incorporated legal practices. However, this was considered to be a 'good point' that requires further consideration.

Another practitioner considered that there was no prohibition equivalent to that in the US regarding the sharing of profits with non-lawyers, to their knowledge. It was noted that law firms can now be owned by non-lawyers (e.g. listed companies such as Slater & Gordon and Shine Lawyers):

> The financing arrangements that sit behind the contingency fee litigation or the firms running contingency fees are going to need some form of examination, but I don't think it's as simple as a prohibition on it.

It was noted that in blended arrangements, the financial interest of the lawyers and the funders and how to divide up the pie is an issue, that is related to conflict of interest.

There was said to also be a possible issue in relation to the taxation of income where the fees are received by the law firm, and thus liable for tax on the whole amount. It was suggested that presumably a deduction would be claimable for any portion payable by the firm to a litigation funder.

One interviewee made the following observation:

> The current weight of opinion, and my own view as well to the extent that I have thought about it, is that although the Victorian regime doesn't expressly prohibit the blended arrangement between contingency fees and funding that the ALRC recommended against, the legislation as it's drafted in Victoria does refer to the payment to the lawyer, and it seems to be contemplating that the payment to the lawyer is to reflect the risk to the lawyer of running the action on a contingent basis. The problem, therefore, is if the lawyer is funded, there is no risk for the lawyer. If the objective of the regime is to compensate the lawyer for risk, and the lawyer has no risk, the consequence must be that the lawyer should not get any or much of a contingent fee. One of my concerns is that the contingency fee is an obstacle to blended fee agreements of any kind, whether you call it portfolio funding or direct background funding or however you want to structure it. If the lawyer is not itself on risk, why should they get a payment justified by reference to the risk personally assumed by the lawyer? The follow-on consequence from that is that it will tend to mean that funders can only participate in class actions under a relatively traditional model which attaches to the transaction costs. Only one or two firms can bear the personal risk of a complex transaction without background funding, namely [x, y & z]. Those other firms can then pitch their contingency rate slightly below the total costs for the traditionally funded alternative,

> and therefore, [firm x] gets to steal all the best cases that it wants to run and that's bad for cricket. It's going to have an impact on competition and the market, and that's my big objection to contingency fee arrangements.

13.4.2 Would an adverse costs order be covered by solicitors' professional indemnity insurance?

One interviewee did not believe that an adverse costs order as a result of the statutory requirement that solicitors indemnify plaintiffs in contingency fee arrangements would be covered by professional indemnity insurance policies.

Another commented:

> Solicitors are probably going to be taking out ATE anyway, certainly I would if I was in the firing line. Maybe the argument is that because this is an assumed liability rather than arising out of their default that it does not fall within the policy.

13.4.3 Insurance for adverse costs risks

It was noted that the availability of insurance may help to offset the risk of adverse costs orders and risks of consequent poor or unethical conduct:

> Liability for adverse costs is not likely to be a problem area. The big firms will self-insure that risk and small firms will go to an adverse costs insurer to insure that risk. Unlike the current system whereby in most circumstances the cost of that insurance is borne by the group, under the contingency arrangement it will come from the group costs order, from the amount that the firm was going to make anyway. I think it will drive the price of adverse costs insurance down across the whole market because the firms will be more incentivised to buy it. That would be a positive force.
>
> Firms currently have an incentive to make cases go on forever and never settle them and run to trials and do hours and hours of work. I don't see a lot of that happening. I see plaintiff lawyers keen to resolve their cases quickly and inexpensively, because they won't run from the ball - they want to get results for their client. I don't see the adverse costs issue changing the underlying philosophy of how they're run. If it is a burden, just insure it and make it go away.

However, where the risk of adverse costs is insured, it was suggested that this may undermine the law firm's entitlement to a percentage fee justified because of that risk. It was noted that this will have to be the subject of judicial consideration.

> Where lawyers pass of the risk to an ATE insurer, I would think that it is very arguable that that defeats their entitlement to a contingent fee for the risk that they have taken on, because they haven't taken on much risk. What they would be entitled to would be some contingency fee to reflect the risk they take on for the premium for the ATE policy that might be a million dollars for a ten-million-dollar policy. The firm would get compensated for being out of its money for a million dollars, not being on the hook for ten million.
>
> I think that my expectation is that it will operate in practice in the way that the Federal Court wanted CFOs to operate. You apply early, and the court agrees that you will get one at the end and the court will either set the rate at the end or tell you now that the rate will not be more than "x". I assume that is what will happen with contingency fees in Victoria. But I assume that the court at that initial hearing will say: "you explain to me what your risk is, because I need to tell you what of your risks I think are going to attract a contingency fee." If you've got a big class action that the total potential exposure is eight million of own-side costs, and twelve million potential adverse costs order, and potential for total twenty million on hook, if the firm is funded for its own fees and protected from adverse costs, or the firm is doing it 'no win no fee' with ATE, then we might give you a contingency fee for the eight

million dollars of own costs but not for the further twelve million of adverse costs risks because it's not a risk that the firm actually wore.

I suppose the answer to all of this is to say that ultimately this is an issue for the courts to decide in the light of all that information which can only be garnered at the conclusion of the case, rather than the commencement of the case.

14 Other issues raised by interviewees in relation to the class actions regime.

14.1 Expert evidence.

I have a particular issue with the way that expert evidence is developed. If you've come from a common law background or a more conventional litigation background: if you brief a surgeon in a medical negligence case or any other expert, common lawyers will send them the question and material and leave them alone and that really is it. You don't get this situation where practitioners sit down and have multiple unrecorded conferences with experts in which they effectively mould their opinion before it's on paper and then look at multiple drafts. Regardless of what we say, the process of moulding expert evidence is quite a refined and sophisticated process that goes under the radar. But that is not just in the class action context, that's in big litigation generally. I would say that I've found that particularly on the big firm respondent side of the fence. I don't think it happens to the same extent on the plaintiff side. It's a slightly different process.

14.2 The provisions in the *Civil Procedure Act* (Vic).

They are constantly talked about in Victorian litigation between practitioners, they are useful but [have] also been abused. The courts are onto that as well. There are a couple of decisions which have warned against people utilising threats in relation to civil procedure type sanctions and personal costs orders against solicitors, not to use those as leverage in litigation. I do think it has had an impact on the culture of litigation. Solicitors are much more careful before they commence proceedings. I think they are much more cautious throughout in relation to the vehemence in which they push issues which can't be pushed. You see that in correspondence all the time between solicitors: "you've taken this position, it seems to be unreasonable, would you please have regard to your *Civil Procedure Act* obligations" and it's with the knowledge that the correspondence might end up before the court. I think people are much more cautious. On the other hand, it has been utilised to take a holier than thou approach to litigation. The culture is perhaps not permitted to be as adversarial as it perhaps should be at times. I think there are pros and cons, but it has undoubtedly affected the conduct of litigation in Victoria.

However, other practitioners considered that the provisions had little if any impact on ethical conduct.

14.3 The tax deductibility of the costs incurred by commercial defendants and insurers.

It was questioned whether the (unlimited) tax deductibility of costs incurred by corporate defendants and insurers was defensible on policy grounds, at least in those cases where substantial costs were incurred in running unmeritorious defences.

The tax deductibility of defendants and insurers on the expenses incurred in defending cases was not viewed as a problem by one interviewee. It was said to be 'the cost of doing business.'

Another interviewee was of the view that the impact of the availability of tax deductions for defence costs was problematic. It was acknowledged that this may act as an incentive for companies to incur costs in litigation.

However, it was suggested that the removal of those deductions for defendants and insurers may lead to negative consequences which should be carefully considered. On the other side of class

actions, deductions would also be available to Australian-based third-party funders who file Australian tax returns.

14.4 Settlement/litigation strategy and insurance cover.

One matter raised in discussions with several interviewees was the question of whether the change in the threshold in liability in respect of continuous disclosure obligations in shareholder cases might provide the insurers of defendants in such litigation with an avenue of denying liability under the terms of the policy for certain types of culpable conduct.

One interviewee could not recall ever being in a situation where defendants in a securities class action defended a matter in a particular way because they believed that, if it was found that the defendant had knowledge or had acted dishonestly, that might mean insurers could deny coverage. This issue is discussed further below.

14.5 The substantive law in relation to continuous disclosure.

14.5.1 Changes to the substantive law.

Opinions of interviewees on the impact of legislative changes in relation to continuous disclosure were divided.

Some were opposed to the changes. It was suggested that should the changes to continuous disclosure and misleading and deceptive conduct be made permanent, this will lead to greater confusion, frustration and uncertainty, and will be a 'recipe for more years of litigation'.

One practitioner stated:

> The knee-jerk law reform in relation to the continuous disclosure regime is inappropriate and dangerous.

For others, the legislative changes regarding continuous disclosure will not have a significant impact as long as s 1041H is retained in its current form. However, it was noted that the actual knowledge requirement would be impossible to prove, and 'a disaster for the investing public'.

Another interviewee commented:

> I think continuous disclosure is important, myself. I am not in favour of relaxing the obligations on companies to disclose things to the market.

Several interviewees were supportive of substantive reform to the law underlying security class actions:

> Where I think the problem lies is then letting people sue the company in circumstances where they never read the relevant announcement, the relevant announcement in fact made no difference to their acquisition of the shares, they were going to buy them anyway for various reasons, and most of the time they still haven't sold the shares and if you turn around six months later, the shares have gone up. [Reference was made to a particular case where a company was sued following a drop in the share price in a short-term period, whereas not long thereafter later the share price increased beyond that prevailing before the drop in price]. I think that is the area that needs to be looked at; the area of causation, absence of reliance, and, indeed, the ability of people with no particular relationship to the conduct being able to sue. I think *fraud on the market* is a problematic idea.

It was suggested that statutory reform is needed to clarify the extent to which concepts such as reliance form part of the Australian law.

14.5.2 Changes to continuous disclosure laws and the liability of insurers to indemnify.

Some interviewees considered that it is possible that the change in the law away from strict liability towards a higher proof requirement in relation to continuous disclosure might give insurers an opt out in terms of D&O and Side C cover.

It was noted that, in Australia, one explanation for the lack of cases which allege accessorial liability against directors and officers in context of shareholder claims is the need to establish knowledge by the defendant officer of the essential element of the cause of action; the *Yorke v Lucas*[59] point:

> It is no secret that plaintiff law firms generally avoid naming directors and officers because to plead their knowledge of those essential elements may be to jeopardise the availability of D&O cover.

However, others did not think that the changes would provide insurers with an opt out under the terms of the indemnity policy for intentional or fraudulent conduct:

> The insurers probably wouldn't be able to avoid most cases. Most policies these days are very beneficial to the insured, in the sense that, putting aside cases of actual fraud, deliberate dishonesty and the like, they probably won't be able to avoid liability. What tends to happen is you have a clause which says that the wrongdoing or fraud of one insured person cannot be attributed to any of the others, so if you have seven directors who are sued, and only one of them had a dishonest mind, the other six will be covered. From the insurers' point of view, the fact that they might be able to deny liability to the seventh doesn't help. I'm not sure that it would change the insurance position very much.
>
> I think the standard that is being considered for knowledge would probably fall short of what would cause problems under insurance policies, but it is an interesting issue.

The effectiveness of the temporary reforms was also queried:

> I wonder about the level of protection the amendments to the continuous disclosure requirements during COVID-19 actually give companies and their officers, though. One of the things that makes me wonder about it is that the vast majority of non-disclosure cases that I have had any involvement in, allege breach of s 674 and also breach of s 1041H … If the idea was to impose a knowledge requirement, unless that knowledge requirement is also a part of causes of action which are typically brought together with non-disclosure, have you actually lifted the common denominator? I tend to think not.
>
> Part of the problem with the reforms is that unless they tackle the misleading and deceptive conduct provisions dealing with the ASX disclosure rules and just dealing with the continuous disclosure provisions doesn't get to the heart of problem.

14.6 Subrogated claims by insurers.

Several interviewees noted that in a number of class actions arising out of various disasters the classes encompassed subrogated claims being pursued on behalf of insurers, who often contributed financially to the conduct of the proceedings. The losses for which compensation was sought often included both insured and uninsured losses.

14.7 Conferral of exclusive jurisdiction on the Federal Court in Corporations Act matters.

The *Dick Smith case*[60] was cited as an example of how the conferral of exclusive jurisdiction for *Corporations Act* matters on the Federal Court would not work.

---

[59] (1985) 158 CLR 661.

[60] *Findlay v DSHE Holdings Limited (Receivers and Managers Appointed) (In Liquidation); Mastoris v DSHE Holdings Limited (Receivers and Managers Appointed) (In Liquidation)* [2019] NSWSC 394.

Another interviewee commented:

> I'm not a fan of the Federal Court having exclusive jurisdiction over *Corporations Law* matters.

14.8 The concurrent conduct of class actions and regulatory proceedings.

The concurrent conduct of class action and regulatory proceedings before the same judge was a subject of concern for one interviewee.

> There is a difficulty in having a regime where class actions are happening at the same time as regulatory actions and people are exposed to criminal or quasi-criminal sanction. It is very difficult to deal with both those issues at the same time.

14.9 The need for more research.

Notwithstanding the excellent empirical research on class actions which has already been carried out, one interviewee was of the view that further research is required.

> One of the problems in this country is that we don't have enough academic writing on the really deep issues in class actions. We all do case commentaries and bits and pieces but there is a handful of people doing this stuff. It's a systemic weakness in this important area. It does seem to me that we suffer and we could do a lot more to get a lot more accurate data. In the parliamentary inquiry, people are debating the data which should be objectively ascertained. Have class actions tripled? It's a yes or no answer. These things can be measured and we just don't have enough resources doing it.

14.10 Better education of lawyers.

It was also suggested that there was a need for better education of lawyers.

> There is a need for better education of lawyers around their ethical obligations, and I don't think requiring a conflicts policy by a funder goes to the heart of some of the issues.

14.11 The increase in insurance premiums.

The contention that class actions have led to an increase in D&O insurance premiums was queried, on the basis that premiums were previously simply under-priced.

14.12 The role of the Federal Court *Class Action Users' Group*.

It was proposed that the Federal Court Class Action Users' Group meet more often. It was also suggested that there should also be a more receptive environment in those meetings to feedback about how the Court is performing.

According to one interviewee:

> The Federal Court user committee is a really good idea but it can't get to the real discussion because the judges are sitting there. You have a great group of people, but the participants are all acutely conscious of the matters they currently have before the judges, and so they can't be candid… It is a great shame because the idea was a great one; for the Court to hear from the consumers and the users on what could be improved and the issues that were cropping up. That was never realised because it very quickly became dominated by the very judges that were listening to it. The sense was, they wanted to tick off that everything they were doing was just fine. That is basically the answer they got because that was the answer they were looking for. If you could actually have a dialogue, there are a number of us that have very strong views about the Federal Court and what is good there and what is bad there. Now you have Supreme Court judges asking the same questions because they can see a change in user patterns.

15 Commentary

The views expressed by the members of the Federal Court Class Actions Users' Group and the Law Council Class Actions Sub-Committee provide valuable insights into the way in which the current class action regime is working and the important role of commercial litigation funding in facilitating access to justice. We are grateful to those who agreed to interviews for their perceptive and frank analyses of both the strengths and limitations of class actions and litigation funding.

There was a considerable amount of unanimity about particular problems and the need for reform in some areas. However, disparate but well-considered opinions were advanced as to how to bring about improvements.

Of particular interest is the fact that there was almost universal concern expressed in relation to the regulatory classification of litigation funding arrangements as managed investment schemes.

Although there were divided views in relation to the 'problems' of cost and delay, many if not most interviewees were of the view that these are significant matters of concern. The views expressed as to the causes and solutions provide considerable food for thought and insight into areas for possible reform.

Annexure 1

Practitioner Members of the *Federal Court Class Action Users' Committee* and/or the *Law Council Class Actions Sub-Committee*

Lachlan Armstrong SC
Amanda Banton
Jason Betts
Dr Peter Cashman
Mathew Chuk
Matthew Darke SC
Robert Dick SC
Guy Donnellan
Ross Drinnan
William Edwards
John Emmerig
John Farrell
Ray Finkelstein AO QC
Tim Finney
Georgina Foster
Damian Grave
Rebecca Gilsenan
Ben Hardwick
Wendy Harris
Sasha Ivantsoff
Robert Johnston
Professor Michael Legg
Kevin Lindgren AM QC
Colin Loveday
Odette McDonald
Richard McHugh SC
Michael Mills
Professor Vince Morabito
Andrew Morrison
Chris Pagent
Colleen Palmkvist
Bill Petrovski
Ben Phi
Bernard Quinn QC
Garry Rich SC
Alexandra Rose
Roop Sandhu
Moira Saville
Damian Scattini
Charles Scerri QC
John Sheahan SC
Ben Slade
Julie Smith
Fiona Steffensen
Belinda Thompson
Andrew Watson
Christopher Withers

Annexure 2

Interview questions

1. **The operation of the class action regime.**

- Are there any problems with the way in which the current class action regime is working?
- Are there any solutions to these problems?

2. **Litigation funding.**

- Are there any problems with the way in which commercial litigation funding is operating?
- Are there any solutions to these problems?

3. **Costs.**

- Are there any problems with the transaction costs incurred in conducting class action litigation?
- Are there any solutions to these problems?

4. **Delays.**

- Are there any problems with the time taken to resolve class actions?
- Are there any solutions to these problems?

5. **The merit of claims.**

- In your view, have class action claims been brought that lack merit?
- What could be done to deal with this?

6. **The merit of defences.**

- In your view, has the defence of any class actions lacked merit?
- What could be done to deal with this?

7. Are you aware of any ethical issues or problems arising out of the **conduct of plaintiff firms?**

8. Are you aware of any ethical issues/problems arising out of the **conduct of defence firms**?

9. Are you aware of any ethical issues/problems arising out of the **conduct of litigation funders?**

10. Are you aware of any ethical issues/problems arising out of the **conduct of counsel?**