

CLASS ACTION SETTLEMENTS IN AUSTRALIA — THE NEED FOR GREATER SCRUTINY

MICHAEL LEGG*

Class actions in Australia are frequently resolved through a court-approved settlement. Yet settlement is fraught with difficulties due to the representative nature of the class action which sees group members who are not before the court bound by the settlement. Consequently the legislature and the courts have taken steps to protect group members. This article explains and critiques those protections before suggesting reforms to ensure that class action settlements are subject to greater scrutiny. In particular, the article focuses on court-appointed costs experts to assess legal fees, an independent guardian to represent group members' interests, less use of suppression orders in relation to the details of the settlement and ensuring settlement approvals are set out in publicly available judgments.

CONTENTS

I	Introduction.....	591
II	Settlement Must Be Approved by the Court.....	593
III	Evidence to Assess the Reasonableness of Proposed Settlement.....	596
	A Reliance on Lawyers.....	596
	B Objections by Group Members.....	598
IV	Legal Fees and Litigation Funders.....	600
	A Legal Fees.....	600
	B Payments to Litigation Funders and Equalisation Orders.....	602
V	Distribution of Settlement Funds.....	605
VI	Improving Scrutiny of Class Action Settlements.....	608
	A Court-Appointed Costs Experts.....	608
	B Guardian for Group Members' Interests.....	611
	C Overuse of Suppression Orders.....	613

* BCom (Hons), MCom (Hons), LLB (UNSW), LLM (Berkeley); Associate Professor, Faculty of Law, The University of New South Wales. The author would like to thank the Hon Kevin Lindgren AM QC, Professor Vince Morabito and the two anonymous reviewers for their comments on earlier drafts of the article.

D Open Justice	616
VII Conclusion	619

I INTRODUCTION

Settlement of class actions (also referred to as representative proceedings or group proceedings)¹ is the most common way in which this form of litigation is resolved.² However, settlement in the class action context is more complicated, and more regulated, than other litigation. Complexity in class actions arises because a representative party brings proceedings on behalf of a number of similarly situated persons or entities, known as group members.³ The group members may be included in the proceedings without their consent and may not be specifically known, although they are afforded notice to allow them to opt out of the proceedings.⁴ The group members' interests are affected by the outcome of the proceedings⁵ but they are not present before the court.⁶ The proceedings rely heavily on lawyers and frequently on litigation funders to create and guide the proceedings,⁷ for which they receive

¹ Class actions have existed in Australia since 4 March 1992 when the *Federal Court of Australia Amendment Act 1991* (Cth) took effect by adding pt IVA to the *Federal Court of Australia Act 1976* (Cth) ('FCA Act'). Part IVA provides for 'representative proceedings' at the federal level. In Victoria, a procedure for 'group proceedings' was inserted in pt 4A of the *Supreme Court Act 1986* (Vic) with effect from 1 January 2000 by the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000* (Vic). In New South Wales pt 10 was inserted into the *Civil Procedure Act 2005* (NSW) by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) so as to make 'representative proceedings' available in New South Wales courts from 4 March 2011. This article focuses on the Federal Court but the analysis is equally applicable to Victoria and New South Wales.

² See Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: First Report — Class Action Facts and Figures' (December 2009) ch 5.

³ See *FCA Act* ss 33C–33D.

⁴ See *ibid* ss 33E, 33H(2), 33J, 33X(1)(a). The development of litigation funding in Australia saw group definitions employed that gave rise to a closed class where group membership was subject to entry into a funding agreement: *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275, 295 [142], [150] (Jacobson J). Where a closed class is employed the identity of group members will be known by the representative party's lawyer and the litigation funder.

⁵ *FCA Act* s 33ZB.

⁶ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 34 [50] (Gaudron, Gummow and Hayne JJ); *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 174 [31] (Merkel J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 179 [36] (Sackville J).

⁷ Lawyers are subject to ethical obligations, professional rules and supervision by the courts requiring candour, loyalty, a duty to avoid conflicts of interest and the provision of the best possible advice to the client: see, eg, *O'Reilly v Law Society of New South Wales*

substantial monetary rewards.⁸ Consequently, settlement must be approved by the court and will usually require the giving of notice to group members and a hearing as to whether the settlement is 'fair and reasonable'.⁹

While the law has responded to the group members' vulnerability with added protections, most significantly judicial oversight, there remains a need to improve and refine the protections to ensure class actions are conducted in the interests of the group members as well as the parties. This article proceeds in three sections. First, Part II provides an outline of the requirements for settlement that flow from the complexities of the class action identified above. Second, Parts III–V identify concerns about the operation of class action settlements, namely, the evidence being provided to the court not being subject to testing as normally occurs in the adversarial system, the inadequate examination of the fees being paid to lawyers and litigation funders and, lastly, a lack of transparency in the operation of the settlement distribution scheme that divides settlements amongst group members.

Finally, in Part VI four suggested reforms are put forward so as to provide courts with better information and subject settlements to greater scrutiny: court-appointed costs experts, an independent guardian for group members' interests, a more open approach to class action settlements that involves less use of suppression orders and ensuring settlement approvals are set out in publicly available judgments.

(1988) 24 NSWLR 204; Law Council of Australia, *Australian Solicitors' Conduct Rules* (at June 2011) rr 3–5, 7, 10–12; G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 5th ed, 2013) 107–17 [4.05]–[4.65]. Litigation funders are subject to significantly less oversight as they do not have ethical or professional obligations and can exclude any fiduciary duty or duty of good faith by contract. However, they are required to manage conflicts of interest: *Corporations Regulations 2001* (Cth) reg 7.6.01AB.

⁸ See, eg, Michael Legg, 'Mass Settlements in Australia' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes: ADR and Settlement of Mass Claims* (Edward Elgar, 2013) 172, 202–3 (Table 8.1: Sample Federal Court of Australia Settlements) (summarising lawyers' and litigation funders' fees in a range of class actions); Vince Morabito, 'An Empirical Study of Australia's Class Action Regimes: Second Report — Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives' (September 2010) 41 (finding that approximately 29.61 per cent of settlement funds from funded class actions in the period under study went to the litigation funder).

⁹ See *FCA Act* s 33V; Federal Court of Australia, *Practice Note CM 17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976* (Cth), 9 October 2013, cl 11.1(a) ('*Practice Note CM 17*').

II SETTLEMENT MUST BE APPROVED BY THE COURT

As I have argued elsewhere,

[s]ettlements are usually viewed as a form of contract in which the parties can settle their dispute for whatever amount they agree upon. The fairness of the settlement amount is not examined provided the parties are competent and not under any disability. In class actions the settlement amount needs to be re-viewed because the lawyer for the class is potentially an unreliable agent of the class and the class is unable to effectively monitor the lawyer. In terms of principal (class) and agent (lawyer), the principal has too little at stake to expend resources monitoring the agent and the agent has superior information.¹⁰

Furthermore,

[t]raditional adversarial positions dissipate in the settlement approval context and the judge must be alive to the possibility of conflict and collusion — class counsel may collude with defendants, and there may be conflict between the representative plaintiff and other plaintiffs, or between class categories.¹¹

The advent of litigation funding adds to, or alters, the above concerns. The funder may be able to monitor the lawyers but it may also collude with those lawyers or pressure the lawyers, and be an unreliable agent for group members. Litigation funders are profit-oriented entities that fund a portfolio of cases to further their own commercial interests, including the interests of their investors, which may conflict with the interests of group members. Settlement is prone to lead to conflicts where the terms may be acceptable to a funder who can avoid the risk of trial and invest in another case compared to the group member who has the one opportunity to obtain compensation to make them whole.¹² Consequently, it is essential that the court exercise a

¹⁰ Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 68.

¹¹ *Ibid* 70, cited in *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 317 [38] (Sackville J). See also *Mercedes Holdings Pty Ltd v Waters [No 1]* (2010) 77 ACSR 265, 268 [9] (Perram J). For discussion of agency theory applied to lawyers in class actions more generally, see, eg, John C Coffee Jr, 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions' (1986) 86 *Columbia Law Review* 669; Jonathan R Macey and Geoffrey P Miller, 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 *University of Chicago Law Review* 1.

¹² See Australian Securities and Investments Commission, *Litigation Schemes and Proof of Debt Schemes: Managing Conflicts of Interest*, Regulatory Guide 248, April 2013, 7–8

critical supervisory and protective role to ensure that a settlement is in the interests of all the group members.¹³

The *Federal Court of Australia Act 1976* (Cth) (*'FCA Act'*) therefore provides the Federal Court with the power, indeed the responsibility, to examine the terms upon which a representative proceeding is being settled or discontinued.¹⁴ Section 33V provides:

- (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
- (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

Despite the importance of settlement approval, s 33V makes no express reference to the criteria for approving settlement. Consequently the Court has developed its own criteria for approving settlement.¹⁵ The Court's approach has now been consolidated into *Practice Note CM 17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976* (Cth) (*'Practice Note CM 17'*), which sets out the test as follows:

11 Court approval of settlement

11.1 When applying for Court approval of a settlement, the parties will usually need to persuade the Court that:

- (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and
- (b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent/s.

[13]–[14], 25 [89]; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [No 2] [2013] FCA 1163 (7 November 2013) [137] (Gordon J).

¹³ *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 (12 August 2013) [8] (Jacobson, Middleton and Gordon JJ).

¹⁴ *Taylor v Telstra Corporation Ltd* [2007] FCA 2008 (13 December 2007) [56] (Jacobson J); *Mercedes Holdings Pty Ltd v Waters* [No 1] (2010) 77 ACSR 265, 268 [9] (Perram J) (dealing with discontinuances).

¹⁵ See, eg, *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR ¶41-678, 42 670 (Finkelstein J); *Williams v FAI Home Security Pty Ltd* [No 4] (2000) 180 ALR 459, 465–6 [19]–[20] (Goldberg J); *Wepar Nominees Pty Ltd v Schofield* [No 2] (2014) 99 ACSR 234, 238 [13] (Besanko J); *Hodges v Waters* [No 4] [2014] FCA 472 (13 May 2014) [14]–[16] (Gleeson J).

11.2 When applying for Court approval of a settlement the parties will usually be required to address at least the following factors:

- (a) the complexity and likely duration of the litigation;
- (b) the reaction of the group to the settlement;
- (c) the stage of the proceedings;
- (d) the risks of establishing liability;
- (e) the risks of establishing loss or damage;
- (f) the risks of maintaining a representative proceeding;
- (g) the ability of the respondent to withstand a greater judgment;
- (h) the range of reasonableness of the settlement in light of the best recovery;
- (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
- (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.¹⁶

The above factors have been applied on numerous occasions.¹⁷ Reference should also be made to s 33ZF(1), which gives the Court the power to ‘make any order [it] thinks appropriate or necessary to ensure that justice is done in the proceeding’, as this provision is relied upon by the Court to allow it to address novel issues that arise as part of a settlement.

Central to the current analysis is the settlement approval or fairness hearing at which evidence addressing the above factors and to support the making of the following orders is put before the Court: (a) approval of the proposed settlement, (b) approval of legal fees and disbursements, (c) approval of any scheme for distribution of the settlement payment, (d) confidentiality of evidence provided in support of the settlement, and (e) disposing of the proceeding (for example, by dismissing the application).¹⁸ The hearing also provides an opportunity for group members to voice objections.¹⁹

The judge considers the evidence in relation to s 33V and determines if the orders sought should be made. If the settlement is approved there will follow

¹⁶ *Practice Note CM 17* cls 11.1–11.2.

¹⁷ See, eg, *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671 (15 June 2011) [68]–[77] (Jacobson J); *Pharm-a-Care Laboratories Pty Ltd v Commonwealth [No 6]* [2011] FCA 277 (25 March 2011) [20]–[27], [37] (Flick J) (*‘Pharm-a-Care Settlement’*); *Wepar Nominees Pty Ltd v Schofield [No 2]* (2014) 99 ACSR 234, 238 [14], 242–5 [33]–[47] (Besanko J); *Hodges v Waters [No 4]* [2014] FCA 472 (13 May 2014) [14]–[16] (Gleeson J); *Lee v Bank of Queensland Ltd* [2014] FCA 1376 (16 December 2014) [15]–[16] (Collier J).

¹⁸ See *Practice Note CM 17* cl 11.3.

¹⁹ *Ibid* cl 11.4(h).

various steps to administer the settlement, including calculating each group member's claim and distributing payments.²⁰

III EVIDENCE TO ASSESS THE REASONABLENESS OF PROPOSED SETTLEMENT

The evidence as to whether a settlement should be approved chiefly comes from the lawyers for the applicant, and objections to a settlement, if there be any, come from disgruntled group members.

A Reliance on Lawyers

The Federal Court has observed that 'the task of the court in considering an application under s 33V is indeed an onerous one' and '[i]t is a task in which the court inevitably must rely heavily on the solicitor retained by, and counsel who appears for, the applicant to put before it all matters relevant to the court's consideration of the matter'.²¹

Reliance on the lawyers is premised on the duties that they owe to group members. In relation to the applicant and those group members who have retained the lawyers — that is, the clients of the lawyer — the solicitor–client relationship will give rise to fiduciary duties.²² The duty to the unrepresented or absent group members is said to be to conduct the proceedings in a way that is consistent with the interests of those group members. This duty is also said to arise as a result of a fiduciary relationship.²³ Conse-

²⁰ *FCA Act* ss 33V(2), 33ZF.

²¹ *Lopez v Star World Enterprises Pty Ltd* [1999] ATPR ¶41-678, 42 670 (Finkelstein J). See also *Pathway Investments Pty Ltd v National Australia Bank Ltd [No 3]* [2012] VSC 625 (19 December 2012) [3] (Pagone J).

²² *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

²³ *McMullin v ICI Australia Operations Pty Ltd [No 6]* (Unreported, Federal Court of Australia, Wilcox J, 27 November 1997) 3; *King v AG Australia Holdings Ltd* (2002) 121 FCR 480, 488 [24] (Moore J); *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168, 184–5 [57] (Sackville J); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 (19 December 2003) [15] (Merkel J); *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 (21 January 2009) [8] (Stone J). The decisions tend to assume, rather than decide, that a fiduciary relationship exists, but applying the criteria for establishing a fiduciary relationship according to the High Court of Australia, it is clear that there is vulnerability of the group member to the lawyer's power or vulnerability necessitating reliance: see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 142 (Dawson J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 200–1 (Toohey J); *Breen v Williams* (1996) 186 CLR 71, 133–4 (Gummow J). There is also a power held by the lawyer to affect the interests of the group members in a legal or practical sense: see *Hospital*

quently, the lawyer is required to act in good faith and avoid conflicts of interest in relation to both clients and absent group members.

A practice has developed where the solicitor for the applicant will provide an affidavit in which they address each of the above factors listed in *Practice Note CM 17* relevant to the instant litigation. Counsel for the applicant will also provide a written opinion as to the fairness and reasonableness of the proposed settlement that focuses on prospects of success of the litigation. The opinion is exhibited to an affidavit made by the solicitor but includes an application for an order that the exhibited opinion be confidential and not required to be served on the respondents so as to maintain the client's legal privilege which attaches to the advice. The opinion is then made available to the judge at the return of the motion.²⁴ As a result the Court then has evidence, albeit untested and uncontradicted, upon which it can make its findings.

Attempts have been made to suggest that

the respondent's lawyers should also bear some responsibility for ensuring that the court has all the information that objectively describes the merits of the case and brings to the court's attention the obstacles to recovery and the benefits to be derived from the proposed settlement.²⁵

Indeed, in *Pathway Investments Pty Ltd v National Australia Bank Ltd [No 3]* ('NAB Shareholder Settlement'),²⁶ the Victorian Supreme Court went further. The Court distinguished between the practice of providing it with submissions on the settlement and an opinion, akin to that of an expert witness, which candidly evaluated the strengths and weaknesses of a party's case. The Court expressed a preference for the latter.²⁷

Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 68 (Gibbs CJ), 96–7 (Mason J). See also Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties' (2014) 37 *University of New South Wales Law Journal* 914.

²⁴ See, eg, *Wright Rubber Pty Ltd v Bayer AG [No 3]* [2011] FCA 1172 (20 October 2011) [9] (Tracey J); *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 (1 July 2011) [17]–[19], [25]–[27] (Emmett J); *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671 (15 June 2011) [154]–[162] (Jacobson J) (which also included an opinion from an expert witness); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029 (21 September 2010) [14] (Finkelstein J) ('*Multiplex Shareholder Settlement*'). The absence of an opinion from counsel has been raised as a 'matter of concern': *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [No 6]* [2013] FCA 447 (17 May 2013) [23] (Jessup J).

²⁵ *Multiplex Shareholder Settlement* [2010] FCA 1029 (21 September 2010) [4] (Finkelstein J).

²⁶ [2012] VSC 625 (19 December 2012).

²⁷ *Ibid* [3], [6] (Pagone J).

Despite these observations, anecdotal evidence suggests that respondents rarely actively gather evidence or make submissions in relation to a settlement, but rather, simply express their support.²⁸ An exception appears to be *Richards v Macquarie Bank Ltd [No 4]* ('*Storm Financial Settlement*'), where the Court received opinions from counsel for both the applicant and the settling respondent.²⁹ However, whether counsel for the respondent is providing an opinion, or submissions, or simply acquiescing, the approval process takes place without an opposing voice seeking to identify aspects of the settlement that are unfair or unreasonable. Both the applicant and the respondent seek to have the settlement that they have negotiated and agreed upon approved by the Court. Neither seeks to actively oppose or critique the settlement from the perspective of group members. The adversarial process that relies on each party bringing forward the evidence that supports their case does not apply, thus making the onerous nature of the judicial task apparent. It also raises for consideration how courts might receive better information and settlements be subject to greater scrutiny.

B *Objections by Group Members*

One obvious source of information is the reaction of the group members to the settlement. The lack of objections by group members has been seen as a sign that a settlement is not opposed and is a factor in favour of the settlement being fair and reasonable.³⁰ However, '[w]here some group members object to a settlement or compromise and state their reasons for doing so, it is appropriate for the Court to have regard to those reasons as a point of reference by which to determine matters of fairness and reasonableness'.³¹

Reliance on a lack of objections has been identified as problematic because silence may not equate to acquiescence but rather reflect the high cost of objecting compared to the benefit to be obtained, or result from group

²⁸ See, eg, *Pharm-a-Care Settlement* [2011] FCA 277 (25 March 2011) [49] (Flick J).

²⁹ [2013] FCA 438 (14 May 2013) [13] (Logan J). In this case Australian Securities and Investments Commission ('ASIC') intervened and also provided submissions on the settlement.

³⁰ *Clime Capital Ltd v Credit Corp Group Ltd [No 3]* [2012] FCA 218 (13 March 2012) [23] (Nicholas J): 'Another matter of significance is the absence of any objection to the proposed settlement agreement from any group members. The authorities make it clear that this is a factor which should be given considerable weight.'

³¹ *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 (1 July 2011) [4] (Emmett J).

members being unaware of the settlement, having insufficient information or miscomprehending the settlement notice.³²

Some Federal Court judges have refined the understanding of a lack of objections. In *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* ('*Multiplex Shareholder Settlement*'), Finkelstein J observed that it is dangerous to assume that silence by group members equals assent but, in the instant case, the lack of objections could be given more weight than usual as most group members were institutional investors who had in-house legal departments, were experienced investors and were better placed than the ordinary investor to assess the benefits of the settlement.³³ In *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* ('*Corrugated Cardboard Cartel Settlement*'), although it was acknowledged that 'some Group Members may have only a small stake in the action', comfort was obtained from all group members being 'business owners who should be able to assess the benefits (or disadvantages) of the settlement'.³⁴

While better resourced and more informed group members are better placed to object if they wish, the collective action problem persists in that the objector incurs costs alone in aid of a benefit that accrues to all group members. The costs for institutional investors may be greater than for individuals as they must give up the relative anonymity provided to group members and take centre stage in a settlement hearing. Institutional investors such as banks and insurance companies may not wish to be seen as litigating against other corporations with whom they may have a current or future relationship, there may be concerns at being identified as having made an unsuccessful investment, or more general reputational concerns such as being associated with class action litigation.³⁵

When objections are made they usually occur without legal assistance and are expressed to be against the amount of the settlement, the amount of legal

³² See Vince Morabito, 'Judicial Responses to Class Action Settlements That Provide No Benefits to Some Class Members' (2006) 32 *Monash University Law Review* 75, 88–9; Christopher R Leslie, 'The Significance of Silence: Collective Action Problems and Class Action Settlements' (2007) 59 *Florida Law Review* 71; Catherine Piché, 'A Critical Reappraisal of Class Action Settlement Procedure in Search of a New Standard of Fairness' (2009) 41 *Ottawa Law Review* 25, 36–7.

³³ [2010] FCA 1029 (21 September 2010) [23] (Finkelstein J).

³⁴ [2011] FCA 671 (6 December 2011) [124] (Jacobson J).

³⁵ Michael Legg, 'Institutional Investors and Shareholder Class Actions: The Law and Economics of Participation' (2007) 81 *Australian Law Journal* 478, 481–2.

fees or due to some idiosyncratic feature of the group member's claim.³⁶ These objections almost never result in a settlement being rejected.³⁷ Often this is because the objection involves a misunderstanding or is put forward without any evidence, compared to the affidavits on prospects of success, fairness of settlement and reasonableness of fees.³⁸

A reliance on a lack of objections and the poor quality of the objections that are made suggests group members need assistance.

IV LEGAL FEES AND LITIGATION FUNDERS

The main deductions from a class action settlement are the fees paid to the lawyers for the applicant and the litigation funder. While the lawyers' and funder's interests may be aligned with the interests of the group members during the litigation and in seeking to maximise the compensation obtained through any settlement, that alignment may cease in relation to the payment of fees. Payments from a settling respondent that go to the lawyers or funder are not then available for group members. This is especially the case in relation to litigation funding as the fee is taken out of the group members' recovery.

A Legal Fees

When a settlement is reached it is usual for it to include the payment of the legal costs incurred by the applicant. Australian courts have power to regulate costs agreements between a solicitor and a client.³⁹ In the class action context, the power in s 33ZF of the *FCA Act* has been interpreted as allowing for the

³⁶ See *Pharm-a-Care Settlement* [2011] FCA 277 (25 March 2011) [34]–[35] (Flick J); *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 (1 July 2011) [31]–[38] (Emmett J); *Casey v DePuy International Ltd [No 2]* [2012] FCA 1370 (4 December 2012) [12], [19] (Buchanan J).

³⁷ The only case that the author is aware of where objections by group members were successful in having a settlement rejected was *Tongue v Council of The City of Tamworth* [2004] FCA 972 (28 July 2004) [21] (Allsop J), where over half of the group members opposed the settlement.

³⁸ See, eg, *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 (1 July 2011) [33] (Emmett J), where a complaint about legal costs was rejected when compared to the affidavit of an independent costs lawyer. A complaint about the loss of a cross-claim against auditors was also rejected since the proposed claim was from the company for an indemnity and would not increase the quantum of the claim: at [37].

³⁹ *Woolf v Snipe* (1933) 48 CLR 677, 678–9 (Dixon J).

supervision of costs agreements with lawyers.⁴⁰ The reason for court supervision of costs arises because the solicitor seeks costs for themselves for which there is no contradictor.⁴¹ Accordingly, it has been accepted that the amount to be paid to the lawyers, including disbursements, must be approved by the Court.⁴²

To assist the Court in determining that the costs amount payable to the lawyers should be approved it has become common practice to supply an affidavit from an independent costs expert who is able to opine as to the reasonableness of the costs and disbursements incurred by the lawyers for the applicant.⁴³ The Court places significant reliance on the evidence of the independent costs expert but it is the judge who must find that the legal fees and disbursements are reasonable.⁴⁴ The judge will also consider the general circumstances of the litigation. In *Dorajay Pty Ltd v Aristocrat Leisure Ltd* ('*Aristocrat Shareholder Settlement*'), Stone J referred to 'the duration of the proceeding, ... the complexity of the matter and novelty of the issues raised, and what senior counsel for the applicant described at the trial as the "years of interlocutory skirmishing" leading up to the hearing'.⁴⁵

The above approach to legal fees has the advantage that it requires Court approval and thus justification must be provided. The downside is not that a review of legal fees is conducted by a costs expert, but that the costs expert is retained by the lawyers seeking the fee award. The expert may become dependent on the lawyers for repeat work, which is unlikely to continue if legal fees are substantially reduced. Adversarial bias in relation to experts, including selection bias whereby an expert is chosen because their views will

⁴⁰ *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 175–6 [35]–[37] (Merkel J).

⁴¹ *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013) [27] (Gordon J) ('*GPT Shareholder Settlement*'), drawing on the principles for a taxation of costs set out in *Redfern v Mineral Engineers Pty Ltd* [1987] VR 518, 523 (Tadgell J).

⁴² *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 94 FCR 167, 176–7 [39] (Merkel J); *Reiffel v ACN 075 839 226 Pty Ltd [No 2]* [2004] FCA 1128 (1 September 2004) [11] (Gyles J). For a contrary position, see *Clarke v Great Southern Finance Pty Ltd (rec and mgr apptd) (in liq)* [2014] VSC 516 (11 December 2014) [137], [150] (Croft J).

⁴³ *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 322 [59] (Sackville J).

⁴⁴ *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19 (21 January 2009) [30] (Stone J); *GPT Shareholder Settlement* [2013] FCA 626 (21 June 2013) [35] (Gordon J).

⁴⁵ [2009] FCA 19 (21 January 2009) [31]. See also *Taylor v Telstra Corporation Ltd* [2007] FCA 2008 (13 December 2007) [73], where Jacobson J accorded weight to the fact that 'settlement was reached only about two weeks before the hearing [and] a substantial amount of work ha[d] gone into the preparation of the case'.

support the party's case, has been of longstanding concern amongst the courts.⁴⁶

In *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* ('GPT Shareholder Settlement'), Gordon J highlighted a number of concerns with the approach taken by the costs expert in relation to the lawyer's fee request, including insufficient information to determine if the fees and disbursements were reasonable, a lack of explanation as to why the amount claimed was substantially in excess of the amount estimated in the legal costs agreement, and why no reductions had been made to costs where the number or seniority of solicitors performing a task was excessive.⁴⁷ To address the above concerns, orders were made for further information to be provided to a court registrar who subsequently reported to the Court.⁴⁸ However, from an adversarial bias perspective it is interesting to note that the costs expert in the *GPT Shareholder Settlement* had been retained by the same law firm in at least four other class actions.⁴⁹

The process could be improved without any increase in cost if the Court appointed the costs expert and the expert owed their allegiance solely to the Court. This reform is discussed further below.⁵⁰

B *Payments to Litigation Funders and Equalisation Orders*

In a typical litigation funding arrangement, the funder (usually a commercial entity) will enter into an agreement with the applicant and some or all of the group members. The funder pays the costs of the litigation (such as the lawyer's fees, disbursements, project management and claim investigation costs) and usually accepts the risk of paying the respondent's costs in the event that the claim fails by providing the applicant with an indemnity. In return, if the claim is successful, the funder will receive a percentage (typically 30–40 per cent) of any funds recovered by the litigants either by way of settlement or

⁴⁶ See, eg, New South Wales Law Reform Commission, *Expert Witnesses*, Report No 109 (2005) 71–3 [5.5]–[5.13]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 611 [58] (Heydon J).

⁴⁷ [2013] FCA 626 (21 June 2013) [38]–[52].

⁴⁸ *Ibid* [53]. See also *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [No 2] [2013] FCA 1163 (7 November 2013).

⁴⁹ See *Earglow Pty Ltd v Sigma Pharmaceuticals Ltd* [2012] FCA 1496 (19 December 2012); *Kirby v Centro Properties Ltd* [No 6] [2012] FCA 650 (19 June 2012) ('*Centro Shareholder Settlement*'); *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 (1 July 2011); *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 (20 May 2011).

⁵⁰ See Part VI(A) below.

judgment, and the litigants will assign the funder the benefit of any costs order they receive.⁵¹

The ability to supervise or alter contractual relations involving a litigation funder is less clear compared to the position of lawyers as the funder is not an officer of the court and the fee arrangements are not amenable to the taxation of costs process.⁵² Yet the funder may have greater conflicts of interest as their recovery directly reduces the compensation payable to the group members. Nonetheless, the fees charged by litigation funders have rarely been examined when a settlement is approved. There are two exceptions: *Pharm-a-Care Laboratories Pty Ltd v Commonwealth [No 6]* ('*Pharm-a-Care Settlement*')⁵³ and the *Storm Financial Settlement*.⁵⁴

In the *Pharm-a-Care Settlement* an issue arose 'as to the extent to which [the] Court should scrutinise both the quantum of monies proposed to be paid to a litigation funder and the percentage that that amount bore to the overall settlement'⁵⁵ but Flick J did not conduct an examination, preferring instead to observe that the percentage to be paid to the litigation funder was below what had been charged in other class actions.⁵⁶ Significantly, though, Flick J did find that the Court had power pursuant to s 33ZF to approve a settlement subject to the litigation funder's fee being limited to a particular amount.⁵⁷

The *Storm Financial Settlement* saw the issue of litigation funding examined by the Federal Court,⁵⁸ and, on appeal, by the Full Federal Court.⁵⁹ However, the issue was more novel as it dealt with whether a 35 per cent uplift in recovery for group members who self-financed the cost of prosecuting their class action, over those who did not, could be approved as part of a settlement. No third party litigation funder was involved. The focus was on whether adequate notice had been provided and the fairness of the distribu-

⁵¹ Michael Legg, 'Reconciling Litigation Funding and the Opt Out Group Definition in Federal Court of Australia Class Actions — The Need for a Legislative Common Fund Approach' (2011) 30 *Civil Justice Quarterly* 52, 56.

⁵² See, eg, *Kirby v Centro Properties Ltd* [2009] FCA 695 (26 June 2009) [42] (Ryan J).

⁵³ [2011] FCA 277 (25 March 2011).

⁵⁴ [2013] FCA 438 (14 May 2013).

⁵⁵ [2011] FCA 277 (25 March 2011) [38] (Flick J).

⁵⁶ *Ibid* [39].

⁵⁷ *Ibid* [42].

⁵⁸ [2013] FCA 438 (14 May 2013).

⁵⁹ *ASIC v Richards* [2013] FCAFC 89 (12 August 2013).

tion of compensation within the group.⁶⁰ However, the Full Federal Court did observe that the amount a litigation funder charges is ‘a result of a number of complicated and interconnecting factors’, but in the instant case the evidence adduced to support the imposition of a premium of 35 per cent was insufficient.⁶¹ Further a return on investment of 525 per cent was disproportionate to the funds provided.⁶² These observations may suggest a greater willingness to test the reasonableness of a funder’s fee.

While the Court has been slow to conduct an examination of the fee paid to the litigation funder, it has endorsed the use of a ‘funding equalisation factor’. In class actions involving funded and unfunded group members so that the funded group members are contractually obliged to pay a percentage of their recovery to a litigation funder but the unfunded group members are not, the applicant will often seek an order for a funding equalisation factor. Such an order operates so as to deduct from a non-funded group member’s entitlement an amount equal to the commission payable to the litigation funder by the funded group members which is then redistributed across all group members.⁶³ The funding equalisation factor is argued to prevent unfunded group members free-riding — that is, obtaining the benefit of the proceedings without contributing to their cost. However, the Court’s power to make such awards is problematic. Presumably ss 33V(2) and 33ZF may be pressed into service but the requirements to do what is ‘just’ would require more than a simple redistribution of funds based on a free-rider argument.

The funding equalisation factor has some similarities with the common fund approach used in the United States, where the lawyers are awarded a percentage or component of the settlement fund created as a result of the class action.⁶⁴ However, the common fund approach involves an assessment by the

⁶⁰ Ibid [40]–[43] (Jacobson, Middleton and Gordon JJ).

⁶¹ Ibid [52].

⁶² Ibid [49].

⁶³ *Aristocrat Shareholder Settlement* [2009] FCA 19 (21 January 2009) [17] (Stone J); *Multiplex Shareholder Settlement* [2010] FCA 1029 (21 September 2010) [27] (Finkelstein J); see generally at [26]–[28]. See also *GPT Shareholder Settlement* [2013] FCA 626 (21 June 2013) [55]–[61] (Gordon J), where approval of a litigation funder taking a commission from unfunded group members’ recoveries equivalent to the amount agreed to be paid by funded group members was refused by the Court. Instead the commission was to be deducted from unfunded group members’ recoveries and added back to the settlement sum and distributed pro rata to all group members. The approach that was rejected was utilised in *NAB Shareholder Settlement* [2012] VSC 625 (19 December 2012) [20] (Pagone J).

⁶⁴ See generally Legg, ‘Reconciling Litigation Funding and the Opt Out Group Definition’, above n 51, 63–9.

Court of what is a reasonable fee.⁶⁵ In Australia the unfunded group members are saddled with whatever percentage the funded group members agree to without any judicial oversight. This is in a context where the litigation funder lacks the ethical, professional and fiduciary obligations that apply to a lawyer.

It is to be expected that further litigation funding models or mechanisms will develop in the future.⁶⁶ For example, applications have been filed in the Federal Court seeking orders for the appointment of an entity as the funder of the class action on terms acceptable to that entity, including the fees to be charged, at the commencement of the proceedings.⁶⁷ The applications seek to remove the need for a litigation funder to contract with a group member and, through court order, make all group members liable to pay the funder's fees.

It is to be hoped that the Full Federal Court's decision in *Australian Securities and Investments Commission v Richards*⁶⁸ creates the impetus for courts to subject the terms of funding, especially when imposed on group members through court order, to greater scrutiny as part of the settlement approval process. However, this requires someone to raise the issue of the terms of funding and for the court to address it in an open manner as is discussed further below.⁶⁹

V DISTRIBUTION OF SETTLEMENT FUNDS

In the *Corrugated Cardboard Cartel Settlement* the five main features of a distribution scheme were set out:

The first is the appointment of [the applicant's lawyers] as Court appointed administrator. The second is the establishment of a procedure for the identification and verification of Group Members who are entitled to participate in the Settlement. The third is the assessment of claims by Participating Group Members and the identification of the formula by which claims are to be assessed

⁶⁵ *Private Securities Litigation Reform Act of 1995*, 15 USC § 78u-4(a)(6) (2012); United States Supreme Court, *Federal Rules of Civil Procedure* (at 1 December 2013) r 23(h).

⁶⁶ See Ben Slade, 'Developments in Funded Shareholder Class Actions', (Paper presented at The University of New South Wales Continuing Legal Education, Allens Linklaters, Sydney, 29 August 2013) discussing past, present and potential future approaches to funding shareholder class actions.

⁶⁷ See *Inabu Pty Ltd*, 'Amended Interlocutory Application', Submission in *Inabu Pty Ltd v Leighton Holdings Ltd*, NSD 2244/2013, 6 February 2014; *Blairgowrie Trading Ltd*, 'Interlocutory Application', Submission in *Blairgowrie Trading Ltd v Allco Finance Group Ltd*, NSD 1609/2013, 8 May 2014.

⁶⁸ [2013] FCAFC 89 (12 August 2013).

⁶⁹ See Parts VI(B)–(D) below.

and determined. The fourth is the establishment of a dispute resolution mechanism. The fifth is the provision for supervision of the Scheme by the Court.⁷⁰

The Court will maintain jurisdiction over settled proceedings to be able to monitor and approve steps involving the calculation and distribution of group members' claims and payment to the solicitors (and possibly third parties such as accountants) undertaking the settlement administration.⁷¹ While the distribution of the settlement is a mechanical task it is also very significant in terms of the fairness of a settlement as it determines whether participation in the settlement is allowed and the actual payment to be received.

In a settlement distribution scheme often the most difficult aspect is the calculation of the group members' loss.⁷² In shareholder class actions based on breaches of disclosure to the market it is necessary to calculate the 'true' value of the securities compared to what they were trading at.⁷³ In cartel class actions it is necessary to calculate the effect of the cartel on prices so as to identify the overcharge paid by group members.⁷⁴ As a result some form of statistical analysis is employed to devise a model for calculating loss. However, settlement distribution schemes and the models they employ often 'operate[] according to broad rules of thumb'⁷⁵ which frequently will not reflect the outcome for group members had the litigation been resolved through a trial with damages awarded to each group member according to their actual loss.⁷⁶ Nonetheless, settlement distribution schemes cannot ignore material differences in group members' claims that go to a claim's prospects of success and

⁷⁰ [2011] FCA 671 (15 June 2011) [23] (Jacobson J). See also *Aristocrat Shareholder Settlement* [2009] FCA 19 (21 January 2009) [20] (Stone J).

⁷¹ *Pharm-a-Care Laboratories Pty Ltd v Commonwealth* [No 9] [2011] FCA 1111 (29 September 2011) [17] (Flick J). The fees earned in administering the fund can be very lucrative. In the *Aristocrat Shareholder Settlement* the applicant's lawyers were paid about \$960 000: Michael Legg, 'The Aristocrat Leisure Ltd Shareholder Class Action Settlement' (2009) 37 *Australian Business Law Review* 399, 405.

⁷² *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* [No 2] (2006) 236 ALR 322, 337–8 [46] (Jessup J).

⁷³ *Clime Capital Ltd v Credit Corp Group Ltd* [No 3] [2012] FCA 218 (13 March 2012) [11] (Nicholas J). See also Bernard Murphy and Andrew Watson, 'Negotiations and Settlement — 2010 Multiplex Debrief' (Paper presented at the LexisNexis Shareholder Class Action Masterclass, Sydney, 18 October 2010) 6–9; Jonathan Beach, 'Class Actions: Some Causation Questions' (2011) 85 *Australian Law Journal* 579, 588–9.

⁷⁴ *Corrugated Cardboard Cartel Settlement* [2011] FCA 671 (15 June 2011) [40]–[52] (Jacobson J); Beach, above n 73, 589–90.

⁷⁵ *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd* [No 2] (2006) 236 ALR 322, 341 [60] (Jessup J).

⁷⁶ *Ibid* 341–2 [60].

the quantum of any recovery.⁷⁷ This is illustrated by *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson*, a product liability class action concerning the drug Vioxx,⁷⁸ where a settlement was devised after a trial and an appeal had been determined. The Full Federal Court found that the representative party, Mr Peterson, could not recover due to certain risk factors attributable to his personal circumstances.⁷⁹ However, group members without those risk factors may have been able to recover.⁸⁰ The settlement agreement created only two pre-requisites to recovery: the group member had to have (1) suffered a heart attack or sudden cardiac death and (2) been prescribed Vioxx.⁸¹ The settlement ignored the strength of group members' claims and treated strong and weak claims alike. As a result,

[u]nder the proposed settlement, for group members whose circumstances are similar to those of the applicant, the payment of the monetary sum proposed would constitute a windfall. ... On the other hand, for a group member who might, consistently with the reasons of the Full Court, anticipate a favourable judgment, the settlement would represent an obvious injustice.⁸²

Jessup J refused to grant approval of the settlement on the basis that it was unfair and unreasonable for the representative party, Mr Peterson, to compromise the claims of those group members who did not have the risk factors on the basis that it enabled the claims of the 'less deserving group members' to be settled.⁸³

There is a trade-off between precision and cost that must be managed so as to ensure settlement funds are distributed fairly. As Jessup J recognised in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* ('*Vitamins Cartel Settlement*'), fairness and reasonableness of a settlement requires consideration of not just the overall settlement sum, 'but also the structure

⁷⁷ *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [No 6]* [2013] FCA 447 (17 May 2013) [17], [20] (Jessup J).

⁷⁸ (2011) 196 FCR 145.

⁷⁹ *Ibid* 177 [120], 178 [124] (Keane CJ, Bennett and Gordon JJ). The heart attack risk factors were hypertension, hyperlipidemia, obesity, the presence of left ventricular hypertrophy and a history of smoking: at 177 [120].

⁸⁰ *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [No 6]* [2013] FCA 447 (17 May 2013) [9]–[10], [12] (Jessup J).

⁸¹ *Ibid* [13].

⁸² *Ibid* [20].

⁸³ *Ibid*.

and workings of the scheme by which that sum is proposed to be distributed among group members'.⁸⁴

While the importance of the Court reviewing the operation of the settlement distribution scheme is acknowledged, there still remains a need for someone to assist the Court in scrutinising how the distribution scheme operates and for the mechanics of the scheme to be available for public scrutiny.

VI IMPROVING SCRUTINY OF CLASS ACTION SETTLEMENTS

To respond to the concerns raised above, four reforms are advocated. They may be divided into two categories. To aid in the internal functioning of settlement approval process it is suggested that the costs expert who opines on the reasonableness of the legal fees sought should be appointed by the Court, rather than being appointed by the lawyers whose fees are subject to review. Further, within the settlement approval process an independent person should be appointed to act as a guardian for group members' interests and to provide an independent perspective to the Court.

The second category of reforms aims to improve the external scrutiny of class action settlements. The need for external scrutiny arises not just because there are absent group members, but flows from the concept of open justice and the idea that class actions have a public interest element that makes the outcome in a class action of concern beyond just the parties. Two areas of concern in the Federal Court are, first, orders that suppress the evidence which supported the approval of the settlement, and second, reasons for the approval of a settlement that are not publicly available or are unduly abbreviated.

A Court-Appointed Costs Experts

A court-appointed expert is an expert appointed by the court, rather than the usual situation where experts are retained by the parties. The expert is appointed to assist the court.⁸⁵ Court-appointed experts have a long history

⁸⁴ (2006) 236 ALR 322, 336 [41] (Jessup J). The settlement distribution scheme was also produced as a schedule to the judgment: at 360–75.

⁸⁵ Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011) 106.

but were rarely used in modern litigation until recently.⁸⁶ Court-appointed experts have been used in a range of circumstances and are indeed common in some jurisdictions such as the New South Wales Land and Environment Court and the Family Court of Australia.⁸⁷ Moreover, in class actions the approach was considered in the Kilmore East-Kinglake Bushfire class action as a method for assisting the judge in relation to scientific and technical issues⁸⁸ and, as explained above, in the *GPT Shareholder Settlement* a court registrar was asked to perform a role similar to that of a court-appointed expert in relation to legal costs.⁸⁹ The reasons for utilising a court-appointed expert are usually expressed to be savings of time and cost, greater independence of the expert and as an aid to understanding for the court.⁹⁰ The main controversies around court-appointed experts are that they may replace contested expert evidence and that their use may be seen as replacing the judge as the ultimate decision-maker.⁹¹

The modest proposal put forward here is that in the class action settlement context a court-appointed costs expert should be employed pursuant to the *Federal Court Rules 2011* (Cth) ('*FCA Rules*').⁹² Rather than have the lawyers who are seeking to have their legal fees approved by the Court being responsible for retaining a costs expert to provide evidence of the reasonableness of the fee sought, the Court would retain the costs expert to perform this function.

The main reason for recommending that the costs expert be appointed by the Court is that it enhances the expert's independence. In *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd*, Sir Thomas Bingham MR sitting on the United Kingdom Court of Appeal observed:

⁸⁶ Ian Freckelton and Hugh Selby, Thomson Reuters, *Expert Evidence* (at September 2014) [6.0.01]; Gary Edmond, 'After Objectivity: Expert Evidence and Procedural Reform' (2003) 25 *Sydney Law Review* 131, 143.

⁸⁷ See Family Court of Australia, *The Changing Face of the Expert Witness* (2002) 14–15; Chief Judge Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 *Journal of Environmental Law* 365, 381–2.

⁸⁸ *Matthews v SPI Electricity Pty Ltd [Ruling No 19]* [2013] VSC 180 (18 April 2013).

⁸⁹ See above n 48 and accompanying text.

⁹⁰ See, eg, Justice G L Davies, 'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (2006) 12 *Journal of Judicial Administration* 155, 166–7.

⁹¹ Legg, *Case Management and Complex Civil Litigation*, above n 85, 109.

⁹² See *FCA Rules* r 23.01. Rule 1.40 gives the Court the discretion to exercise a power 'at any stage of the proceedings' and 'on its own initiative'.

For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties. There must be at least a reasonable chance that an expert appointed by the court, with no axe to grind but a clear obligation to make a careful and objective evaluation, may prove a reliable source of expert opinion.⁹³

Greater independence of the costs expert would mean that both the Court and group members could have greater confidence in the opinion provided, although the Court would still need to give its approval. The judge is not replaced by the costs expert; rather, the judge receives independent evidence to aid in the duties he or she must fulfil. Moreover, the approach would bolster the credibility of the class action as the costs to be paid to the plaintiff's lawyers would be the subject of independent verification.

In *Tyler v Thomas*, Branson J, as part of a Full Federal Court, reviewed the authorities on court-appointed experts and set out a number of guiding principles as to the circumstances in which the discretionary power of the Court should be exercised.⁹⁴ Central to the discretion was that the power to appoint an expert was 'for the purpose of ensuring the just, efficient and cost-effective management of litigation'.⁹⁵ The proposed use of a court-appointed costs expert would not add to the cost of litigation or be less efficient than the current approach where a single expert is already utilised. Further, the speciality of legal costs is not an area where duelling experts is a necessity as shown by the current practice.⁹⁶ The principles to be applied and the analysis that is undertaken can be readily comprehended by legal practitioners and judges.

⁹³ [1996] 1 WLR 1534, 1542 (Sir Thomas Bingham MR for Sir Thomas Bingham MR, Gibson and Schiemann LJ). See also *Newark Pty Ltd v Civil & Civic Pty Ltd* (1987) 75 ALR 350, 351 (Pincus J): 'Experience suggests that too often expert witnesses display a degree of partiality, whereas the court-appointed expert may be expected to be indifferent as to the result of the case.'

⁹⁴ (2006) 150 FCR 357, 361–6 [15]–[30].

⁹⁵ *Ibid* 365 [29].

⁹⁶ Michael Legg and Ross McInnes, *Annotated Class Actions Legislation* (LexisNexis Butterworths, 2014) 233 [22.19].

B Guardian for Group Members' Interests

The responsibility for the approval of a settlement, including protecting group members' interests, is an onerous and important role for the presiding judge. A potential reform to aid the judge is the use of a guardian for group members.⁹⁷ This reform deserves to be reiterated because it allows for the Court to create an adversary contest⁹⁸ which would otherwise be lacking, for representation of the interests of absent group members, monitoring of the parties, and assistance to the Court in understanding the mechanics and ramifications of the settlement.⁹⁹ These are issues which continue to present themselves in the class action context because of the complexities explained at the outset of this article.

In Australia in both *King v AG Australia Holdings Ltd* ('GIO Shareholder Settlement')¹⁰⁰ and the *Aristocrat Shareholder Settlement*,¹⁰¹ a 'contradictor' was appointed to represent the putative group members who sought to be included in the settlement but had failed to return a necessary form by the specified date.¹⁰² The contradictor was thought necessary because the lawyers for the applicant and group members were arguing against inclusion. The contradictor was a senior barrister who was paid by the lawyers for the applicants.¹⁰³ In the *Storm Financial Settlement* a settlement was challenged successfully on appeal by the Australian Securities and Investments Commission ('ASIC'), which intervened in the proceedings to object to the payment of

⁹⁷ See Sylvia R Lazos, 'Abuse in Plaintiff Class Action Settlements: The Need for a Guardian during Pretrial Settlement Negotiations' (1985) 84 *Michigan Law Review* 308; Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231, 249; Edward H Cooper, 'The (Cloudy) Future of Class Actions' (1998) 40 *Arizona Law Review* 923, 950; Edward Brunet, 'Class Action Objectors: Extortionist Free Riders or Fairness Guarantors' (2003) *University of Chicago Legal Forum* 403, 464–71; Federal Judicial Center, *Manual for Complex Litigation, Fourth* (2004) § 21.644; Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347, 380; American Law Institute, *Principles of the Law: Aggregate Litigation* (2010) § 3.09.

⁹⁸ See Judith Resnik, 'Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation' (2000) 148 *University of Pennsylvania Law Review* 2119, 2161.

⁹⁹ Brunet, above n 97, 466–7.

¹⁰⁰ [2003] FCA 1420 (5 December 2003).

¹⁰¹ (2008) 67 ACSR 569.

¹⁰² *GIO Shareholder Settlement* [2003] FCA 1420 (5 December 2003) [15] (Moore J); *Aristocrat Shareholder Settlement* (2008) 67 ACSR 569, 574 [11] (Stone J).

¹⁰³ *GIO Shareholder Settlement* [2003] FCA 1420 (5 December 2003) [15] (Moore J); *Aristocrat Shareholder Settlement* (2008) 67 ACSR 569, 574 [11] (Stone J).

a 35 per cent uplift to group members who had made a contribution to legal costs.¹⁰⁴ Although 28 notices of objection to the settlement were filed by group members¹⁰⁵ it was only ASIC that appeared at the hearing and made submissions explaining the objections to the settlement. Without ASIC's intervention a 'substantial wrong' would not have been identified.¹⁰⁶

It has been accepted that in the analogous area of court approval of a pecuniary penalty agreed between a regulator and a respondent that a contradictor may be beneficial. In *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd*, the Federal Court was asked to approve an agreed penalty following breaches of the *Petroleum Retail Marketing Sites Act 1980* (Cth).¹⁰⁷ At first instance, Gyles J referred a question to the Full Federal Court regarding whether his Honour was bound by the decision in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*.¹⁰⁸ In the course of giving its reasons, the Full Federal Court observed that if the absence of a contradictor inhibits the Court in the performance of its duties, it may seek the assistance of an *amicus curiae* or of an individual or body prepared to act as an intervener.¹⁰⁹

A guardian or contradictor could be usefully employed in Australian class actions on a more extensive basis. This follows due to the limitations on the adversarial process through lack of participation by respondents in critiquing the fairness and reasonableness of settlements, including the quantum of legal fees and litigation funding fees, while reliance on objectors (if there are any) is problematic and absent group members are vulnerable to decisions by the parties. A guardian that is given access to the necessary information and

¹⁰⁴ *ASIC v Richards* [2013] FCAFC 89 (12 August 2013). ASIC has power pursuant to s 1330(1) of the *Corporations Act 2001* (Cth) to 'intervene in any proceeding relating to a matter arising under this Act'. See also Georgia Wilkins, 'ASIC Weighs In on Great Southern Row', *The Sydney Morning Herald* (Sydney), 28 October 2014, 21, reporting that ASIC sought and was granted leave by the Victorian Supreme Court to intervene in the settlement approval hearing for the Great Southern class action.

¹⁰⁵ *ASIC v Richards* [2013] FCAFC 89 (12 August 2013) [38] (Jacobson, Middleton and Gordon JJ).

¹⁰⁶ *Ibid* [58].

¹⁰⁷ (2003) 134 FCR 370.

¹⁰⁸ (1996) 71 FCR 285.

¹⁰⁹ *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] ATPR ¶41-993, 48 628 [58], 48 630-1 [72] (Branson, Sackville and Gyles JJ). The Victorian Court of Appeal in *ASIC v Ingleby* (2013) 275 FLR 171, 180 [29] (Weinberg JA), 194 [99] (Harper JA), 194 [101] (Hargrave AJA), took issue with the Federal Court's approach to approving pecuniary penalties. The Court did not, however, take issue with the concept of seeking further information: at 181 [33] (Weinberg JA), 194 [101] (Hargrave AJA).

required to act in the interests of the group members can provide a valuable critique or outright objection to a settlement that may otherwise be unavailable. However, the employment of a guardian must consider a number of practical questions such as who pays the guardian, who instructs the guardian and how confidential information is made available to the guardian. These issues would need to be addressed by the Court at the time of the appointment. The use of a guardian does incur additional costs that would need to be monitored to ensure the benefits of a guardian did not come at too high a price. The cost of the guardian could be paid for by one or more of the parties where the settlement is not approved, or deducted from the settlement if it is approved. As with costs generally, the costs of the guardian would be in the Court's discretion.¹¹⁰ As the guardian is needed where group members are unable to protect their own interests, the Court may need to specify the issues or questions for the guardian to address in a manner similar to the referral of questions to a referee.¹¹¹ Alternatively, the Court may request assistance from a relevant body, such as a regulator, or consumer or shareholder's association, which could proceed as an *amicus curiae* or intervener.¹¹² The guardian may need access to some or all of pleadings, evidence, funding agreements, settlement agreements and settlement distribution formulae. Some of these documents may be confidential, which would necessitate confidentiality agreements or undertakings to the Court. The role of a guardian or contradictor should remain flexible so that it can be adapted to protect group members' interests and assist the Court as needed.

C Overuse of Suppression Orders

In Federal Court class actions, suppression orders have been made in relation to:

- 1 affidavits or opinions from a legal practitioner addressing whether the settlement is fair and reasonable and the factors relevant to settlement that

¹¹⁰ See *FCA Act* s 43(2). Courts have been given specific power to deal with the costs of third parties who assist in the proceedings in a number of circumstances: see, eg, *FCA Rules* rr 9.12, 28.11(d), 28.61 (dealing with interveners, arbitrators and referees respectively); *Civil Procedure Act 2005* (NSW) s 28(a) (dealing with mediators).

¹¹¹ See *FCA Act* s 54A; *FCA Rules* div 28.6.

¹¹² See *FCA Rules* r 9.12(3) (the Court in appointing an intervener may specify the form of assistance to be given and the matters that may be raised); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534–5 (Davies, Wilcox and Gummow JJ) (the role the *amicus* plays is a matter entirely within the discretion of the Court).

- are set out in *Practice Note CM 17*, and which are subject to client legal privilege,¹¹³
- 2 information that is commercially sensitive or confidential;¹¹⁴
 - 3 the settlement deed or agreement;¹¹⁵
 - 4 the details of settlement distribution schemes, including the formulae employed;¹¹⁶
 - 5 the payments made to individual group members but with publication of the total settlement amount paid by the respondent;¹¹⁷ and
 - 6 the payments made to individual group members and the global settlement sum.¹¹⁸

Suppression orders are in contrast with ‘the general principle of justice being done, and being manifestly seen to be done, openly and in public’.¹¹⁹ Conse-

¹¹³ See, eg, *Vernon v Village Life Ltd* [2009] FCA 516 (12 May 2009) [54] (Jacobson J); *Multiplex Shareholder Settlement* [2010] FCA 1029 (21 September 2010) [14] (Finkelstein J); *Pharm-a-Care Settlement* [2011] FCA 277 (25 March 2011) [29] (Flick J); *Centro Shareholder Settlement* [2012] FCA 650 (19 June 2012) [7]–[8] (Middleton J); *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [No 9]* (2013) 97 ACSR 227, 241 [103]–[105] (Jacobson J). See also *NAB Shareholder Settlement* [2012] VSC 625 (19 December 2012) [5] (Pagone J).

¹¹⁴ See, eg, *Weimann v Allphones Retail Pty Ltd* [2011] FCA 537 (20 May 2011) [31] (Foster J).

¹¹⁵ See, eg, *Wong v Silkfield Pty Ltd* [2000] FCA 1421 (2 October 2000) [34]–[36] (Spender J); *Fowler v Airservices Australia* [2009] FCA 1189 (19 October 2009) [36]–[38] (Bennett J); *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 (20 May 2011) [33] (Gordon J); *Branaghan v Thiess Pty Ltd* [2013] FCA 790 (17 July 2013) [18] (North J); *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Ltd* [2014] FCA 982 (8 September 2014) [16] (Yates J). Cf *Vitamins Cartel Settlement* (2006) 236 ALR 322, 327–8 [17], 360–3 (Jessup J).

¹¹⁶ See, eg, *Aristocrat Shareholder Settlement* [2009] FCA 19 (21 January 2009) [13]–[15] (Stone J) (only group members could obtain access to the ‘Loss Assessment Formula’ provided they executed confidentiality agreements); *Vernon v Village Life Ltd* [2009] FCA 516 (12 May 2009); *Hadchiti v Nufarm Ltd* [2012] FCA 1524 (28 November 2012) [8] (Middleton J); *Earglow Pty Ltd v Sigma Pharmaceuticals Ltd* [2012] FCA 1496 (19 December 2012) [9] (Middleton J); *Inabu Pty Ltd v Leighton Holdings Ltd [No 2]* [2014] FCA 911 (25 August 2014) [46] (Jacobson J); *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Ltd* [2014] FCA 982 (8 September 2014) [16] (Yates J). Cf *Vitamins Cartel Settlement* (2006) 236 ALR 322, 328–9 [18], 363–75 (Jessup J); *GPT Shareholder Settlement* [2013] FCA 626 (21 June 2013) [19] (Gordon J).

¹¹⁷ See, eg, *Hadchiti v Nufarm Ltd*, NSD 1847/2010, Order, Middleton J, 11 September 2012; *Paxtours International Travel Pty Ltd v Singapore Airlines Ltd*, NSD 787/2007, Order, Robertson J, 21 June 2012.

¹¹⁸ *Fowler v Airservices Australia* [2009] FCA 1189 (19 October 2010) [36]–[38] (Bennett J).

quently, the use of suppression orders to prevent evidence provided to a court being accessed by the public raises the conflict between the principle of open justice and the need, in certain circumstances, to protect confidential material so as to allow a court to do justice.¹²⁰

Part VAA of the *FCA Act* governs suppression and non-publication orders. Part VAA replaced s 50 of the *FCA Act* with effect from 12 December 2012.¹²¹ However, both regimes are phrased in similar terms, namely that the order must be necessary to prevent prejudice to the administration of justice.¹²² The reasoning applicable to s 50 has been held to apply to the new pt VAA.¹²³ The High Court of Australia has observed that '[i]t is insufficient that the making or continuation of an order under s 50 appears to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest'.¹²⁴ Rather, the requirement that the order be 'necessary' sets a high standard and 'suggests Parliament was not dealing with trivialities'.¹²⁵

In relation to the first and second categories referred to above, these are areas which traditionally are treated as confidential because otherwise the very nature or value of the material would be altered or lost.¹²⁶ The third category is usually rendered confidential by agreement of the parties in the

¹¹⁹ *NAB Shareholder Settlement* [2012] VSC 625 (19 December 2012) [5] (Pagone J), citing *Scott v Scott* [1913] AC 417 and *R v Chief Registrar of Friendly Societies; Ex parte New Cross Building Society* [1984] QB 227, 235 (Sir John Donaldson MR).

¹²⁰ See *Hogan v Hinch* (2011) 243 CLR 506, 530–2 [20]–[21] (French CJ); *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 667 [42] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

¹²¹ See *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

¹²² *Australian Competition and Consumer Commission v Air New Zealand Ltd [No 3]* [2012] FCA 1430 (14 December 2012) [18] (Perram J).

¹²³ *Ibid* [19]; *B v Department of Education and Training (NSW)* [2013] FCA 331 (9 April 2013) [6] (Griffiths J); *Stanford v DePuy International Ltd* [2013] FCA 1304 (5 December 2013) [19], [67] (Robertson J).

¹²⁴ *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

¹²⁵ *Ibid*, quoting *Australian Broadcasting Corporation v Parish* (1980) 29 ALR 228, 234 (Bowen CJ).

¹²⁶ Client legal privilege is premised on the existence of confidentiality: *Evidence Act 1995* (Cth) ss 118–19. Some factual content included in affidavits or opinions may not qualify for client legal privilege even though the advice that draws on that factual content is privileged. Commercially sensitive information has been recognised as attracting the operation of suppression orders: *Australian Broadcasting Corporation v Parish* (1980) 29 ALR 228, 234–5 (Bowen CJ), 245 (Franki J); *Australian Competition and Consumer Commission v Air New Zealand Ltd [No 3]* [2012] FCA 1430 (14 December 2012) [35] (Perram J).

actual agreement or deed, so that it is a subset of category two.¹²⁷ However, it differs in that for the purposes of approving a settlement the terms of that settlement need to be considered and disclosed, at least in part, if reasons for approval are to be given.¹²⁸

The global settlement sum and the operation of the settlement distribution scheme should not be kept confidential. The specific individual payments referred to in category five do not need to be disclosed if the mechanics of the settlement distribution scheme are disclosed. Indeed, the privacy of the individual group members may support a lack of disclosure. However, for the class action process to be accountable and open to critique then the quantum of a settlement and the process by which it is distributed to group members need to be publicly available.¹²⁹ Moreover, allowing this information to be suppressed prevents it being discussed in any judgment.

D *Open Justice*

The Federal Court has made orders approving a settlement which are not accompanied by a judgment, and given judgments that contain very little detail as to the terms of the settlement and the reasons for approval. These circumstances are very much the exception but it is undesirable that they

¹²⁷ See, eg, *Storm Financial Settlement* [2013] FCA 438 (14 May 2013) [9], [24] (Logan J).

¹²⁸ See *Jarrama Pty Ltd v Caltex Australia Petroleum Pty Ltd* [2004] FCA 1114 (27 August 2004) [7] (Crennan J); *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, 463–4 [14]–[15] (Goldberg J).

¹²⁹ See generally *Dye v Commonwealth Securities Ltd [No 2]* [2010] FCAFC 118 (14 September 2010) [121] (Marshall, Rares and Flick JJ):

The principle of open justice operates on the premise that all the material placed in evidence before a court and on which, in open court, it is asked to act is open to public scrutiny. That is because publicity itself has the purposes of both informing the public of how judicial power is exercised and ensuring that the courts are accountable for the use of that power entrusted to them.

In relation to class actions specifically, see *NAB Shareholder Settlement* [2012] VSC 625 (19 December 2012) [5] (Pagone J):

The need to balance the confidential expression of facts and views with the need for justice to be seen and to be done openly is of particular significance in the case of class actions where some members of the group, but not all, may have the ability to access the confidential information. The parties affected by a judicial decision, as well as the public on whose behalf a decision is made, are entitled to know the reasons for the decision.

See also *Brannaghan v Thiess Pty Ltd* [2013] FCA 790 (17 July 2013) [16] (North J): ‘the desirability of [suppression orders in the class action context] might need to be examined by the Court’.

should occur at all and they should be discouraged from occurring in the future.

The former situation is illustrated by the Australian Wheat Board ('AWB') shareholder settlement.¹³⁰ The claim alleged against AWB was that as part of the United Nations' Oil-for-Food Programme, AWB paid \$280 million in bribes in the form of 'handling' and 'transportation' fees to Iraq in breach of United Nations Security Council sanctions.¹³¹ When these payments were disclosed the AWB share price fell, causing losses to shareholders which gave rise to a class action worth an estimated \$100 million.¹³² Amongst the defences raised were that the claims were not justiciable in Australian courts because they involved matters of state and the company's constitution waived the right of shareholders to make the claims. The case was settled for \$39.5 million including legal costs.¹³³ Despite the controversial nature of the allegations, the novel defences, the public interest in the case and the quantum of the settlement, no judgment was published.

The latter situation is illustrated by *Kirby v Centro Properties Ltd [No 6]* ('*Centro Shareholder Settlement*'), which involved three class actions, including cross-claims against auditors and directors.¹³⁴ The proceedings were estimated to be worth \$1 billion but settled for \$200 million. This constitutes the largest shareholder class action settlement in Australia to date.¹³⁵ The class action followed successful civil penalty proceedings brought by ASIC against the directors, although no penalties were imposed on the non-executive directors.¹³⁶ The judgment is a mere 17 paragraphs, makes no reference to the settlement amount (although the orders specify the amount to be paid for legal fees) and simply states that the requirements for settlement approval are

¹³⁰ See generally Ben Slade, 'The AWB Shareholder Class Action: Dealing with Uncertainties' (Paper presented at the LexisNexis Shareholder Class Action Masterclass, Sydney, 18 October 2010).

¹³¹ See generally Commonwealth, Royal Commission of Inquiry into Certain Australian Companies in relation to the UN Oil-for-Food Programme, *Report* (2006).

¹³² Rebecca Urban, 'AWB Settles Class Action for \$39.5m', *The Australian* (Sydney), 16 February 2010, 7.

¹³³ Slade, 'The AWB Shareholder Class Action', above n 130, 1; Urban, above n 132, 7.

¹³⁴ [2012] FCA 650 (19 June 2012).

¹³⁵ Michael Legg, *The Price of Settlement? The Centro Class Action and the Divide between Private and Public Enforcement*, Centre for Law, Markets & Regulation, Faculty of Law, The University of New South Wales <<http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/price-settlement-centro-class-action-and-divide-between-private-and-public-enforcement>>.

¹³⁶ See *ASIC v Healey* (2011) 196 FCR 291; *ASIC v Healey [No 2]* (2011) 196 FCR 430.

met based on evidence before the Court, which by Court order is made confidential.¹³⁷ The *Centro Shareholder Settlement* is of major significance to the public policy debate as to whether shareholder class actions achieve meaningful compensation and whether they perform a useful deterrence role as an adjunct to ASIC enforcement.¹³⁸ Yet the judgment sheds little light on the fairness or reasonableness of the settlement.

It may be argued that a truncated analysis of a settlement might be necessary in the context of a respondent that is insolvent or with minimal resources so as to reduce costs,¹³⁹ or because the settlement is taking place in the midst of a trial which must continue if the settlement is rejected, as occurred in both the AWB shareholder settlement and the *Centro Shareholder Settlement*. While these practicalities need to be recognised and managed¹⁴⁰ they cannot be allowed to trump the core values in the legal system of open justice and reasoned judgments.

A reasoned judgment is an extension of the principle of open justice. It is the way in which the court explains how a decision was reached and the adjudicative function is made accountable.¹⁴¹ The extent of a judge's duty to state reasons for a decision turns on the importance of the point involved and the likely effect of the decision on the rights of parties to the proceedings.¹⁴² The more significant the decision the greater the need for extensive reasons. It may be the case that a settlement is thought to be of less importance as factual

¹³⁷ *Centro Shareholder Settlement* [2012] FCA 650 (19 June 2012).

¹³⁸ See generally Michael Legg, 'Public and Private Enforcement' in Michael Legg (ed), *Regulation, Litigation and Enforcement* (Lawbook, 2011) 151; Legg, *The Price of Settlement*, above n 135.

¹³⁹ See, eg, *Guglielmin v Trescowthick [No 5]* [2006] FCA 1385 (12 October 2006); *Markov v Dukas* [2010] FCA 1419 (17 December 2010); *Wright Rubber Pty Ltd v Bayer AG [No 3]* [2011] FCA 1172 (20 October 2011).

¹⁴⁰ See Slade, 'The AWB Shareholder Class Action', above n 130, 11, describing how both legal teams in the AWB class action utilised their resources to allow for meaningful settlement discussions to take place while ensuring that the allocated time for the conduct of the trial did not need to be abandoned.

¹⁴¹ *Wainohu v New South Wales* (2011) 243 CLR 181, 215 [58] (French CJ and Kiefel J). See also Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787, 789–90; Chief Justice J J Spigelman, 'Judicial Accountability and Performance Indicators' (2002) 21 *Civil Justice Quarterly* 18, 18.

¹⁴² *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 279 (McHugh JA); see generally at 278–80; *Apps v Pilet* (1987) 11 NSWLR 350, 352 (Kirby P), 356–7 (McHugh JA); *Dowling v Fairfax Media Publications Pty Ltd [No 2]* [2010] FCAFC 28 (16 March 2010) [131] (Logan and Flick JJ).

issues do not need to be decided nor questions of law resolved. Indeed, the matter is not being resolved on the merits.

However, class action settlements are different from other litigation settlements as recognised by Parliament through its enactment of s 33V. The class action settlement cannot be treated like other litigation where the persons affected are present and wish to have the resolution of their dispute kept confidential. Class actions have a representative capacity and resolve numerous persons' claims, primarily the claims of group members who are not before the court. Class actions also frequently perform a public function by being employed to vindicate broader statutory policies such as disclosure to the securities market, prohibiting cartels or fostering safe pharmaceuticals.¹⁴³ Class actions are not simply disputes between private parties about private rights.¹⁴⁴ A reasoned judgment is necessary to protect absent group members and to provide the community with confidence as to the operation of class actions and the underlying laws that are the subject of the proceedings.

VII CONCLUSION

Australia has had a class action procedure since 1992 which has resulted in the process for settlement being well tested and, to a significant degree, standardised in relation to some causes of action. This is reflected in the Federal Court being able to provide significant guidance as to how settlement approval will be undertaken in *Practice Note CM 17*. Nonetheless, the reasons for requiring court approval, such as the risk of conflicts of interest, collusion and outcomes that are not for the benefit of absent group members, remain. The settlement approval process, including the process for the distribution of

¹⁴³ The objective of providing for class action litigation in the *FCA Act* was to provide access to justice, to resolve disputes more efficiently, to avoid respondents facing multiple suits and the risk of inconsistent findings, and to reduce costs for the parties and the courts: see Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3174–5 (Michael Duffy, Attorney-General). However, a further objective, deterring contravention of the law, was also recognised: Commonwealth, *Parliamentary Debates*, Senate, 13 November 1991, 3023 (Siegfried Spindler). See also Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 114 ('class actions can have a strong regulatory impact with the potential scale of the pecuniary damages providing a strong incentive to abide by existing laws').

¹⁴⁴ See *Madgwick v Kelly* (2013) 212 FCR 1, 21 [91] (Allsop CJ and Middleton J) (referring to the 'significant statutory and public policy in proceedings under pt IVA' and that pt IVA is 'an important statutory mechanism for the vindication of the rights of the parties'); Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1282–4.

settlement funds, requires close and careful scrutiny. Reforms that can aid the Court in fulfilling the onerous responsibilities of approving class action settlements should be explored.