UNSW SYDNEY

IMF Bentham Class Actions Research Initiative

Australian Class Action Settlement Distribution Scheme Design

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IMF Bentham Class Action Research Initiative Research Report No. 1

1 June 2017

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Rebecca Gilsenan[*] and Michael Legg[+]

I. INTRODUCTION

Settlement of class actions is the most common way in which this form of litigation is resolved. A key step in the settlement process is the distribution of the settlement funds to the group members. This requires the settlement sum to be broken up and divided amongst the group members who have suffered loss. In some situations, it may also require as a preliminary step the determination of liability or that the group member has a recognised claim. The distribution takes place pursuant to a court-approved settlement distribution scheme (SDS). Although each SDS is central to the determination of the actual amount that an individual group member receives from a class action settlement, the design and operation of SDS's have attracted little critical attention, and less academic study.[1] This article describes the legal framework for the approval of an SDS and explains the operation of SDSs drawn from three main types of class action: shareholder, cartel and mass tort / product liability class actions. The article then utilises these real-world SDS examples to explain how an SDS is designed, including trade-offs between mirroring a court-based outcome and taking account of the need to minimise cost and delay.

II. BACKGROUND

Class actions were introduced into Australia through the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth) which provided for "representative proceedings" through inserting Part IVA into the *Federal Court of Australia Act 1976* (Cth) ('FCA Act'). Part IVA commenced on 4 March 1992. Since then class action procedures based on the FCA Act have been adopted in Victoria, New South Wales and Queensland.[2]

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[1] The first Australian article dealing with SDS was Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89.

[2] In Victoria, a procedure for 'group proceedings' was inserted in Part 4A of the *Supreme Court Act 1986* (Vic) with effect from 1 January 2000 by the *Courts and Tribunals Legislation (Miscellanous Amendments) Act 2000* (Vic). In New South Wales Part 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 NSW courts from 4 March 2011. In Queensland the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld) inserted Part 13A into the *Civil Proceedings Act 2011* (Qld) so as to make 'representative proceedings' available. Part 13A commenced on 1 March 2017.

Most class actions settle.[3] However, a class action may not be settled or discontinued without the approval of the Court.[4] The criteria for approving settlements in the Federal Court has been discussed on a number of occasions[5] and are now consolidated in Federal Court of Australia, Class Actions Practice Note (GPN-CA), 25 October 2016. The Practice Note at paragraph 14.3 states:

> 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 class members who will be bound by the settlement; and
>
> (b) the proposed settlement has been undertaken in the interests of class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s)…

It has been recognised in Australian class actions that fairness and reasonableness of a settlement requires consideration of not just the overall settlement sum 'but also the structure and workings of the scheme by which that sum is proposed to be distributed among group members.'[6]

The Practice Note makes specific reference to the distribution process. Paragraph 14.1 states:

> An application for the Court's approval of a proposed settlement must be made by interlocutory application. The orders which are commonly made on such an application include orders for:
>
> ...
>
> (b) … Court approval of: …
>
> (ii) any scheme for distribution of any settlement payment;

Further, the Class Actions Practice Note raises for consideration by the court, and requires information from the parties, as to how and when a settlement will be distributed. Paragraph 14.5 states:

> To the extent relevant, the affidavit or affidavits in support [of the settlement] should state:

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[3] See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes – First Report* (December 2009) 30-36.

[4] *Federal Court of Australia Act 1976* (Cth) s 33V. See also *Supreme Court Act 1986* (Vic) s 33V; *Civil Procedure Act 2005* (NSW) s 173; *Civil Proceedings Act 2011* (Qld) s 103R.

[5] See, eg, *Taylor v Telstra Corporation Ltd* [2007] FCA 2008; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [6]-[8]; *De Brett Seafood Pty Limited v Qantas Airways Limited (No 7)* [2015] FCA 979; *City of Swan v McGraw-Hill Companies Inc* [2016] FCA 343, [32]-[35].

[6] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, [41]. See generally Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 605-608.

(c) the effect of [the terms of settlement] on class members (ie the quantum of damages they are to receive in exchange for ceasing to pursue their claims and whether class members are treated the same or differently and why);

(d) the means of distributing settlement funds;

(e) the time at which it is anticipated settlement funds will be received by class members;

(f) the frequency of any post-approval report(s) to be provided to the Court regarding the distribution of settlement funds;

Paragraph 14.6 adds:

> The Court will require to be advised at regular intervals of the performance of the settlement (including any steps in the settlement distribution scheme) and the costs incurred in administering the settlement in order that it may be satisfied that distribution of settlement monies to the applicant and class members occurs as efficiently and expeditiously as practicable.

Paragraphs 14.5(e), (f) and 14.6 were new additions to the Practice Note when it was reissed in 2016.

The approval of a settlement distribution mechanism means that the Court is required to consider whether the settlement is fair as between the group members, as well as between the applicant and respondent, or put another way, that settlement approval requires consideration of the settlement *inter se* as well as *inter partes*.[7] The objective in sharing compensation among claimants has been described as to 'achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible'.[8] In short, settlement distributions need to balance fairness and precision with efficiency.

III. SHAREHOLDER CLASS ACTION SETTLEMENT DISTRIBUTION SCHEMES

A. Overview

The main causes of action relied upon in shareholder class actions are contravention of the continuous disclosure regime and breach of the prohibitions on misleading or deceptive conduct.[9]

The continuous disclosure regime is created by the Australian Securities Exchange (ASX) Listing Rules and the *Corporations Act.* The ASX Listing Rules contain several provisions,

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[7] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [5]. See also *Foley v Gay* [2016] FCA 273, [7]; *Farey v National Australia Bank Ltd* [2016] FCA 340, [31]; *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, [39] endorsing the approach.

[8] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [5]; *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [118]. See also *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204, [37]-[39].

[9] For more detailed discussion see Michael Legg, 'Shareholder Class Actions in Australia - The Perfect Storm?' (2008) 31 (3) *UNSWLJ* 669.

most notably Listing Rule 3.1, which require listed bodies to make immediate disclosure of information to the market. The *Corporations Act* Ch 6CA gives the ASX listing rules legislative backing by requiring listed disclosing entities to notify the ASX of information required to be disclosed by Listing rule 3.1 where that information is not generally available and it is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the securities of the entity.[10] Contravention of the above requirement may ground a claim for damages as a person who suffers damage may apply for a compensation order.[11]

Section 1041H of the *Corporations Act 2001* (Cth) and s 12DA of the *Australian Securities and Investments Commissions Act 2001* (Cth), provide broad ranging causes of action premised on engaging in misleading or deceptive conduct. A person who suffers loss or damage by conduct that leads into error or causes someone to believe that which is false in relation to a financial product or a financial service may recover the amount of loss or damage by action against the person contravening the section or against any person involved in the contravention.[12] This means that shareholders may commence proceedings against a corporation's directors and advisors as well as the corporation, although this tends to be rare in practice. The *Corporations Act* also contains similar but specific provisions regulating misleading or deceptive takeover documents and fundraising documents.[13]

There is no requirement under the above provisions to show intent or some form of culpability, such as negligence.[14] However, the wording of the statutory provisions means that causation must be proved.[15]

To date all shareholder class actions in Australia have settled.

B. Typical Settlement Distribution Scheme

Shareholder class actions usually employ a SDS that involves the following steps: court appointment of an administrator (usually the lawyer for the applicant); collection of group member information; application of a loss assessment formula; a process for group members to

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[10] See generally *Grant-Taylor v Babcock & Brown Ltd (in liq)* (2016) 330 ALR 642.

[11] *Corporations Act 2001* (Cth) s 1317HA(1).

[12] *Corporations Act 2001* (Cth) ss 1041I, 1325; *Australian Securities and Investments Commissions Act 2001* (Cth) s 12GF(1).

[13] *Corporations Act 2001* (Cth) ss 670A, 670B (takeovers) 728, 729 (fundraising).

[14] Michael Legg, 'Shareholder Class Actions in Australia - The Perfect Storm?' (2008) 31 (3) *UNSWLJ* 669.

[15] The statutory wording in *Corporations Act 2001* (Cth) ss 1041I (by), 1317HA(1) (resulted from), 1325(2) (because); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GF (by) necessitates proof of causation: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (Mason CJ).

check the accuracy of information utilised; an opportunity to challenge the assessment of loss; the payment of funds to group members.[16]

The group member information required is personal information such as name, address and bank account, and share trading data, including the dates on which shares were bought and sold, the price paid and received, and the number of shares transacted. In some cases shareholders may still hold their shares so that there is no sale data. The opportunity for a group member to check the accuracy of the share trading data used by the administrator may occur before application of the loss assessment formula or after an assessment has occurred.

The loss assessment formula is central to the distribution of the settlement. It is also the subject of confidentiality orders by the Court. Consequently, while the general operation of formulae is clear, the detail of specific schemes is usually not publicly known. The formula usually seeks to measure the extent to which the share price at a particular time was inflated so as to determine the loss suffered by a group member.[17] The construction of the formula will involve an assumption as to when disclosure ought to have been made by the respondent so as to determine that the market was misinformed (start date).[18] It will also require an assumption as to the end date when the market ceased to be misinformed. These dates will be alleged in the claim and usually form part of the parameters for group definition ie person who purchased shares in company X between two dates. However, the start date when disclosure should have been made will usually be hotly contested prior to any settlement. The achievement of a settlement then requires the application of principles of law to the facts to determine the date for disclosure, which in turn will impact whether a group member has a compensable claim. In most cases the date for disclosure that is employed in the formula will be the date alleged by the applicant. This is only likely to change if the administrator is convinced that the allegation would not have been made out and a different date should be used.[19]

As explained above causation is a necessary element of the causes of action employed in a shareholder class action. However, the means of satisfying causation is unsettled in shareholder class actions. There exists a debate as to whether only direct reliance is capable of satisfying the causation requirement, or a lesser standard, usually called indirect causation or market causation, is sufficient.[20] Recent decisions tend to indicate that the lower standard, where a misleading

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[16] See, eg, *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19, [20]; *Hobbs Anderson Investments Pty Limited v Oz Minerals Limited* [2011] FCA 801, [22]; *Inabu Pty Ltd v Leighton Holdings Ltd (No 2)* [2014] FCA 911, [13].

[17] See, eg, *Clime Capital Ltd v Credit Corp Group Ltd (No 3)* [2012] FCA 218, [11] ('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.).

[18] *Foley v Gay* [2016] FCA 273, [16].

[19] See, eg, *Taylor v Telstra Corporation Ltd* [2007] FCA 2008, [76]-[79] where certain group members were excluded as the respondent's evidence demonstrated that the market could not have been inflated at certain times.

[20] See, eg, *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [15]-[17]; *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801, [9]-[10], *Earglow Pty Ltd v Newcrest*

statement or failure to disclose impacts the share price in the market and the group member relied on the share price being accurate, will be sufficient for group members to succeed.[21] The loss assessment formula usually, and perhaps ahead of its time, assumes or accords most weight to market based causation. Further group members who bought shares during the relevant period are assumed or required to certify that they relied on the share price.

Once the parameters of the relevant period have been determined, a number of methods are available to calculate the inflationary component of the share price. Similar to causation, the law has not resolved the correct approach for determining loss, nor which method or methods may be employed to determine the amount of price inflation. The legal tests put forward for calculating loss may be summarised as the *Potts v Miller* measure (difference between the price paid and the true value of the shares, ie the underlying value of the company, at the time of purchase),[22] a variation on *Potts v Miller* (where the true value is replaced by the market price that would have prevailed if disclosure had been made), the left-in-hand measure (difference between the price paid and whatever is left in hand after the actual or assumed sale of the shares by the date on which the share is no longer inflated by the conduct the subject of the action). A further measure of loss is a 'no-transaction' case which assumes that the shareholder would not have purchased the shares at all had the market been properly informed. There may also be claims for foregone investment returns as the group member lost the opportunity to be able to invest elsewhere.[23]

(continued…)

Mining Limited [2016] FCA 1433, [68]. See also Ross Drinnan and Jenny Campbell, 'Causation in Securities Class Actions' (2009) 32 (3) *UNSW Law Journal* 928; Andrew Watson and Jacob Varghese, 'The Case for Market-Based Causation' (2009) 32 (3) *UNSW Law Journal* 948; Damian Grave, Leah Watterson and Helen Mould, 'Causation, loss and damage: Challenges for the new shareholder class action' (2009) 27 *Companies & Securities Law Journal* 483; Jonathan Beach, 'Class Actions: Some Causation Questions' (2011) 85 *Australian Law Journal* 579; David Pompilio, 'Will the fraud-on-the-market theory be adopted in Australia?' (2012) 40 *Australian Business Law Review* 77; Michael Legg, John Emmerig and Georgina Westgarth, 'US Supreme Court Revises Fraud on the Market Presumption: Ramifications for Australian Shareholder Class Actions' (2015) 42 *Australian Business Law Review* 448; James Argent, 'Requiring proof of individual reliance to establish causation in disclosure-based shareholder class actions: The role of principle and policy' (2016) 34 *Companies & Securities Law Journal* 87; Leah Watterson and Damian Grave, 'Causation: Establishing the Critical Link Between Misconduct and Loss in Securities Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia*, Ross Parsons Centre (2017) 141; Justice Jonathan Beach, 'Some Current Issues in Securities Class Actions' (2017) 36 (2) *Civil Justice Quarterly* 146, 154-157; Jenny Campbell and Jerome Entwisle, 'The Australian Shareholder Class Action Experience: Are we Approaching a Tipping Point?' (2017) 36 (2) *Civil Justice Quarterly* 177, 187-190.

[21] *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 (finding market-based causation arguable in the context of an interlocuatory pleading dispute); *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149, [219]-[220] (accepting market-based causation in obiter statements); *In the matter of HIH Insurance Limited (in liquidation)* [2016] NSWSC 482 (court recognised and applied indirect causation in a shareholder claim).

[22] *Potts v Miller* (1940) 64 CLR 282, 297-300 (Dixon J).

[23] Damian Grave, Leah Watterson and Helen Mould, 'Causation, Loss and Damage: Challenges for the New Shareholder Class Action' (2009) 27 *Company & Securities Law Journal* 483, 498-502; John Emmerig, 'Causation and Damages Issues in Shareholder Class Actions, UNSW CLE Seminar - Class Actions, Sydney, 25 October 2012, 15-18; *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [69]; Michael Garner and Helen Mould, 'Measuring and Proving Loss in Securities Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia*, Ross Parsons Centre (2017) 171; Justice Jonathan Beach, 'Some Current Issues in Securities Class Actions' (2017) 36 (2) *Civil Justice Quarterly* 146, 158-163

Not all of these measures will be employed in the SDS as much will turn on what is pleaded in the case and what is seen to be the most accurate or correct measure, noting that the law is uncertain. It may also be the case that the SDS employs multiple methods to produce a weighted approach.[24]

The methods for determining price inflation may be summarised as including:

(a) the event study method;
(b) the percentage price inflation method;
(c) the dollar price inflation method.[25]

Event studies are a form of regression analysis which seeks to measure materiality and the magnitude of the impact of a misrepresentation on the share price by removing other unrelated events such as general market or industry wide events.[26] In simple terms, an expert determines per-share damages by constructing a 'value line' which represents the market price of the security on each day of the class period if the market was properly informed and comparing that price with the price actually paid by a group member. The loss suffered in the difference between the price paid and the value line, multiplied by the number of shares purchased.[27] The percentage price inflation method determines the percentage price drop of the company's share price at the time of the disclosure of the information and uses that percentage as the inflation in the share price for the relevant period. The dollar price inflation method looks at the dollar price drop of the company's share price at the time of the disclosure of the information and uses that amount as the inflation in the share price for the relevant period.[28]

The event study is a more rigorous approach as it seeks to determine the impact of non-disclosure throughout the relevant period, including by excluding other causes of price movements. The percentage and dollar price inflation methods are more simplistic as they assume a constant level of inflation and ignore other causes of price movements. Equally, their simplicity makes them less costly to prepare. In practice a full event study will only be used

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[24] See Bernard Murphy and Andrew Watson, 'Negotiations and Settlement – 2010 Multiplex Debrief' *LexisNexis Shareholder Class Action Masterclass*, Sydney, 18 October 2010, 11 ('the measure of class members' losses was assessed by taking the average of: (i) the price paid for each relevant security less the price received; and (ii) the price paid for the security less its true value, as assessed on an inflation per share basis by an expert economist.').

[25] Justice Jonathan Beach, 'Some Current Issues in Securities Class Actions' (2017) 36 (2) *Civil Justice Quarterly* 146, 158.

[26] See *Taylor v Telstra Corporation* [2007] FCA 2008, [21]-[22]; AC MacKinlay, 'Event Studies in Economics and Finance' (1997) XXXV *Journal of Economic Literature* 13 (setting out the history of the use of event studies as well the procedure for conducting an event study).

[27] Janet Alexander Cooper, 'Rethinking Damages in Securities Class Actions' (1996) 48 *Stanford Law Review* 1487, 1491-1493; Michael Legg, The Aristocrat Leisure Ltd shareholder class action settlement (2009) 37 *Australian Business Law Review* 399, 403-404.

[28] Justice Jonathan Beach, 'Some Current Issues in Securities Class Actions' (2017) 36 (2) *Civil Justice Quarterly* 146, 158.

where it has already been undertaken to quantify loss as part of the litigation. Where a matter settles early a less sophisticated approach may be employed.

A loss assessment formula may use one of these methods or combine them, ie by calculating loss using two methods and taking the average of the outcome, or combining them but with some form of weighting such as 80-20.[29]

The formula also allocates the settlement sum, which will almost always be less that the total actual loss, to the group members pro rata. This means that if the settlement was 70% of the alleged total loss, then each group member receives 70% of their alleged loss.

Once the amount to be paid to a group member is determined they will be afforded an opportunity to challenge the calculation. This will invoke a dispute resolution process which involves a recalculation of the amount.[30] When the challenged assessments are complete the settlement is distributed to individual group members.

C. Variations

1. Open or Closed Class

The FCA Act has been interpreted as authorising the applicant to bring the proceeding on behalf of "some or all" of the persons who have claims against a respondent.[31] An Australian class action is colloquially described as being brought on behalf of an 'open' or closed' class. This description refers to the group or class definition employed.[32] A closed class is brought on behalf of some claimants, usually by reference to a characteristic that means that they are all clients of the applicant's solicitor and the litigation funder.[33] Consequently, the group members are known and able to be readily contacted for their share trading data. Indeed, the data will often be obtained when the group member joins the class action. In class actions that are commenced on behalf of a closed class, the class is very often opened and closed again. The opening of closed classes often occurs around the time of settlement and is driven by a desire, on the part of those defending class actions to achieve finality.[34]

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[29] *Vernon v Village Life Ltd* [2009] FCA 516, [31]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029, [25].

[30] See, eg, *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801, [22]; *Foley v Gay* [2016] FCA 273, [13]; *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, [88].

[31] *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

[32] *Federal Court of Australia Act 1976* (Cth) s 33H requires that the group members be described or otherwise identified, but it is not necessary to name or specify the number of group members. See also *Supreme Court Act 1986* (Vic) s 33H;*Civil Procedure Act 2005* (NSW) s 161; *Civil Proceedings Act 2011* (Qld) s 103F.

[33] *Earglow Pty Ltd v Sigma Pharmaceuticals Limited* [2012] FCA 1496, [4]; *Wepar Nominees Pty Ltd v Schofield (No 2)* [2014] FCA 225, [22].

[34] *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* (2015) 325 ALR 539, [28]; *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148, [188].

In an open class action, some, maybe many, group members will be caught by the group definition but not be known to the applicant's solicitor. However, if the group members are not identified then there can be 'no distribution of settlement monies to members of the class'.[35] In the Leighton class action, Jacobson J explained that there were a large number of group members who may be entitled to share in the settlement, but, it was "necessary for those group members who wish to take part in the settlement to identify themselves and provide their trading information so as to enable an efficient and orderly distribution of the funds'.[36] Where an open class is used and a settlement achieved there will need to be a step included for closing the class, which means the provision of notices and requests for the provision of share trading data, before a settlement can be distributed.

Most recently there is a trend towards closing the class for settlement purposes only.[37] Where this occurs, class members are required to take an active step to identify that they intend to participate in any settlement that might be reached and where, if they fail to do so, they are precluded from participating in any settlement but they are not precluded from participating in the fruits of any judgment given by the Court after a trial.

2. Litigation Funding - Funded and Unfunded Group Members

Where the group members to a class action have received litigation funding there will be a contractual requirement for part of the recovery to be paid to the litigation funder. In a closed class that is never opened this is straightforward as all group members will have the obligation and the deduction can take place as part of the SDS.[38]

In class actions involving funded and unfunded group members the unfunded group members are not contractually required to pay the funder. As a result, the applicant may seek 'common fund' orders or 'funding equalisation' orders. The former order all group members regardless of whether they have entered into a funding contract are to pay a court determined fee to the funder at the conclusion of proceedings.[39] The funding equalisation 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

[35] *Dorajay Pty Ltd v Aristocrat Leisure Limited* (2008) 67 ACSR 569, [13].

[36] *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622, [21].

[37] See, eg, *Jones v Treasury Wines Estates Limited (No.2)* [2017] FCA 296, [37] – [62].

[38] *Vernon v Village Life Ltd* [2009] FCA 516, [7], [28].

[39] *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 (relying on *Federal Court of Australia Act 1976* (Cth) s 33ZF); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 (relying on *Federal Court of Australia Act 1976* (Cth) s 33V(2)).

members.[40] Another version, which has met with a mixed response from the courts, involves simply deducting from each unfunded group member's recovery an amount equal to the commission paid by funded group members and paying it directly to the funder.[41] The SDS will need to take account of such orders in calculating the amounts to be distributed.

3. Legal Costs – Separate Amount or Part of Settlement Sum

Where the lawyer's costs and disbursements are negotiated as an amount separate from the settlement sum for group members then the SDS does not need to deal with legal costs. However, if a single settlement sum which is to comprise legal costs is agreed with a respondent then the legal costs may need to be deducted from the settlement sum as part of the SDS.

IV. CARTEL CLASS ACTION SETTLEMENT DISTRIBUTION SCHEMES

A. Overview

Cartel class actions are relatively rare. From the introduction of Part IVA of the *Federal Court of Australia Act 1976* (Cth) in 1992 to provide a mechanism for representative proceedings up to 2014, only five cartel class actions were commenced.[42] To the authors' knowledge, none have been commenced since 2014. Of the five cartel class actions that were commenced, one was dismissed by consent and the other four were resolved through settlements.[43] Each of the four class actions that continued to resolution were based on allegations of price fixing conduct in contravention of the now superseded sections 45 and 45A of the *Trade Practices Act 1974* (Cth), along with allegations of other cartel arrangements including market sharing and bid rigging.[44]

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[40] *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [17]; *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd (No 4)* [2010] FCA 1029, [26]–[28].

[41] *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625, [20]; *Farey v National Australia Bank Ltd* [2014] FCA 1242 (allowing direct payment to the funder); *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [55]–[61] (where approval of a litigation funder taking a commission from unfunded group member's recoveries equivalent to the amount agreed to be paid by funded group members was rejected by the Court). See also *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq)* [2015] FCA 811, [163]-[166] comparing the 'funding equalisation' approach with the approach from *Pathway Investments* and *Farey*.

[42] Vince Morabito, 'An Empirical Study Of Australia's Class Action Regimes, Third Report, *Class Action Facts And Figures – Five Years Later*' (2014) < http://ssrn.com/abstract=2523275>.

[43] The first action filed, *The Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* [1998] FCA 791 (Drummond J), was dismissed by consent in 2000. The other four that settled were *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* [2006] FCA 1388 (Jessup J) (Settlement orders and judgment dated 31 August, 27 October 2006) (the Vitamins Class Action); *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] ATPR 42-361 (Settlement orders dated 2 May 2011) (the Corrugated Fibreboard Packaging Class Action); *Wright Rubber Pty Ltd v Bayer AG* (No 3) [2011] FCA 1172 (Orders dated 2 September, 20 October 2011) (the Rubber Chemical Class Action); *De Brett Seafood Pty Ltd v Qantas Airways Limited* (Orders dated 6 June 2014) (the Air Cargo Class Action).

[44] Brooke Dellavedova and Rebecca Gilsenan, 'Challenges in Cartel Class Actions' (2009) 32(3) *UNSW Law Journal* 1001.

The four cartel class actions that resolved were all brought on behalf of open classes and only one, the Air Cargo class action, was supported by litigation funding although not all group members had entered into a litigation funding agreement.

B. Typical Settlement Distribution Scheme

The settlement distribution schemes in the 4 cartel class actions that settled are similarly structured and have 5 main features in common.

The first feature is the appointment of the applicant's lawyers as the court appointed administrator of the scheme. In this role, the lawyers are obliged to act properly on behalf of the claimant group as a whole and not as the lawyer for any individual claimant.[45]

The second feature is a procedure for the identification and verification of Group Members who are entitled to participate in the Settlement. In the Corrugated Fibreboard Packaging Class Action (CFP class action) SDS, this step was undertaken somewhat differently to the other class actions. In the CFP class action, in the course of the proceeding, the defendants had discovered or otherwise provided transactional data for every customer covering the relevant claim period. The SDS design took this into account and the verification and assessment processes were able to be significantly streamlined. It was expected that in most cases, the scheme administrator was going to be able to verify that a potential claimant was entitled to make a claim and assess claims based on data already in its possession.[46] There was provision for potential claimants to provide or correct business records and data where they thought that the data was missing or incomplete. Further, the scheme administrator retained discretion to consult with or seek further information from the defendants for verification purposes. Once the claimant was verified, the administrator issued a notice of claim data to each participating group member setting out the transactional data in the possession of the administrator. Once that data had been verified, either by default where there was no dispute or following a review, the claim would proceed to assessment.

In the other 3 cartel class actions, the verification step and the assessment step were undertaken together and participants had to submit proof of transactions drawn from their own records because that information was not disclosed or provided by respondents in the course of the conduct of the action. Potential claimants submitted proofs of claims in a specified form that included invoices and other business records proving purchase and a statutory declaration or deed poll verifying the accuracy of the proof of claim.

The third feature is a process for assessment of claims and a formula by which claims are assessed.

The legal and economic principles governing the quantification of damages in private cartel claims in Australia are uncertain.[47] This uncertainty extends to the treatment of any portion of

[45] See, eg, Amcor/Visy class action SDS cl 3.2.

[46] *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [29] – [30].

[47] Brooke Dellavedova and Rebecca Gilsenan, 'Challenges in Cartel Class Actions' (2009) 32(3) *UNSW Law Journal* 1001, 1013-1018.

damages which is passed on by a claimant to its own customers, also known as 'pass on'. A number of methods have been identified for calculating the losses in a cartel claim, which involves a determination of what prices which would have prevailed in the absence of cartel conduct. The simplest method is a "before and after" approach which involves a simple comparison of prices during the period of the alleged cartel with the prices in the period before and/or after, on the assumption that this provides a reasonable approximation of the price levels in the absence of the cartel. The "yardstick" approach involves a comparison of the market where the collusion is alleged to have occurred with a similar market unaffected by the conspiracy. The benchmarked market would ideally have similar competitive characteristics to the allegedly collusive market thus allowing differences in prices between the two markets to be attributed largely to the effects of the cartel as opposed to other market conditions. The "cost-based" approach involves obtaining information on the average unit cost of production from the cartel members and estimating a competitive price by adding to this cost a profit margin considered to be appropriate under competitive conditions. The "price prediction" approach involves econometric modelling which seeks to predict prices in a but-for scenario on the basis of past determinants of prices in the market or between the market in question and yardstick markets. Econometric modelling has increasingly been used to estimate damages in antitrust cases in the US.

In the CFP Class Action, Professor Daniel Rubinfeld, an independent expert economist assessed the claims of participating group members. Professor Rubinfeld had prepared a report on loss on which had been served by the applicant. He assessed losses under the SDS on the basis of a price prediction approach utilising econometric modelling that he had undertaken in his expert report. The econometric modelling was based on multiple regression analysis which, using statistics, determined the relationship between prices and determinants of prices of CFP products in a period not affected by the alleged cartel. Deviations in the relationship in the period affected by the alleged cartel were attributed to the alleged cartel. The modelling enabled the expert to calculate the loss suffered by each individual group member by applying the estimated effect on the market to the specific group member having regard to relevant and measurable individual characteristics. The loss was then scaled so as to determine each participating group member's share of the amount available for distribution. In this fashion, the amount recovered by each group member would be adjusted according to how many group members participated in the settlement. [48] While there was a simplified loss assessment formula set out in the SDS this was not the complex econometric formula that underpinned the modelling. The modelling and its application under the SDS was explained by Professor Rubinfeld in a report filed in support of the settlement approval application.

In the other 3 cartel class actions, the scheme administrator undertook the loss calculation by reference to formulae that were set out in each SDS. The formula in each SDS applied a percentage overcharge or overcharges to cartel affected purchases. The formulae in SDSs in the Vitamins Class Action and the Air Cargo Class Action also included absorption rates which reflected the extent to which categories of market participants absorbed (rather than passed on) the overcharge. This reflected the fact that in those actions the class included different levels of

[48] *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [40] – [52].

market participants e.g. wholesale and retail, where one type of class member might have purchased the relevant product or service from the other, whereas the CFP class action was brought on behalf of direct purchasers only. The formula is the Vitamins Class Action also included a fund to compensate group members who were in competition with the alleged cartelists to compensate them for loss of market share.[49] Each of the SDSs included a scaling device providing for adjustment of the calculated payment according to how many group members participated in the settlement.[50]

The fourth main feature is a dispute resolution or review mechanism that provides for a review of the determinations as to eligibility or quantum made by the administrator under the SDS. Each of the SDSs provide for a review by an independent senior barrister and for the group member to meet the cost of the review.[51] The SDS in the CFP class action also provides for a review of the data that is provided in respect of each group member and the independent barrister was empowered to consult with Professor Rubinfeld as required.

The fifth main feature is a mechanism for the referral by the administrator of any issue arising out of the administration and implementation to the court for determination.

C. Variations

1. Availability of Group Member Information

The most significant variations for settlement distribution are set out above. While the frameworks for these cartel settlements were similar there were significant differences within those frameworks. The most significant difference was the fact that the administrator in the CFP class action had a full dataset through earlier discovery which formed the basis of the loss assessment and participants were not required to assemble their own dataset to make a claim. Other significant differences included that an expert economist assessed the losses in the CFP class action according to a complex formula that had regard to individual differences and pricing whereas the administrator assessed the losses under the other SDSs according to a simpler formula that had less regard to possible individualised differences. This was made possible by work that was done for trial in the CFP class action where a claim was made for aggregate damages and, in support of that claim, damages had been assessed for the entire class in the evidence that had been prepared for trial.[52] This provided the basis for a very detailed and individualised assessment under the SDS. The work of assessing class members' losses had been done and it was a case of adjusting the overall losses to reflect how many class members participated in the settlement and the amount available for distribution.

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[49] Vitamins Class Action SDS s 5.

[50] Air Cargo Class Action SDS s 10; Vitamins Class Action SDS s 6; Rubber Chemical Class Action SDS s 5.

[51] Air Cargo Class Action SDS s 11; Vitamins Class Action SDS s 9; Rubber Chemical Class Action SDS s 6; CFP Class Action s 7.

[52] *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [99] – [100].

2. Open or Closed Class

Three of the cartel class actions were brought and settled on behalf of open classes and did not involve litigation funding. The class in the Air Cargo class action was closed prior to settlement negotiations and for the purposes of settlement (only). It was supported by litigation funding and the SDS contained a provision that required the scheme administrator to provide to the litigation funder, in respect of each funded group member participating in the settlement, the final entitlement of each such claimant and for the litigation funder to advise the administrator of the amount payable by that group member to the funder pursuant to the funding terms.

3. Legal Costs and Reimbursements

The Air Cargo class action SDS provided that the Settlement Sum was inclusive of the applicant's costs and disbursements, reimbursement payments to the lead applicants as well as any costs ordered by the Court associated with discontinuing the proceedings against a non-settling respondent.[53] At the time of the SDS being approved, the costs of discontinuing the proceeding against the non-settling respondent had yet to be determined by the Court. The SDS also provided for administration costs, being the costs associated with distributing the settlement, to be paid from the interest earned on the settlement sum. The administration costs were capped at the amount of interest earned on the settlement sum and any surplus formed part of the amount to be distributed to class members.[54]

The Rubber Chemicals class action SDS provided that the settlement sum was inclusive of a reimbursement payment to the lead applicant and part reimbursement of the applicant's costs in specified sums, with the balance only to be paid if there was money left after distributions were made to class members in accordance with the terms of the SDS.[55] The SDS provided that any interest that accrued on the funds during the administration would form part of the amount available for distribution.[56] The SDS did not provide for payment of administration costs, presumably because the applicant's lawyers accepted that it was unlikely that those costs would ever be paid in circumstances where there appeared to be a likelihood of part payment only of the legal costs incurred up to settlement. Finally, the Rubber Chemicals SDS made provision for the fact that one of the respondents had filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.[57] The SDS required approval from the United States Bankruptcy Court before the settlement could be distributed and, unusually, specified that a large

[53] Air Cargo Class Action SDS cl 4.1.

[54] Air Cargo Class Action SDS cls 6.1, 6.2.

[55] Rubber Chemical Class Action SDS cls 3.1, 3.6.

[56] Rubber Chemicals Class Action SDS cl 3.1

[57] Rubber Chemicals Class Action SDS cl 1.4

proportion of the settlement payment by that respondent would be in the form of stock, which stock would be liquidated by the applicant and added to the distribution sum.[58]

The Vitamins class action SDS acknowledged that the respondents paid separate amounts for distribution to class members and in respect of the applicant's legal costs.[59] Reimbursement payments approved by the Court to be paid to lead applicants were paid out of the sum for distribution to class members.[60] The SDS provided for the amount to be distributed to class members to be divided into two funds in specified proportions – being the amount allocated to compensate class members for paying overcharge and the amount allocated to compensate class members who competed with the alleged cartelists for a loss of market share. [61] The SDS provided for interest earned on the settlement funds to be applied to payment of disbursements incurred in connection with obtaining court approval of the settlement and the costs of administering the SDS, with any leftover interest to be allocated pro rata according to the balance held in each of the two funds for distribution to class members.[62]

The CFP class action SDS did not refer to the applicant's costs and disbursements, which were paid by the respondents in a separate amount to the amount to be distributed to class members. The SDS provided for interest that accrued on the settlement funds to be applied to payment of the costs of administering the settlement as well as to reimbursement payments to the applicant and sample class members, with any residual amount to be distributed to participating class members in the proportion that their individual claims bore to the amount available for distribution.[63] The SDS also provided the administrator with discretion to make preliminary payments to class members whose claims have been assessed, once the highest reasonable estimate of claims still awaiting determination was less than 20% of the amount available for distribution and provided that an amount of at least double the highest reasonable estimate of the claims still awaiting determination plus the highest reasonable estimate of administration costs likely to be incurred was held back.[64]

V. MASS TORT AND PRODUCT LIABILITY SETTLEMENT DISTRIBUTION SCHEMES

A. Overview

[58] Rubber Chemicals Class Action cls 2.1, 2.4.

[59] Vitamins Class Action SDS cl 2.1.

[60] Vitamins Class Action SDS cl 7.2.

[61] Vitamins Class Action SDS s 3.

[62] Vitamins Class Action SDS s 8.

[63] CFP class action SDS s 8.

[64] CFP class action SDS cl 9.4.

Mass tort and product liability claims have been brought in relation to a wide array of products and incidents. These include medical devices, pharmaceutical products, food and drink, tobacco, consumer goods such as cars, agricultural products and disaster incidents such as floods and bushfires.

Product liability actions are commonly based on a suite of statutory causes of action. The Federal causes of action that are usually pleaded include sections 75AC and 75AD of Part VA of the *Trade Practices Act 1974* (Cth) (TPA), which made a manufacturer strictly liable for injury that was caused by goods whose safety was not such as persons were generally entitled to expect and sections 74B and 74D of Division 2A of Part V of the TPA which imposed statutory warranties on manufacturers for goods that are not fit for purpose or not of merchantable quality. In 2011the TPA was superseded by the Australian Consumer Law (ACL) which is in Schedule 2 to the *Competition and Consumer Act 2010* (Cth). Part 3-2 of the ACL establishes a series of statutory consumer guarantees that are provided by a supplier of consumer of goods, including that the goods are of "acceptable quality" and that they are reasonably fit for a disclosed purpose. Part 3-5 of the ACL contains provisions that are similar to those in Part VA of the TPA. Other statutory causes of action that are sometimes pleaded in product liability class actions are the proscriptions against misleading or deceptive conduct,[65] unconscionable conduct,[66] false and misleading representations,[67] supplying consumer goods not compliant with a safety standard,[68] manufacturing, or, possessing and having control over vehicles that were not compliant with a safety standard.[69]

In addition to statutory causes of action, product liability class actions are often also based on the tort of negligence. Occasionally the tort of deceit or equitable misrepresentation might also be pleaded. Class actions relating to disasters such as floods and bushfires are usually based on the tort of negligence.

Settlement distribution schemes for mass tort and product liability class actions usually provide for some form of threshold determination as to eligibility and/or liability and/or causation. This could include, for example, a process for determining whether the putative participant was a consumer or recipient of the relevant product, whether the product failed in the manner alleged or for some other reason and whether that failure caused the injuries in respect of which compensation is sought.

Settlements of mass tort and product liability claims involving personal injuries need to take account of statutory thresholds, caps and reductions that apply to claims involving death or

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[65] *Trade Practices Act 1974* (Cth) (*'TPA'*) s 52; *Competition and Consumer Act 2010* (Cth) sch 2 (*'ACL'*) s 18.

[66] *TPA* s 51AB; *ACL* s 21.

[67] *TPA* s 53 (a); *ACL* s 29.

[68] *TPA* s 65C; *ACL* s 106 (1).

[69] *TPA* s 65C; *ACL* s 106 (3).

personal injury. At the federal level Part VIB of the *Competition and Consumer Act 2010* (Cth), formerly the *Trade Practices Act 1974* (Cth) imposes a threshold for eligibility for non-economic loss damages[70] and caps the quantification of certain heads of damages.[71] Where negligence is pleaded, settlements also need to have regard to state and territory legislation which modifies the single common law that applies throughout Australia to the quantification of damages. Some states and territories have applied thresholds for eligibility for non-economic loss damages and caps on damages for non-economic loss, gratuitous care and economic loss.[72] In addition, different interest rates and discount rates apply to the quantification of personal injury damages among jurisdictions. When negligence is pleaded and group members suffer injuries in different states and territories, the SDS needs to provide for which law or laws will apply to the quantification of damages. Usually a uniform regime will be adopted rather than one that seeks to incorporate variations based on the different regimes and practices that apply in each state and territory.[73] SDSs that apply to settlements involving personal injuries sometimes also provide for what should happen if the settlement participant dies before their compensation amount is determined or paid because this too can vary from one Australian jurisdiction to another.[74]

Settlements involving personal injuries also need to take into account the likelihood that participants in the settlement will have some reimbursement obligations pursuant to statute and/or contract for treatment expenses, social security and income continuance payments that have been made in relation to the injuries the subject of the claim.[75]

Because of the wide range of incidents and harms that have formed the basis of product liability and mass tort class actions, and because of the array of settlement structures that have been adopted, it is not possible to identify a typical settlement distribution scheme so much as to identify types of schemes that have been utilised and some of the features that they have in common.

B. Global Sum Settlement with Individualised Distribution Scheme

This form of SDS is the most common and involves a settlement for a specified sum that is to compensate all group members. There is no role for the defendant/respondent or adversarial

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[70] *Competition and Consumer Act 2010* (Cth) ('*CCA*') s 87S.

[71] *CCA* ss 87M (caps non-economic loss damages), 87U−87V (caps on economic loss claims), 87W-87X (caps on gratuitous attendant care services).

[72] See, eg, *Civil Liability Act* 2002 (NSW) Part 2; *Wrongs Act* 1958 (Vic) Parts VB & VBA.

[73] See, eg, *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [142] (provisions of the *CCA* adopted rather than state based legislation).

[74] See, eg, *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (DePuy ASR Implants (Hips) Class Action) SDS s 6.6.

[75] See, eg, *Health and Other Services (Compensation) Act 1995* (Cth) (medicare); *Social Security Act 1991* (Cth) Pt 3.13 (social security benefits); Katy Barnett and Sirko Handler, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 181.

component as occurs in the process settlement discussed below. The global sum is divided amongst group members by the scheme administrator. The division is achieved through assessing each group member's claim and paying them a proportion of their claim reduced to the same degree by which the global settlement sum is lower than the full recovery that might have been achieved at trial. The individual assessment requires the claimant to provide information about their injury and/or loss to which the scheme administrator or someone appointed by the scheme administrator then applies the relevant law. The relevant law is the principles of tort law as altered by statute and/or statutory compensation schemes.

The process may be illustrated through the Kilmore-East Kinglake bushfire class action which included 1481 personal injury and dependency (I-D) claims and 9,174 economic loss and property damage (ELPD) claims. The settlement sum of $494,666,667 was paid into two separate funds. One for I-D claims and the other for ELPD claims. Osborne J in approving the settlement of the class action explained that '[f]undamentally, the SDS is concerned with procedures for establishing a value for every claim of every claimant'.[76]

For I-D claims a claim book was prepared and delivered to a barrister who specialised in personal injury. That barrister then conferred with the claimant and evaluated the claim. The barrister then delivered a statement of reasons and an initial assessment of the value of the claim in accordance with the laws of Victoria.[77] The assessment involved determining the usual heads of damages for personal injury, namely pecuniary loss resulting from lost capacities (eg lost earning capacity and loss of domestic capacity), pecuniary loss resulting from special needs (eg medical expenses and the cost of care) and non-pecuniary loss (eg pain suffering, loss of amenities of life and loss of expectation of life).[78]

Part VBA of the *Wrongs Act 1958* (Vic) requires a claimant to have suffered a 'significant injury' (defined as above 5 per cent impairment for physical injuries, or above 10 per cent for psychiatric injuries) as a precondition to entitlement for damages for pain and suffering. The determination of significant injury is to be assessed by an approved medical practitioner or Medical Panel.[79] As a result the SDS made provision for a medico-legal assessment to determine if the threshold for a significant injury was met.

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[76] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [411].

[77] *Matthews v AusNet Electricity Services Pty Ltd (Ruling No. 40)* [2015] VSC 131, [6].

[78] Michael Tilbury, *Civil Remedies – Volume II Remedies in Particular Contexts* (Butterworths, 1993) 14; Katy Barnett and Sirko Handler, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 167; Normann Witzleb, Elise Bant, Simone Degeling and Kit Barker, *Remedies: Commentary and Materials* (Thomson Reuters, 6th ed, 2015) 330.

[79] *Wrongs Act 1958* (Vic) ss 28LB, 28LE, 28LF, 28F; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [60]; *Deitrich v Pulse Pharmacy Northcote Pty Ltd* [2014] VSC 307, [34]. Similar requirements exist in relation to Division 8A of Part IV of the *Accident Compensation Act 1986* (Vic) or Division 1 of Part 6 of the *Transport Accident Act 1968* (Vic) which were provided for in the SDS.

The claimant could seek a review if dissatisfied with the assessment, including challenging whether the threshold for recovery had been met. The assessment, which may be modified by the review, then determined the value of the claim.[80]

Claimants who received benefits from Centrelink, Medicare, private health insurers, or under statutory compensation schemes may have been required to reimburse those bodies for some or all of the payments that had been made for their benefit. Those reimbursements formed part of a claimant's damages award. The Scheme Administrator sought to devise arrangements with those bodies to allow for the exchange of information so that reimbursements could be dealt with through the scheme.

For ELPD claimants a claim book was prepared and delivered to an ELPD Assessor (barrister) who then undertook two steps. First the claim was evaluated in accordance with ELPD Assessment Principles and otherwise in accordance with the law of the State of Victoria to determine Final Assessed Values. Second the Final Assessed Values were multiplied by the ELPD Multipliers to determine the ELPD Distribution Values.[81]

The ELPD Assessment Principles were more than 40 discrete loss categories including homes, non-home buildings, fences, gardens and trees, home contents and chattels, livestock, and labour costs were pursued by the proceedings. For each loss, item or category a narrative rule defined the basis on which the value of the loss was to be assessed.[82] The ELPD Assessment Principles were subject to orders making the rules confidential.[83] However an indication of how the narrative rules operated may be gleaned from some of the other bushfire class actions which set out the values attached to the above loss categories.[84] For example particular costs were assigned to garden/amenity trees, farm/utility trees and fences, while for other items such as lost or damaged buildings or machinery, the loss had to be established by the group member.[85] The ELPD Multipliers are further adjustments to reflect the risks or prospects of success applicable to certain types of claim that the loss would not be recovered if the relevant claim went to judgment.[86] There were also subject to confidentiality orders.[87]

The claimant was afforded an opportunity to correct any errors or omissions and then a notice and reasons are provided by the ELPD Assessor. The claimant could then seek a review if dissatisfied with the assessment and may provide written contentions in support of the review. A

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[80] *Matthews v AusNet Electricity Services Pty Ltd (Ruling No. 40)* [2015] VSC 131, [6].

[81] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [417].

[82] Ibid, [418]-[419].

[83] Ibid, [440] (the ELPD Assessment Principles were in schedule A of the settlement distribution scheme).

[84] *Thomas v Powercor* [2011] VSC 614, [6]-[7]; *Perry v Powercor* [2012] VSC 113, [6]-[7].

[85] Ibid.

[86] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [421].

[87] Ibid, [440] (the ELPD Multipliers were in schedule A of the settlement distribution scheme).

final assessment is then produced, with the ELPD Review Assessor being able to seek further material and instruct a valuer as needed.

The SDS was also structured so that the ELPD claims fund was distributed pro-rata between uninsured claims and insurance recovery claims. This approach was adopted because of legal uncertainty as to the appropriate order of priority as between insurer and insured in the distribution of the settlement sum.[88]

C. Process or Liability and Settlement Distribution Scheme

A process settlement is one where there are two steps. The first is determination of whether an individual group member's situation results in the scheme recognising that they have a compensable claim through employing some form of adversarial alternative dispute resolution process. At a general level this type of scheme involves an exchange of information and potentially argument about each person's claim which may see liability accepted or a process for the determination of liability by an independent person or panel triggered. If liability is accepted or found by the independent person or panel then the second steps occur, the calculation of compensation, in keeping with an agreed protocol. The total settlement amount is usually not capped but the maximum recoveries for each loss or injury may be specified.

The process settlement may be illustrated by the LCS ® Duofix ™ Femoral Components class action that dealt with components of a knee replacement implant. The implant components were the subject of a recall because in some implants alumina particles used during the manufacturing process had the potential to migrate to the space between articulating surfaces in the knee, leading to wear of those surfaces. This created the potential for abnormal wear which gave rise to a greater risk of implant failure.[89] The class action settled on the basis that the negotiated protocols known as the "liability protocol" and the "compensation protocol" would be applied.

The liability protocol set out an overarching criterion for liability, namely 'if it is more likely than not that alumina particles from an Affected Implant caused Abnormal Wear (the Characteristic)'. There are then a series of presumptive evidentiary criteria for finding that the Characteristic is satisfied. For example, where the removed implant (the explant) is available and abnormal wear is present it will be observable and the Characteristic presumed. If the explant is not available or if only one of the metal components of the explant is available, then other indicators of abnormal wear are specified. There are also exclusionary criteria that result in ineligibility for compensation, such as the failure of the Implant because of infection, allergic reaction or trauma. The criteria were adopted by the parties based on expert advice. If the lawyers for the group member and the respondents agree that the group member is eligible for compensation, then the compensation protocol is applied. If no agreement is reached then the claim is referred to an assessor, an orthopaedic surgeon with experience in removing knee

[88] Ibid, [395]-[398].

[89] *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370, [4]-[5].

implants, who considers the available materials and applies the above criteria to determine if compensation is payable.[90]

The Compensation Protocol provides for: (a) compensation for non-economic loss and gratuitous care; (b) compensation for financial losses. Compensation for non-economic loss and gratuitous care is to be determined in accordance with four categories: A, B, C and D. The amounts of compensation for categories A, B and C are $30,000, $40,000 and $65,000 respectively. Category D involves individual assessment. Categories B, C and D are in ascending order of the number of revisions (removal of an Affected Implant) and surgeries. Category D also includes group members that experienced extraordinary or significant complications or injury greater than those group members in categories A, B or C. Category A is for group members who do not meet the criteria for any other category. The lawyers for the group member and the respondents then attempt to agree on the category that a group member falls into, failing which they will request a report from the group member's treating surgeon, if that is unable to result in agreement then a report is sought from an Assessor, and if agreement is still not reached then the applicable category is determined by independent counsel. For category D where compensation is individually assessed the provisions and principles in Part VIB of the *Trade Practices Act 1974* (Cth) are applied, with requirements for the provision of certain documentation, such as medical history and reports, and the respondents being able to request the group member to attend reasonable medical examinations. Compensation for financial losses covers out-of-pocket expenses, lost income, sick leave, holiday leave, superannuation entitlements or other economic loss arising from past or future loss of earnings and interest, also in accordance with Part VIB. Where the lawyers for the group member and the respondents cannot agree on category D compensation for non-economic loss and gratuitous care, or on compensation for financial losses they will attempt to resolve the dispute by negotiation, failing which the matter will be referred to independent counsel for determination.[91]

Other examples include the Victorian bushfire cases *Thomas v Powercor* [2011] VSC 614 (Horsham fire), *Perry v Powercor Australia Ltd* [2012] VSC 113 (Coleraine fire) and *Place v Powercor Aust Ltd* [2013] VSC 6 (Weerite fire).

D. Matrix Settlement Distribution Scheme

Matrix or grid settlements have rarely been utilised in Australian mass tort class actions to the author's knowledge.[92] However, they are common in the US.[93] Mass tort settlements typically

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[90] *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370, [6]-[8]; Casey v DePuy International Limited and Johnson & Johnson Medical Pty Ltd, Liability Protocol, 24 August 2012 and amended pursuant to the Court's direction on 31 August 2012.

[91] *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370, [9]-[15]; Casey v DePuy International Limited and Johnson & Johnson Medical Pty Ltd, Compensation Protocol 24 August 2012.

[92] A matrix SDS was used in *Amom v New South Wales* [2016] NSWSC 1900 (false imprisonment of young people). The matrix allocated compensation based on the group member being subject to various occurrences such as false imprisonment, strip search, a degree of humiliation, a degree of discomfort, age. Reference to a US grid style payment scheme was discussed in *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [105], [108].

divide the claims of the class into several distinct categories that correspond to the medical conditions thought to result from the product in question. Compensation amounts are then assigned to each category.[94] Other factors may also be incorporated, such as age. For example the silicone breast implant settlement employed a grid with two axes: a disease axis and an age axis. The disease axis contained the four disease processes for which compensation was allowed, as well as subcategories based on severity. The age axis broke age into 35 and under, 36-40, 41-45, 46-50, 51-55, and over 56. Once a person's disease and age were known, the grid provided the exact dollar amount of compensation.[95]

The settlement for *In re National Football League Players Concussion Injury Litigation* provided compensation for NFL players that suffered concussion related injuries.[96] The settlement provided compensation based on a Qualifying Diagnosis and the age at the time of diagnosis as set out in Table 1.[97]

Table 1

Age	**ALS**	**Death with CTE**	**Parkinson's Disease**	**Alzheimer's Disease**	**Level 2 Neurocognitive Impairment**	**Level 1.5 Neurocognitive Impairment**
Under 45	$4m	$4m	$3.5m	$3.5m	$3m	$1.5m
45-49	$4.5m	$3.2m	$2.47m	$2.3m	$1.9m	$950,000
50-54	$4m	$2.3m	$1.9m	$1.6m	$1.2m	$600,000
55-59	$3.5m	$1.4m	$1.3m	$1.15m	$950,000	$475,000
60-64	$3m	$1.2m	$1m	$950,000	$580,000	$290,000
65-69	$2.5m	$980,000	$760,000	$620,000	$380,000	$190,000
70-74	$1.75m	$600,000	$475,000	$380,000	$210,000	$105,000
75-79	$1m	$160,000	$145,000	$130,000	$80,000	$40,000
80+	$300,000	$50,000	$50,000	$50,000	$50,000	$25,000

The amounts in the above grid were also subject to a reduction to take account of the NFL seasons played as follows:[98]

(continued…)

[93] See, eg, Samuel Issacharoff and John Fabian Witt, 'The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law' (2004) 57 *Vanderbilt Law Review* 1571.

[94] Richard Nagareda, 'Turning from Tort to Administration' (1996) 94 *Mich. L. Rev*. 899, 921-922.

[95] Howard Erichson, A Typology of Aggregate Settlements (2005) 80 *Notre Dame L. Rev*. 1769.

[96] *In re National Football League Players Concussion Injury Litigation*, 307 FRD 351 (ED Pa, 2015) and approved on appeal *In re National Football League Players Concussion Injury Litigation*, 2016 WL 1552205 (3d Cir Apr 18 2016).

[97] *In re National Football League Players Concussion Injury Litigation*, Class Action Settlement Agreement dated 25 June 2014 (as amended 13 February 2015), Exhibit 3.

[98]) Ibid, s 6.7(b)(i).

(1) 4.5 Eligible Seasons: 10%
(2) 4 Eligible Seasons: 20%
(3) 3.5 Eligible Seasons: 30%
(4) 3 Eligible Seasons: 40%
(5) 2.5 Eligible Seasons: 50%
(6) 2 Eligible Seasons: 60%
(7) 1.5 Eligible Seasons: 70%
(8) 1 Eligible Season: 80%
(9) 0.5 Eligible Seasons: 90%
(10) 0 Eligible Seasons: 97.5%

Other offsets also existed, including a medically diagnosed stroke or traumatic brain injury occurring prior to a qualifying diagnosis, both of which result in a reduction of 75%.[99]

E. Variations

1. Interim Payments

The Bonsoy class action SDS provided that once 30% of claims were finally assessed the scheme administrator had discretion to make interim distributions to participants with completed assessments either progressively or in tranches and up to 60% of the value of the assessment. [100] In the Kilmore East Bushfire class action the SDS provided that once there were 30% (by number) of I-D Claims or 40% (by number) of ELPD claims completed (ie the assessment process completed) the Scheme Administrator could, if he wished, commence to make interim distributions from the respective funds to claimants whose claims have been completed.[101] In the LCS ® Duofix ™ Femoral Components class action a claimant could receive $15,000 by way of advance payment if they were suffering financial hardship.[102] However, interim payments can be problematic as recognised by Forrest J:

> For there to be a satisfactory and just distribution of the funds, it is essential that in determining the quantum of the distribution the Administrator knows exactly the individual amounts to be awarded to each group member. Absent those figures, the Administrator cannot make the pro rata allocation necessary to ensure that there is an equitable distribution.[103]

If interim distributions are too high then the funds available for later payment may be diminished so that a pro rata allocation to all group members is not possible.

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[99] Ibid, s 6.7(b)(ii), (iii).

[100] *Downie v Spiral Foods Pty Ltd*, S CL2010 5318 ('the Bonsoy class action SDS') cl12.

[101] *Matthews v Ausnet (Ruling No.41)* [2016] VSC 171, [5].

[102] *Casey v DePuy International Limited and Johnson & Johnson Medical Pty Ltd*, Compensation Protocol 24 August 2012, cl 7.

[103] *Matthews v Ausnet (Ruling No.42)* [2016] VSC 394, [9].

2. Fast Track

In the DePuy ASR Implants (hips) class action eligible group members were given the option of electing to accept a "fast track resolution" of their claim, which entitled them to a single $55,000 lump sum payment per hip.[104] Alternatively, group members could undergo a conventional form of individual assessment, with the scheme administrators preparing a claim book that is then provided to an assessor, who is an experienced personal injury lawyer, for determination according to Part VIB of the Competition and Consumer Act. Wigney J explained that the fast track 'avoids the necessity of any assessment process and will result in a prompt payment of a fixed amount'.[105] The fast track was thought to be most attractive to group members who had not suffered significant loss or damage, or who wanted an expeditious payment of their entitlements. Indeed the calculation was based on there being no inclusion for economic loss.

3. Surveys and Actuarial assessments of loss

In some settlements the number of group members is known through the use of a closed class definition or through a class closure process.[106] However, in others the number of participating group members and the quantum of their claims may be uncertain. In the DePuy ASR Implants (hips) class action the total amount of compensation was fixed, but the number and size of the claims that may ultimately be made under the scheme was not known and not fixed.[107] This was because the eligibility criterion that enabled group members to receive compensation if their revision operation occurred up to 13 years after the primary hip replacement. As the device was used in Australia until December 2009, this meant that group members may become eligible if their revision occurred as late as December 2022.[108] An important method of addressing the uncertainty was the use of surveys and expert actuarial evidence. A survey was undertaken to assess the incidence of post-operative complications after ASR revision surgery, and more broadly, to evaluate outcomes after revision surgery. The survey gave rise to a profile of claimants that became an input into the actuarial assessment of compensation amounts. The actuarial assessment resulted in an estimate of 2018 claimants and compensation amounts of $276 million, which based on a settlement of $250 million would see group members recover 70% of their loss.[109] Uncertainty continued as the actuarial assessment was based on assumptions which may vary from what occurs.[110] Pro rata adjustments may be needed as claims

[104] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [64]. See also Julian Schimmel, 'Product Liability Class Actions in Australia: 25 Years On', *UNSW CLE - Class Actions: Current Issues after 25 years of Pt IVA Federal Court of Australia Act*, Sydney, 23 March 2017.

[105] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [141].

[106] See, eg, *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [25] (class closure orders used to identify group members participating in settlement).

[107] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [144].

[108] Julian Schimmel, 'Product Liability Class Actions in Australia: 25 Years On', *UNSW CLE - Class Actions: Current Issues after 25 years of Pt IVA Federal Court of Australia Act*, Sydney, 23 March 2017, 15.

[109] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [76]-[77].

[110] Ibid, [144].

are made in the future, although the SDS sought to alleviate this by making payments in traches with payments held back until further certainty was achieved.[111] However, the survey and actuarial assessment assist in crafting a settlement and assisting the Court in assessing whether it is fair and reasonable.

VI. DESIGN OF SETTLEMENT DISTRIBUTION SCHEMES

A. Losses and Prospects

An SDS needs to be consistent with the applicable law and the pleaded claim but does not need to mirror or be as precise as if the individual claim was determined by a court.[112] The settlement distribution process does not involve a trial before an independent judicial officer who hears competing evidence that is tested through cross-examination, receives argument on the application of the law and resolves the dispute through weighing the evidence, applying that law and giving reasons.[113] Rather, it is an approximation of the litigation process with that process providing more or less guidance on the specific case depending on the stage at which the proceedings are settled.

The SDS needs to allocate compensation consistent with the harm or loss experienced by the group member. Those who suffered greater harm or loss should be compensated more than those who suffered less. In practice that means that it is rare that a settlement sum can simply be evenly divided amongst group members so that they all receive the same amount.[114]

The SDS should also seek to take account of the prospects of success, or risk that a claim would not be made out vis-à-vis other claims. If the claims and their prospects are homogenous then this would be reflected in the discount that was factored into the settlement amount compared to the amount claimed. No further steps would be necessary. However, where claims and their prospects are heterogenous then this needs to be taken into account in allocating compensation. Weaker claims should not recover to the same degree as stronger claims.[115] But even courts have acknowledged that the determination of prospects of success by them 'requires an element of guesswork and judicial intuition'.[116]

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[111] Julian Schimmel, 'Product Liability Class Actions in Australia: 25 Years On', *UNSW CLE - Class Actions: Current Issues after 25 years of Pt IVA Federal Court of Australia Act*, Sydney, 23 March 2017, 15.

[112] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [43], [47].

[113] Michael Legg and Sera Mirzabegian, 'Appropriate Dispute Resolution and the Role of Litigation' (2013) 38 *Australian Bar Review* 55, 57–61.

[114] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [95].

[115] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322, [66].

[116] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [100].

However, the application of the law and prospects of success, as well as the determination of the harm or loss experienced, must also take account of 'whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution'.[117] Similarly in the Kilmore East bushfire class action settlement, Osborn JA commented:[118]

> the potential claims are so heterogeneous that unless some simplified scheme of assessment is provided, the process of assessment of damages will be impractically costly, contentious and delayed

Precision or accuracy is unlikely to be attainable without significant cost and delay. It follows that a trade-off between precision and efficiency is needed.

B. Legal and factual uncertainty

The above guidance necessitates that the SDS adopt an approach to dealing with legal and factual uncertainty.

Legal uncertainty is illustrated by the position described above in relation to causation and calculation of damages in shareholder class actions and the quantification of damages in cartel class actions. The law in relation to these issues has not been determined by Australian courts and one or more competing approaches exist. The SDS may adopt any approach that is arguable and has been pleaded. Equally, the SDS may be structured so as to combine approaches, as has sometimes occurred in shareholder class actions, where a group member's loss is an average of two or more available measures of loss.

The approach taken to legal uncertainty is often driven by the data or information that is available and the cost to adopt more sophisticated or precise approaches. As a result, indirect causation in a shareholder class action SDS may be justified on the basis that it is an arguable measure at law and allows for causation to be treated as a common issue which removes the need for more costly individualised proof of causation.[119] Similarly, some damages calculation methods require greater data, cost and time to construct. A case where settlement occurs after expert evidence has been filed, expert conclaves held or determination of the representative party's loss has better information and guidance for the SDS than a case that settles early. Experts could be retained to construct sophisticated loss models but this will incur costs that reduce the fund available for distribution.[120]

The guiding principle in relation to the approval of a settlement, including a SDS, is that it is 'fair and reasonable'. In the Kilmore East bushfire class action, Forrest J stated:

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[117] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [43].

[118] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [420].

[119] *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 , [17] ('If the applicant makes out its market-based causation case, the applicant and all class members will have a common measure of compensation based upon a per share recovery by each of them.').

[120] See, eg, *Wright Rubber Products Pty Ltd v Bayer AG (No 3)* [2011] FCA 1172, [23].

> the settlement of a class action and the process of assessment and review is by no means perfect. It is not intended to be so: it is intended to provide a reasonable process by which claims of Group Members can be processed fairly and efficiently without the need for court intervention.[121]

Mortimer J in the Great Western Lodge class action settlement dealing with mistreatment of vulnerable persons stated:

> Fairness and reasonableness are moderate standards, rather than ones which require absolute certainty or confidence in a particular point of view about legal issues, if there can ever be such certainty in the law in any event.[122]

The standard may permit the SDS to avoid a close 'intellectual engagement with the various legal and factual arguments' where competing views are possible.[123] Nonetheless, the SDS should 'achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible'.[124] There will necessarily need to be an exercise in judgment as to whether differing legal tests have a material impact on group member recovery and should be built into the SDS.

The underlying facts relevant to a claim will be a combination of common and individual factual issues, consistent with the class actions framework that requires common issues but permits or accepts the existence of individual issues. The facts relevant to the common issues will need to be developed for trial and as a result will be the subject of pre-filing investigation, pleadings, discovery and evidence. However, these steps may not occur if a settlement is reached before one or more of those steps take place. It may also be that the facts are controverted by the respondent or through material obtained from third parties. The SDS will be constructed using the facts relevant to the common issues as known at the time of the settlement. The later the settlement the greater the likelihood that detailed work will have been undertaken to a standard (and cost) that is suitable to use in trial. Where that work has not already been done settling parties are likely to pursue something less precise and less expensive to form the basis of settlement distribution.

Information about individual factual issues will need to be obtained from group members. Some of that information can be obtained through a registration or class closure process where the group member needs to provide requested information. For example, in a shareholder class action the group member needs to advise the number of shares held, date of purchase and date of sale. In cartel class actions business records showing purchases of the relevant product can be requested. Although in the CFP class action individual transactional data had been obtained during the course of the class action and was therefore used in the SDS.[125] In mass tort claims

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[121] *Matthews v Ausnet Pty Ltd (Ruling No 43)* [2016] VSC 583, [32].

[122] *McAlister v State of New South Wales (No 2)* [2017] FCA 93, [32].

[123] Ibid, [32] (the observation was made in relation to the fairness of settlement between the parties rather than between group members).

[124] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [5]. See also *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204, [37]-[39].

[125] *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [29].

information may be requested that demonstrates use of, or exposure to, the product, or in cases like the bushfires class actions, presence of property or the person in the area where the harm was done. However, further individual information may need to be obtained at a later stage as the class closure process should not be unduly onerous as otherwise it may dissuade participation in the class action.[126] Consequently, only once a settlement has been achieved should more granular individual information be required. This type of information is more likely to be needed for mass tort cases where a more individualised assessment is necessary. The information can be obtained through questionnaires, interviews, medico-legal assessments and valuations.

C. Proof of causation

A specific example of how an SDS may take account of an issue that combines both legal and factual elements is causation.

In the Bonsoy soy milk product liability class action, the settlement employed a distribution scheme which required an administrator to determine 'whether, on balance of probabilities, consumption of Bonsoy within the Relevant Period caused the injuries claimed'.[127] As a result it was necessary for a group member to establish a causal link between the consumption of Bonsoy and thyroid dysfunction.

In the Kilmore East Bushfire class action claims were made against the State parties alleging that, planned burning had been insufficient allowing for the spread of the fire to be greater than it otherwise would have been, and a failure of the State parties to provide proper and adequate warnings to the claimants, the I-D claimants suffered injury loss and damage.[128] The State defended the case on a number of bases, including causation.[129] As part of the settlement approval judgment it was said that it 'may be doubted that the Court could safely reach a conclusion that the loss and damage occasioned by the spread of the bushfire was likely to have been materially reduced by the planned burning ultimately identified'.[130] Further in relation to the warnings case, 'a substantial proportion of the individual I-D claims would fail on the basis of causation'.[131] The SDS dealt with the problems around causation, and the causes of action against the State parties generally, by providing that the I–D claims were capped at an 80% recovery rate.[132] Rather than require I-D claimants to try and demonstrate causation, which

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[126] *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [40] ('Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring.').

[127] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [156]. See also [58]-[59].

[128] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [254]-[256], [270]-[274].

[129] Ibid, [275].

[130] Ibid, [267].

[131] Ibid, [289]-[291], [294].

[132] Ibid, [413].

would have required an assessor to evaluate causation, the potential recovery was discounted across all I-D claims.

In shareholder class actions causation is effectively assumed provided the group member provides the information necessary to be part of the group ie they bought shares in the relevant company during the relevant period and they certify that they relied on the share price. This approach is permitted because the pleadings will almost always seek to rely on indirect or market-based causation, which in simplified form is relying on the share price.

Each of the above approaches has advantages and disadvantages. Requiring proof of causation is more costly and time-consuming but removes group members who do not have a claim. Making an adjustment to all group members' recoveries to take account of difficulties in establishing causation reduces cost and delay, but it also means that there may be some group members who may have been able to prove causation in their particular circumstances but do not recover under the SDS. The reverse situation is then experienced through the shareholder class action approach where the low threshold for proving causation may mean some group members who may have failed to meet the threshold if required to prove individual reliance, still recover. The best approach will turn on knowledge of the group and their claims and striking a balance between precision and efficiency. Over-compensating the undeserving or under-compensating the deserving may be necessary as part of a cost-benefit assessment. However, as stated above in relation to an SDS generally, but which is also applicable to an element such as causation, the approach must take account of 'whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution'.[133] Applying this to Kilmore East Bushfire class action, the approach to causation was only adopted in relation to the claims against the State parties. The I-D Claimants who may have been able to prove causation but were not afforded the opportunity to do so, were afforded compensation based on them being able to recover against the other defendants.

D. Individual Assessment

All SDS are aimed at determining the amount of compensation to be paid to individual group members. However, that determination can be more or less individualised in the process employed.

Shareholder and cartel SDS are usually able to be less individualised in approach compared to mass tort or product liability SDS. This is because shareholder and cartel claims are dealing with financial losses from the same security or product/service that largely impact all group members in the same way. Consequently, the shareholder and cartel SDS are able to employ a formula which calculates losses using the relevant inputs that are applicable to all group members or large groups within the whole group. In a shareholder SDS this would be number of shares bought (and sold) in the relevant period and a calculation that compared the actual price paid with the price adjusted for price inflation. The group member only needs to provide their particular inputs, ie shares bought (and sold) in the relevant period.

[133] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [43].

A mass tort that results in personal injury is seeking to compensate the harm suffered by an individual that is specific to that individual, namely lost capacities (eg lost earning capacity and loss of domestic capacity), pecuniary loss resulting from special needs (eg medical expenses and the cost of care) and non-pecuniary loss (eg pain suffering, loss of amenities of life and loss of expectation of life). The impact of the mass tort on each group member may vary in terms of not just applicable heads of loss, but in terms of severity or gradation of harm. However, the use of the matrix/grid approach raises for consideration whether a less individualised approach could be employed in the mass tort context.

In the DePuy ASR Implants (hips) class action Wigney J compared the matrix or grid style SDS employed in the US for the same hip implants with the approach adopted in the Australian class action.[134] Wigney J observed that:

> It could also perhaps be said that the United States settlement provided at least some more certainty, or at least less uncertainty, for claimants. By the same token, although the grid style payment system tended to provide some degree of certainty, it may ultimately have been to the disadvantage of certain claimants who, for whatever reason, may have suffered loss or damage that may not be fully compensated by an amount that was not the result of an assessment process, but rather was the product a general formula involving a base payment and pre-set deductions.[135]

The matrix is more certain to the extent that the compensation attributed to a particular injury/harm and any deductions are clearly spelt out at the time a settlement is brought to the court for approval. There is no assessor, or in most class actions many assesors, evaluating injuries and/or applying legal principles to each claimant at some later point during the application of the SDS. However, the claimant under a matrix SDS must still demonstrate that they meet the criteria for payment. The matrix is less able to take account of individual issues. The US literature has recognised that the creation of standardized distribution matrixes is hampered by the highly individualized nature of damage factors, such as pain and suffering, emotional distress, and magnitude of injury.[136]

In the US, mass torts created significant challenges for the conventional tort system due to the complexity and sheer size of those actions. As a result not only was settlement promoted, but efficient mechanisms for distributing settlements were needed. Individual damage determinations were often not practical.[137] The matrix or grid SDS is more efficient than individualised determinations. However, the downside of such an approach is that the group member receives a payment that takes account of some but not all relevant factors and as result is less accurate.

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[134] *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452, [99]-[109].

[135] Ibid, [108].

[136] Samuel Issacharoff, 'Administering Damages in Mass Tort Litigation' (1991) 10 *Review of Litigation* 463.

[137] Rony Kishinevsky, 'Damage Averaging-How the System Harms High-Value Claims' (2017) 95 *Texas Law Review* 1145, 1154.

Further it can result in underpayment to group members with strong claims and overpayment to group members with weak claims.[138]

The need for individual assessment, like SDS design generally, is driven by a need to balance precision with cost and delay. In the mass tort context the lack of precision may have more serious consequences than in the shareholder or cartel SDS because there is greater variation in claims. However, the need to recognise and adopt some form of trade-off continues, as shown by the comments of Hoeben CJ at CL in the Springwood fire class action in NSW:

> An important aspect of the scheme is that the relatively modest compensation which the group members will receive not be reduced by expensive and time consuming individual assessments of group member claims.[139]

E. Role of the Respondent

In most forms of SDS the respondent plays no role. The settlement sum is usually paid into a bank account by the respondent when the settlement deed/agreement is signed or once the class action settlement has been approved. The distribution of the settlement sum is undertaken by a scheme administrator, which is usually the law firm or lawyer that acted for the applicant in the class action.

The exception to the above approach is the process or liability SDS which is illustrated above through the LCS ® Duofix ™ Femoral Components class action. The process or liability SDS requires that as a first step the liability of the respondent to each group member be proved by reference to specified criteria. The respondent may dispute that liability has been shown and the issue will need to be determined by an assessor. Once that hurdle is overcome the lawyers for the group member and the respondents need to agree the compensation to be paid. If agreement cannot be reached then independent counsel is required to reach a determination. The SDS therefore incorporates an adversarial component to the process.

The continued involvement of the respondent may give rise to some advantages. The litigation process is more closely mimicked so that claim outcomes are closer to what would occur at trial after presentation and challenging of evidence. The outcome may be more accurate as the respondent has an incentive to test claims that it sees as weak or failing to meet the necessary criteria. This type of SDS may have no cap on liability. This was the case with the LCS ® Duofix ™ Femoral Components SDS. As a consequence group members do not have their recovery reduced pro rata because the fund is only a proportion of the amount equivalent to full recovery. The degrees of success or failure inform the approach taken by the parties in the SDS.

However, there are also disadvantages. The SDS is likely to be more costly and time-consuming. The LCS ® Duofix ™ Femoral Components class action took over 3 years to deal with about

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[138] Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89.

[139] *Johnston v Endeavour Energy* [2016] NSWSC 1132, [36].

400 claims.[140] In contrast the much larger Kilmore East Bushfire SDS (1481 personal injury and dependency (I-D) claims and 9,174 economic loss and property damage (ELPD) claims) will take about 2 years 4 months.[141] Settlement distributions in non mass tort claims are usually much quicker and cheaper. The CFP SDS took 6 months.[142]

F. Review mechanisms and oversight of settlement distribution

The SDS is approved by a court order as part of the settlement approval process in the class actions legislation.[143] As a consequence the terms of the SDS need to be explained and justified as part of the evidence filed seeking judicial approval of the settlement and are subject to examination and challenge as part of the settlement approval hearing.[144] The court will appoint an administrator to manage and oversee the SDS.[145] The court may also maintain jurisdiction over the proceedings while the SDS is administered and/or will make orders permitting the relisting of the matter for dealing with issues arising from the administration of the SDS.[146]

The administrator is required to distribute the settlement fund in accordance with the SDS approved by the Court.[147] Beyond this requirement the administrator's responsibilities and the

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[140] Rebecca Gilsenan, 'Class Actions: Settlement Distribution,' *UNSW CLE Seminar - Class Actions: Case Management, Mediation and Settlement Distribution in Focus*, Sydney, 15 March 2016, 3.

[141] *Matthews v AusNet Pty Ltd (Ruling No 45)* [2017] VSC 187.

[142] Rebecca Gilsenan, 'Class Actions: Settlement Distribution,' *UNSW CLE Seminar - Class Actions: Case Management, Mediation and Settlement Distribution in Focus*, Sydney, 15 March 2016, 6.

[143] *Federal Court of Australia Act 1976* (Cth) s 33V; Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 25 October 2016, [14.1]. See also *Supreme Court Act 1986* (Vic) s 33V; *Civil Procedure Act 2005* (NSW) s 173, *Civil Proceedings Act 2011* (Qld) s 103R.

[144] Michael Legg, 'Mass Settlements in Australia' in Christopher Hodges and Astrid Stadler (eds), *Resolving Mass Disputes* (Edward Elgar, 2013) 179-182.

[145] The power relied on by the court to appoint an administrator is *Federal Court of Australia Act 1976* (Cth) s 33ZF; *Supreme Court Act 1986* (Vic) s 33ZF and *Civil Procedure Act 2005* (NSW) s 183. See, eg, *Earglow Pty Ltd v Sigma Pharmaceuticals Limited* [2012] FCA 1496, Order 6; *Camilleri v Trust Company (Nominees) Limited* [2015] FCA 1468, Order 9; *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 312, [6]

[146] See eg, *Earglow Pty Ltd v Sigma Pharmaceuticals Limited* [2012] FCA 1496 (no orders dismissing the proceeding, orders allowing the administrator and the parties to apply for directions); Matthews v AusNet Electricity Services Pty Ltd – S CI 2009 4788, Supreme Court of Victoria, *General Form of Order*, 23 December 2014 (order dismissing the proceeding upon completion of distribution pursuant to the SDS and allowing the plaintiff, group members and administrator to apply for orders 'in respect of any issue arising in relation to the administration of the [SDS]'); *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452 (orders dismissing the proceeding but allowing the parties to apply for orders consequential to the SDS); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 (orders dismissing the proceeding but allowing the administrator to apply for directions).

[147] See eg, Matthews v AusNet Electricity Services Pty Ltd – S CI 2009 4788, Supreme Court of Victoria, *General Form of Order*, 23 December 2014 (order 4); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 (order 5).

source of those responsibilities is still developing. The SDS usually states that the administrator is to act on behalf of the group members as a whole, and not act as the lawyer for any individual group member.[148] The SDS may grant the administrator discretion in relation to the various elements of the SDS, such as whether to make an interim distribution. The reason for such discretion is 'to provide the Scheme Administrator with the agility to deal with issues as they arise'.[149] In the Springwood fire class action the NSW Supreme Court stated:

> The administrator and administrator's staff are under a duty to the Court to administer the scheme fairly according to its terms and are obliged under the scheme to act properly on behalf of the group members as a whole. The administrator has the same immunities from suit as a Judge of the Supreme Court of New South Wales.[150]

The integrity of class actions, and the SDS in particular, also requires the inclusion of review/appeal mechanisms. There are 3 common mechanisms that have been adopted.

First, in all of the SDS described above there were review mechanisms which provide at least one opportunity for a group member who thought that there was an error in the amount that was determined to be payable to them to challenge it. This can be relatively straightforward, as with shareholder class actions, where there will usually be an opportunity for group members to check that calculations are undertaken correctly, including the accuracy of inputs such as the number of shares held. More complex mechanisms may also be provided such as with the ELPD claimants in the Kilmore East bushfire SDS. There the claimant was given an opportunity to correct errors and then subsequently seek a review which included providing written contentions.[151] These appeal mechanisms may require the group member to pay a form of bond, which may be refunded if there is an error or an assessment is increased.[152]

The second mechanism is court oversight of settlement distributions. Court oversight has been most obvious in relation to the Victorian bushfire class actions where hearings have frequently been reported on in the media. Going forward, court oversight would appear to be a standard practice as shown by the Federal Court's Class Actions Practice Note which since its reissue on 25 October 2016 requires that the court be advised at regular intervals of the progress a SDS to ensure 'that distribution of settlement monies to the applicant and class members occurs as efficiently and expeditiously as practicable'.[153]

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[148] *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)* [2012] VSC 625 (SDS [4.2] annexed to the judgment); Kilmore Bushfire Class Action Settlement Distribution Scheme, 10 November 2014, [C (i)].

[149] *Matthews v Ausnet Pty Ltd (Ruling No 44)* [2016] VSC 732, [19]. See also *Johnston v Endeavour Energy* [2016] NSWSC 1132, [40].

[150] *Johnston v Endeavour Energy* [2016] NSWSC 1132, [37].

[151] Kilmore Bushfire Class Action Settlement Distribution Scheme, 10 November 2014, [E4.2], [E5.1], [E5.3].

[152] *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [38] (non-refundable fee for review).

[153] Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 25 October 2016, [14.6].

The scope of the court's power in undertaking oversight is still developing. As explained above, the SDS is approved by a court order as part of the settlement approval process. As a result, it has been held that the terms of a SDS cannot be challenged once approved. The court's role is 'to ensure that the scheme is administered properly, consistent with the terms of the SDS'.[154] The court can be asked to provide 'judicial advice' in relation to the administration of the SDS.[155] The court cannot review an individual assessment provided the SDS procedures have been followed.[156] Forrest J in overseeing the Kilmore East bushfire SDS explained that:

> The only remedy available, as I see it, is that of judicial review – but that would need a party to establish that there was either jurisdictional error or procedural unfairness on the part of the administrator or the reviewer.[157]

However, courts have been prepared to amend a SDS, which would seem to provide a method by which a SDS that gave rise to some form of procedural unfairness or injustice could be addressed.[158] As Flick J explained in obiter in the Pan Pharmaceuticals class action:

> It would be … surprising if the ability of this Court subsequent to approval being given pursuant to s 33V is confined to merely supervising the distribution of settlement monies in accordance with that approval and not to address unexpected unfairness arising from the approved distribution scheme[159]

The third mechanism relates to costs. Costs incurred in administering the SDS must be approved by the Court. To assist in this approval process the Victorian courts have appointed costs consultants as special referees to report on the costs claimed for administering an SDS.[160] The special referee's role is 'to ensure that there [is] an independent audit of the administration costs claimed by [the scheme administrator] (for professional costs and disbursements such as counsels' fees or loss assessors' fees) and that the claims were reasonable'.[161]

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[154] *Matthews v Ausnet (Ruling No.42)* [2016] VSC 394, [4]. (see)

[155] *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 312, [12]-[16] (the administrator's ability to approach the court for advice was part of the SDS and court orders at the time of settlement approval).

[156] *Matthews v Ausnet Pty Ltd (Ruling No.43)* [2016] VSC 583, [30]; *Matthews v AusNet Pty Ltd (Ruling No 45)* [2017] VSC 187, [40]. For a contrary view expressed obiter see *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 11)* [2012] FCA 105, [19].

[157] *Matthews v Ausnet Pty Ltd (Ruling No.43)* [2016] VSC 583, [31].

[158] *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 6)* [2016] VSC 166, [20]-[23] (amending the SDS to allow solicitors in addition to barristers to assess claims so as to expedite the process).

[159] *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 11)* [2012] FCA 105, [19].

[160] *Matthews v Ausnet (Ruling No.41)* [2016] VSC 171, [26], *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731, [5]-[6]; *Downie v Spiral Foods Pty Ltd (Ruling No 3)* [2017] VSC 7, [4].

[161] Ibid, [27].

VII. CONCLUSION

This paper has sought to achieve several goals. First it has described the design and operation of a range of class action SDS that have previously not been subject to study and analysis. The description is detailed so that the reader can appreciate the range of options that have been utilised. Second it has aimed to highlight the difficult trade-offs involved in seeking to balance precision with minimising costs and delay. This balance can be more or less difficult depending on the underlying causes of action and losses. The greater the need for an individualised assessment the starker the trade-off. As a result shareholder and cartel class action SDSs can usually achieve sufficient precision with less cost and delay than mass tort SDSs. Third, the paper has sought to highlight the unique context in which the SDS operates. It is a settlement and not a court adjudication, yet it is subject to court approval. Consequently the substantive law and the compensation that law would award imparts a significant gravitational pull on the terms of the SDS as the substantive law is the court's guiding light. It also follows that to gain the imprimatur of the court, which is itself required to do justice, an SDS is expected to afford some degree of procedural fairness to the group members who have their claims determined by the SDS process. Fourth the paper has set out guidance on the design of a SDS based on judicial comment and the SDS described in the paper. However, there is no single correct approach, but rather a need to strike the right balance between precision and efficiency in the circumstances of the particular case.