FEDERAL COURT OF AUSTRALIA

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

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| File number: | VID 513 of 2015 |
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| Judges: | **MURPHY, GLEESON AND BEACH JJ** |
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| Date of judgment: | 26 October 2016 |
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| Catchwords: | **PRACTICE AND PROCEDURE –** representative proceedings under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (“the Act”) **–** litigation funding of representative proceedings – where order is sought for all group members to pay a litigation funding commission from any settlement or judgment, not just those group members who have signed a litigation funding agreement – whether Court has power to make such an order under ss 33ZF and 23 of the Act – meaning of the expression “appropriate or necessary to ensure that justice is done in the proceeding” in s 33ZF of the Act – whether order is appropriate to ensure that justice is done in the proceeding **–** the significance of the low level of objection by group members – whether there is a benefit for group members in judicial approval of the rate of the funding commission – whether there is a benefit for group members of a condition that they not be worse off by reason of the order – whether there is a benefit for group members in being informed of the obligation to pay a Court-approved funding commission before deciding whether to opt out – whether the right to opt out operates to safeguard group members’ interests **–** whether the order will be to the detriment of group members **–** whether a funding equalisation order is likely or to be preferred to a common fund order – whether a common fund order is consistent with the broad policy aims of the representative proceeding regime in Part IVA. |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth)*Corporations Act 2001* (Cth)*Australian Consumer Law* (Cth)*Federal Court of Australia Act 1976* (Cth)*Federal Court of Australia Amendment Bill 1991* (Cth)  |
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| Cases cited: | *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89*Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers Appointed) (in liq)* (2015) 325 ALR 539; [2015] FCA 811*Bray v F. Hoffman La Roche Ltd* [2003] FCA 1505*Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11; [2009] FCAFC 147*Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41*City of Swan v McGraw-Hill Companies, Inc* (2016) 112 ACSR 65; [2016] FCA 343*Cominos v Cominos* (1972) 127 CLR 588*Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388*Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19*Dugal v Manulife Financial Corporation* 2011 ONSC 1785*Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469*Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52;[2012] NSWCCA 125*Farey v National Australia Bank Ltd* [2014] FCA 1242*Farey v National Australia Bank Ltd* [2016] FCA 340*Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203*In re Prudential Insurance Co of America Sales Practice Litigation* 148 F3d 283 (3d Cir 1998)*Kelly v Willmott Forests Ltd (In Liquidation) (No 4)* (2016) 112 ACSR 584; [2016] FCA 323*King v AG Australia Holdings (formerly GIO Australia Holdings Ltd)* [2003] FCA 980*McCulloch v State of Maryland* 17 US 316 (1819)*Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626*Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275; [2007] FCAFC 200*P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029*Pathway Investments Pty Ltd & Anor v National Australia Bank Ltd (No 3)* [2012] VSC 625*Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277*Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167*Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33*Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925Australian Law Reform Commission, *Grouped Proceedings in the Federal Court, Report No 46* (Australian Law Reform Commission, Canberra, 1988)Eisenberg T and Miller G, “Attorney fees in class action settlements: An empirical study” (2004) 1 (No 1) *Journal of Empirical Legal Studies* 27Graves D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Lawbook Co, 2012)Hoffman-Ekstein J, “Funding open classes through common fund applications” (2013) 87 *Australian Law Journal* 331Legg M, “Reconciling litigation funding and the opt out group definition in Federal Court of Australia class actions – The need for a legislative common fund approach” (2011) 30(1) *Civil Justice Quarterly* 52Legg M, “Institutional investors and shareholder class actions: The law and economics of participation” (2007) 81 *Australian Law Journal* 478 Legg M, “Litigation funding in Australia” (2010) *University of New South Wales Law Research Series*, 12*Manual for Complex Litigation* (4th ed, Federal Judicial Centre, 2004)Moore M, “10 years since King v GIO” (2009) 32(3) *UNSW Law Journal* 883Morabito V, *An Empirical Study of Australia’s Class Action Regimes, Second Report* (September 2010)Morabito V, *An Empirical Study of Australia’s Class Action Regimes, Fourth Report* (July 2016)Morabito V, “Revisiting Australia’s first shareholder class action”, *Investor Class Actions* (Justice KE Lindgren (ed), Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney, 2009)Mulheron R, “The case for an opt out class action for European member states: A legal and empirical analysis” (2009) 15 *Columbia Journal of European Law* 409 Mulheron R, *The Class Action in Common Law Legal Systems* (Hart Publishing, 2004)Victorian Law Reform Commission, *Civil Justice Review, Report 14* (Victorian Law Reform Commission, Melbourne, 2008)Walker J, Khouri S and Attrill W, “Funding criteria for class actions” (2009) 32(3) *UNSW Law Journal* 1036Waye V and Morabito V, “Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions” (Paper presented at the Litigation Costs Funding and Behaviour Symposium, Law School, Leiden University, December 2015)Waye V and Morabito V, “The dawning of the age of the litigation entrepreneur” (2009) 28(3) *Civil Justice Quarterly* 389 |
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| Date of hearing: | 27 May 2016 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 206 |
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| Counsel for the Applicant: | Mr M B J Lee SC with Mr W A D Edwards |
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| Solicitors for the Applicant: | Maurice Blackburn |
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| Counsel for the Respondent: | Mr M O’Bryan QC with Mr R Foreman |
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| Solicitors for the Respondent: | Allens |

ORDERS

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|  | VID 513 of 2015 |
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| BETWEEN: | MONEY MAX INT PTY LTD, AS TRUSTEE FOR THE GOLDIE SUPERANNUATION FUNDApplicant |
| AND: | QBE INSURANCE GROUP LIMITEDRespondent |

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| JUDGES: | MURPHY, GLEESON AND BEACH JJ |
| DATE OF ORDER: | 26 OCTOBER 2016 |

THE COURT ORDERS THAT:

1. Within 14 days of the date of this order, the parties each file and serve proposed minutes of orders to give effect to these reasons including any written submissions (limited to one and a half pages each) on the question of costs.
2. Costs reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

# INTRODUCTION

1. The present proceeding is a shareholder class action brought by the applicant, Money Max Int Pty Ltd, against the respondent, QBE Insurance Group Ltd (**QBE**), pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth)(the **Act**). The action is funded by a litigation funder, International Litigation Funding Partners Pte Ltd (the **Funder**). The applicant brings the class action on its own behalf and on behalf of an “open class” comprising all persons who acquired an interest in QBE shares in the defined period and who claim to have suffered loss as a result of QBE’s conduct. As at the date of hearing of the present application, the applicant and approximately 1,290 class members (the **funded class members**) had each entered into a litigation funding agreement (**Funding Agreement**) with the Funder. The balance of class members had not (the **unfunded class members**).
2. Pursuant to each Funding Agreement the applicant and the funded class members have agreed that, in consideration for the Funder agreeing to meet their legal costs, any adverse costs order and any security for costs they will, from any settlement or judgment monies they receive, reimburse the Funder the legal costs paid and will also pay the Funder a percentage commission (**funding commission**) of either 32.5% or 35% (depending upon how many QBE shares they acquired in the defined period). The effect of each Funding Agreement is that funded class members are collectively bearing the cost of the action against QBE as they have agreed to pay a funding commission and to reimburse the legal costs paid by the Funder out of any settlement or judgment. Unfunded class members who do not opt out benefit from the commercial arrangements under which the Funder pays the legal costs, takes on the burden of adverse costs and provides security for costs, even though they are not presently required to pay the Funder a percentage funding commission or a proportionate share of legal costs.
3. Before the Court is an interlocutory application in which the applicant seeks orders pursuant to s 33ZF of the Act which would, in essence, have the effect of applying litigation funding terms to *all* class members (not just the funded class members). The principal orders sought would require the applicant and all class members to pay the Funder a pro rata share of the legal costs incurred and a funding commission at the (reduced) rate of 30% from the common fund of any settlement or judgment in their favour. We will refer to this as a “common fund order”. Such an order would oblige *all* class members, including those that have not entered into a Funding Agreement, to contribute equally to the legal costs and litigation funding costs of the proceeding by paying the Funder.
4. All class members were notified of the application. There were only two objections to the application and, for reasons that we will later explain, those objections have little significance to our decision.
5. QBE opposes the orders sought. Central to QBE’s opposition is the contention that the Court is likely to make a “funding equalisation order” in the context of a settlement approval application. Such an order would allow deductions from the settlement amounts payable to unfunded class members of amounts equivalent to the funding commission that would otherwise have been payable by them had they entered into a funding agreement. Such amounts would then be distributed pro rata across all class members, so that both funded and unfunded class members would receive the same proportion of their settlement or judgment. Although unfunded class members would not pay a funding commission to the Funder, such an order would achieve equality of treatment between class members because unfunded class members would not receive any more “in hand” than funded class members.
6. QBE contends that a common fund order will lead to a substantial and unjustified increase in the aggregate funding commission paid to the Funder compared to the funding commission payable under a funding equalisation order. It argues that a common fund order would leave class members with a significantly lower proportion of any settlement or judgment monies “in hand”, and that this would be to the detriment of both funded and unfunded class members. QBE also contends that a common fund order would create an unnecessary financial hurdle to the resolution of the case. Moreover, it argues that in the present circumstances the Court has no power to make the orders sought.
7. For the reasons that we explain, we are satisfied that the orders that we propose are within power and are appropriate pursuant to ss 33ZF and 23 of the Act.
8. The orders that we propose, which are not precisely as the applicant has sought, are to the benefit of class members and will not cause any material detriment to their interests. Upon receipt of an undertaking by the Funder, the applicant and the solicitors for the applicant agreeing to be bound by what we consider to be not inappropriate litigation funding terms (**Funding Terms**), but with the funding commission rate to be *later* set and approved by the Court at the appropriate time, we will make orders which require all class members to pay the same pro rata share of legal costs and the funding commission from the common fund of any amounts they receive in settlement or judgment in the case. The effect of the orders will be to impose the burden of the legal costs and litigation funding commission costs incurred in the proceeding equally upon all class members who stand to benefit from the proceeding, not just upon funded class members.
9. In form, we will make orders in the following terms:

Upon the provision of an undertaking by each of International Litigation Funding Partners Pte Ltd, the Applicant and Maurice Blackburn to each other and to the Court within seven days of the date of this order that they will comply with their obligations under the Funding Terms (being Annexure A to this order) and the terms of Order 1:

The Court orders that:

1. Subject to further order, upon Resolution (as defined in the Funding Terms) the Applicant and Group Members pay from any Resolution Sum (as defined in the Funding Terms), the amounts referred to in sub-clauses 6(a) to (d) of the Funding Terms, prior to any distribution to Group Members, in accordance with the Funding Terms.

2. Upon Resolution, no amount payable by the Applicant and Group Members pursuant to Order 1 is to exceed an amount that would otherwise be payable by the Applicant and Group Members in the event that Order 1 had not been made.

1. We have set out in Annexure A to these reasons what we contemplate as the Funding Terms, which are as the applicant proposed except for amendments to clauses 6(b) and (c), 16 and 17. For convenience, we note that the amended clause 6 of the Funding Terms provides:

Upon Resolution, the Funder or its nominee shall be paid the following amounts from the Resolution Sum, prior to any distributions to Group Members:

(a) an amount equal to the total monies paid by the Funder pursuant to paragraph 2 above;

(b) an amount, as consideration for the funding of the Proceedings, expressed as a percentage of the Resolution Sum as approved by the Court;

(c) if the Funder funds an appeal, or the defence of an appeal, or any further appeal or the defence of any further appeal, a further amount expressed as a percentage of the Resolution Sum as approved by the Court, in respect of each appeal so funded; and

(d) an additional amount, on account of GST, being the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by the Funder for any taxable supply made to the Applicant by the Funder under or in connection with these Funding Terms.

We will give the parties an opportunity to make further submissions on the proposed orders before pronouncing them.

1. The proposed orders include the following safeguards. *First*, we have not approved the funding commission at the rate of 30% as the applicant seeks, or indeed at any percentage rate. Court approval of a reasonable funding commission rate is to be left to a later stage when more probative and more complete information will be available to the Court, probably at the stage of settlement approval or the distribution of damages. This compares favourably with the present situation for class members in the following respects:
2. Under the Funding Agreements, funded class members are contractually obliged to pay a funding commission at the rate of 32.5% or 35% from any settlement or judgment. However, under the proposed orders they will have the protection inherent in judicial approval of such a potentially lower funding commission rate as the Court considers reasonable. We make no attempt to bind the Court hearing the relevant application but in our view it is highly likely that the funding commission will be approved at a rate lower than 32.5% or 35%.
3. Under the Funding Agreements, for funded class members there is no cap on the aggregate funding commission that they may be contractually obliged to pay. Accordingly, under the present arrangements, in the event of a very large settlement it might eventuate that the Funder is entitled to an excessive or disproportionate amount. Under the proposed orders, that consequence will be significantly ameliorated if not avoided.
4. Under the present funding arrangements, unfunded class members face the prospect (and on QBE’s contentions it is likely) that through a funding equalisation order they will be saddled with the deduction from any settlement or judgment of an amount equivalent to the funding commission rate charged to funded class members and currently fixed in the Funding Agreements. But under the proposed orders, such class members (indeed all class members) will have the protection inherent in the judicial approval of a deduction at such a potentially lower rate as the Court considers reasonable. We again note our view that it is highly likely that the funding commission will be approved at a rate lower than 32.5% or 35%.

The fact that class members’ interests will be protected by judicial oversight of the funding commission charged by the Funder is central to our decision.

1. *Second*, the proposed orders contain a floor condition that no class member can be worse off under the orders than he or she would be if such orders were not made. This protects class members in relation to QBE’s principal argument that a common fund order is likely to result in the Funder receiving substantially more money and all class members receiving substantially less money, than if a funding equalisation order were made.
2. *Third,* we contemplate that before class members are required to choose whether or not to opt out, they will be informed of the proposed orders and the fact that they will have deducted from any settlement or judgment a reasonable funding commission at a Court-approved rate. If class members are concerned about an obligation to pay a reasonable Court-approved funding commission, they can opt out of the proceeding and bring their own case (either individually or collectively) with or without other funding arrangements.
3. More generally, whilst our decision is based on the interests of justice in the extant proceeding rather than on broad policy considerations, it is worth observing that a common fund approach to litigation funding charges and legal costs is consistent with the aims of Part IVA. A common fund approach may be said to enhance access to justice by encouraging “open class” representative proceedings as a practical alternative to the “closed class” representative proceedings which are prevalent in funded shareholder class actions. Open class proceedings are more consistent with the opt out representative procedure envisaged by the legislature in enacting Part IVA. Further, by encouraging open class proceedings, a common fund approach may reduce the prospect of overlapping or competing class actions and reduce the multiplicity of actions that sometimes occurs with class actions. However, this is not a matter of significance in the present case because it is common ground between the parties that a competing class action is now unlikely to be filed.

# THE SUBSTANTIVE PROCEEDING

1. The substantive proceeding was filed on 9 September 2015. The class is defined as all persons who acquired an interest in ordinary shares in QBE between 20 August and 6 December 2013 (the **relevant period**) and who claim that they suffered loss or damage resulting from the pleaded conduct of QBE (except for the Chief Justice or any Judge of this Court or the High Court). The applicant alleges that in connection with the performance of its North American business QBE engaged in misleading or deceptive conduct in breach of ss 1041E and 1041H of the *Corporations Act 2001* (Cth)*,* s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth),and/or s 18 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and breached its continuous disclosure obligations under s 674 of the *Corporations Act 2001* (Cth) and Australian Stock Exchange (**ASX**) Listing Rule 3.1.
2. It is common ground that the price of QBE shares declined by $4.63 per share over 9 and 10 December 2013 after the release of an announcement by QBE to the ASX (which the applicant describes as a corrective disclosure).
3. The principal theory of causation advanced in the proceeding is one of “market-based causation”, it being claimed that during the relevant period the QBE share price on the ASX was wrongly inflated because the market was trading while informed by QBE’s misleading conduct and without the benefit of information which ought to have been disclosed pursuant to QBE’s continuous disclosure obligations. The applicant alleges that potentially every person who acquired QBE shares in the relevant period is a class member because they paid more than the true value of the shares and suffered immediate loss or damage as a result. 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. In the alternative, it is alleged that the applicant and class members relied on QBE’s various announcements and disclosures in acquiring QBE shares in the relevant period.
4. The proceeding is at a relatively early stage. Discovery is not complete and no evidence has been filed. The Funder has provided $3.5 million in security for costs and QBE has liberty to apply for further security for costs.
5. No date has yet been set by which class members must choose whether to opt out of the proceeding pursuant to s 33J of the Act.

# THE INTERLOCUTORY APPLICATION

1. On 25 September 2015, at the first case management conference, Senior Counsel for the applicant flagged that the applicant would make an application seeking a common fund order. On 3 December 2015, the applicant filed the interlocutory application now before this Court. On 6 April 2016 the Chief Justice directed pursuant to s 20(1A) of the Act that the application be referred to the Full Court for hearing and determination.

## The evidence

1. The following material is before the Court:
2. two affidavits of Jacob Varghese, a partner in the firm Maurice Blackburn which acts for the applicant, the first affirmed on 11 March 2016 (with some paragraphs redacted) and the second on 26 May 2016;
3. two affidavits of Andrew Watson, a partner in Maurice Blackburn, the first sworn on 5 April 2016 and the second on 16 May 2016;
4. an affidavit of Anthony O’Brien, a solicitor with Maurice Blackburn affirmed on 4 May 2016;
5. an affidavit of Frederick Rose, the Chairman of the Board of the Funder, sworn on 13 May 2016;
6. an expert report of Dr Ramsey Zein, an independent expert economist, dated 11 March 2016 and filed on behalf of the applicant; and
7. documents produced on a notice to produce and subpoena including:
8. an email from Maurice Blackburn to the applicant with attachments including a Funding Agreement, a Retainer and Costs Agreement between the applicant and Maurice Blackburn, a Privacy Statement and a Conflicts of Interest Statement provided by Maurice Blackburn;
9. the audited Financial Statements of the Funder as at 31 December 2014;
10. Financial Statements of the Funder for the year ended 31 December 2015 and for the year commenced 1 January 2016, as at 31 March 2016; and
11. the minutes of the Funder’s Board Meeting held on 17 November 2015.
12. Mr Varghese gave evidence in support of the application and he was not cross-examined. There is nothing in the materials or submissions which cause us to doubt his evidence in any material way and we accept his evidence. We also accept the evidence of the other deponents, most of which is uncontentious.

## The Funding Agreement

1. The Funding Agreement entered into by the applicant is in evidence, and the funded class members entered into agreements in the same or similar terms. The key provisions of the Funding Agreement are as follows:
2. clause 4, which provides for the obligations of the “Claimant” (being each funded class member), including:
3. to provide instructions to the “Lawyers” (being Maurice Blackburn or any other firm appointed after consultation with the Funder), subject to a direction that the Lawyers consult with the Funder with regard to any “significant issue”: cl 4.1;
4. to conduct the proceedings so as to avoid unnecessary cost and delay: cl 4.2(c);
5. to accept and follow the Lawyers’ reasonable legal advice: cl 4.2(d);
6. to not communicate with QBE about the “Claims” (that is, the Claimant’s own claims) or their compromise other than through the Lawyers or upon their reasonable advice: cl 4.5(a);
7. to permit the representative party (being the applicant) to give binding instructions to the Lawyers in relation to the “Claims” and the claims of other funded class members including instructions and decisions in relation to settlement: cl 4.8;
8. to authorise the Lawyers to advise the Funder of any settlement discussions, and consult with the Funder as to the terms of any proposed settlement: cl 4.9; and
9. in the event of a disagreement between the Claimant and the Funder as to the appropriate terms of settlement, to authorise Senior Counsel to provide an advice as to whether the settlement is fair and reasonable. The parties are bound by that advice: cll 4.10-4.11;
10. clause 5, which provides for the obligations of the Funder, including to:
11. pay all legal costs and disbursements reasonably incurred and payable to the Lawyers: cl 5.1(a);
12. pay any adverse costs order made in the proceeding against any funded class member: cl 5.1(b); and
13. furnish security for costs as ordered: cll 5.4–5.5;
14. clauses 8 to 10, which provide for the receipt and application of any “Resolution Sum” (being the amount for which the “Claims” – that is, the Claimant’s own claims and not the claims of other class members – are settled or for which judgment is given), including that:
15. the Claimant irrevocably authorises and directs the Lawyers to receive any Resolution Sum into an account kept for that purpose: cl 8.2;
16. the Claimant irrevocably authorises and directs the Lawyers to make payments out of the account as referred to in cl 10.1: cl 9.1. Those amounts are:
17. an amount equal to the funded class member’s share of the total monies paid by the Funder pursuant to clause 5 and the equivalent clause in other funding agreements: cl 10.1(a). This renders each Claimant liable for his or her proportionate share of the total legal costs of the action by reference to the proportion his or her own recovery bears to the recovery of all Claimants (excluding any amount recovered in respect of costs);
18. an amount equal to the percentage of the Resolution Sum (being, relevantly, either 32.5% or 35% depending on how many QBE shares the Claimant acquired in the claim period): cl 10.1(b). This renders each Claimant liable for a percentage of the amount recovered in respect of its own claim (not the claims of others);
19. if a lump sum amount is received by way of settlement of the Claims, then, subject to any Court order, following deduction of all amounts permitted by the Funding Agreement, the monies are to be distributed to funded class members on a pro rata basis by reference to the “Gross Recovery” of all funded class members: cl 9.2. The effect of this provision is that each funded class member has agreed that following deduction of his or her share of legal costs and the funding commission, the balance of the recovery by funded class members is to be distributed pro rata to all funded class members.
20. The effect of the Funding Agreements is that funded class members are collectively bearing the cost of the litigation. Although unfunded class members who do not opt out will benefit from the funding arrangements, they are not presently required to pay the Funder a pro rata share of the funding commission or any share of the legal costs.

## The ratio of shares acquired by funded class members compared to shares acquired by unfunded class members

1. On the basis that approximately 920 class members had entered into funding agreements as at 16 March 2016, Mr Varghese estimates that the total number of QBE shares acquired during the relevant period and held until 9 December 2013 (**relevant shares**) by funded class members is approximately:
2. 71.5 million, calculated on a share trading first-in first-out basis; and
3. 54 million, calculated on a share trading “netting basis”.
4. Dr Zein estimates that the total number of relevant shares for all class members is approximately:
5. 218.8 million, using the “Single-Trader Model” for estimation; and
6. 150.9 million, using the “Multi-Sector Multi-Trader Model” for estimation.
7. For the purposes of the present application, QBE does not contest the estimates of Mr Varghese and Dr Zein.
8. Dr Zein estimates (again on the basis that approximately 920 class members had entered into funding agreements as at 16 March 2016) that the proportion of relevant shares acquired by:
9. funded class members falls in the range of approximately 25% to 47 %; and
10. conversely, unfunded class members falls in the range of approximately 75% to 53%.

That is, he estimates that the ratio of relevant shares acquired by funded class members to relevant shares acquired by unfunded class members (the **ratio of funded to unfunded class members’ shares**) falls within the range 25:75 and 47:53.

1. By the time the application was heard the number of funded class members had increased to approximately 1,290 persons and the ratio of funded to unfunded class members’ shares was therefore higher than Dr Zein’s estimate. It seems likely that more class members will enter into funding agreements over time, and the proportion of funded class members will increase further as a result. Further, as we later explain, it would be unsurprising if the number of unfunded class members who participate in a settlement or judgment in this proceeding was far lower than the number of unidentified class members who fall within the class description. This could significantly increase the ratio of funded to unfunded class members’ shares.

## The Funding Terms proposed by the applicant

1. The interlocutory application seeks orders for Court approval of Funding Terms modelled on the terms of the Funding Agreement but which seeks that the terms be applied to the applicant and all class members and provides for a reduced funding commission rate of 30%. The terms include that:
2. the Funder’s obligations to pay the applicant and class members’ lawyers (**Lawyers**), to pay any adverse costs order made and to furnish any security for costs, extends to all class members, and not just funded class members;
3. any sum for which the applicant and class members’ claims are settled, or for which judgment is given (**Resolution Sum**), is paid into one common account;
4. subject to any order of the Court, the Lawyers are to pay the Funder from the common account:
5. an amount equal to the total monies paid by the Funder for legal costs in funding the proceeding; and
6. an amount equal to 30% of the Resolution Sum;

and the net balance is to be distributed on a pro rata basis to all class members proportionately in accordance with any distribution scheme approved by the Court;

1. the Lawyers’ professional duties are owed to the applicant and not to the Funder. The applicant, as the representative party, will give binding instructions to the Lawyers and make binding decisions on behalf of the class members up to the point of any court approval of settlement or the delivery of judgment in respect of the common issues in the proceeding;
2. if there is a dispute between the Funder and the applicant as to the appropriate terms of settlement, the Lawyers will brief Senior Counsel to provide an advice which will be final and binding on both the applicant and the Funder; and
3. the Funding Terms can only be terminated by Court order on application by the applicant, the Funder or a class member. Those terms provide for what happens upon termination, but expressly subject to “any contrary order of the Court”.
4. Some of the Funding Terms, in particular the requirement for the Funder to pay class members’ legal costs, adverse costs and any security for costs, the requirement that the Lawyers’ professional duties are to the applicant and not the Funder, and the requirement that any dispute between the applicant and the Funder be resolved by Senior Counsel, operate to safeguard class members’ interests.
5. QBE opposed the application for approval of the Funding Terms in the terms set out in the interlocutory application. It argues that such orders would bind various known and unknown persons to a set of commercial arrangements relating to the funding and conduct of the proceeding when the unfunded class members had not previously been a party to any commercial relationship with the Funder, the applicant’s lawyer or the funded class members. QBE also argued that the Court was not empowered to approve or impose commercial arrangements on some class members at the request of others.
6. As a consequence of some of QBE’s concerns, the applicant then modified its proposal and sought the following order as its preferred position, conditioned upon the Funder providing an undertaking to comply with the Funding Terms:

Upon the provision of an undertaking by International Litigation Funding Partners Pte Ltd to the Court within seven days of the date of this order that it will comply with its obligation under the terms of this Order:

The Court Orders That:

Subject to further order, upon Resolution (as defined in the Funding Terms being Annexure A to this Order) the Applicant and Group Members pay from any Resolution Sum (as defined in the Funding Terms), the amounts referred to in sub- clauses 6 (a) to (d) of the Funding Terms, prior to any distribution to Group Members, in accordance with the Funding Terms.

1. In the event that the Court did not adopt its preferred position, the applicant also put forward the following alternative orders (the **alternative orders**), again conditioned upon the provision of an undertaking by the Funder to comply with the Funding Terms:

Upon the provision of an undertaking by International Litigation Funding Partners Pte Ltd to the Court within seven days of the date of this order that it will comply with its obligation under the terms of Order 1:

The Court Orders That:

1. Subject to further order, upon Resolution (as defined in the Funding Terms being Annexure A to this Order) the Applicant and Group Members pay from any Resolution Sum (as defined in the Funding Terms), the amounts referred to in sub- clauses 6 (a) to (d) of the Funding Terms, prior to any distribution to Group Members, in accordance with the Funding Terms.

2. Upon any settlement, no amount payable by the Applicant and Group Members pursuant to Order 1 is to exceed an amount that would otherwise be payable by the Applicant and Group Members in the event that Order 1 had not been made.

1. In both sets of proposed orders, the applicant accepted that the Court could revisit the rate of funding commission at the settlement approval stage. As we earlier explained, our proposed orders follow the alternative orders but with the important variation that the funding commission rates are not specified and are left for later consideration and approval by the Court, preferably at the time of settlement approval or the distribution of any damages award if the matter proceeds to judgment.

# NOTICE TO CLASS MEMBERS

1. By orders made on 7 and 23 December 2015, the applicant was required by 29 January 2016 to publish a notice by email or by ordinary post (and on the Lawyers’ website) to all persons who acquired an interest in QBE shares in the relevant period, giving them notice of the present application (the **Notice**).
2. The Notice informed class members of the substance of the interlocutory application and that if they wished to be heard in opposition to the application, they should file a Notice of Intention to Object (**Objection**). We are satisfied on the evidence that class members were sent the Notice in accordance with the orders.

## The Objections

1. As at 4 May 2016, 51 class members had filed an Objection. However, it appears on the face of the Objections that most objectors were confused as to the meaning and purpose of the Notice. Rather than objecting to the proposed orders, it appears that most class members who filed an Objection sought to be included in or to support the class action.
2. To deal with this apparent confusion the solicitors for the applicant wrote to each of the 51 class members that filed an Objection to explain the purpose of the Notice. Subsequently 45 of the 51 objectors gave instructions to that firm to withdraw their Objections.
3. Of the six remaining Objections:
4. three class members did not respond to the solicitors for the applicant. We note that their Objections did not state an intelligible ground of objection;
5. one class member informed the solicitors that he wished to withdraw his Objection, but had not done so at the date of hearing. The Objection did not state a ground; and
6. two class members, Advance Industries Pty Ltd and Mr Liook Chin, maintained their Objections. Both objected on the basis that the funding commission rate was too high especially when legal costs were required to be paid on top of the funding commission.
7. There were also 38 persons who completed an Objection but did not file it (or who indicated to the solicitors for the applicant that they had or may have completed an Objection without sending it to the firm or filing it). Following communications between the solicitors for the applicant and those class members, 37 of them informed the firm that they were withdrawing their Objections. The remaining class member did not respond to the solicitors but, as the stated ground of objection by that class member was “I do not believe QBE made transparent the true position”, we infer that the class member was confused as to the purpose of the Notice.

## The applicant’s contentions as to the significance of the low level of objection

1. It is convenient to now deal with the parties’ contentions as to the significance of the fact that there were no substantive objections by class members to the proposal to impose a funding commission on unfunded class members (as distinct from in relation to the funding commission rate) and only two objections to the rate.
2. Of the two objections, it is noteworthy that Advance Industries Pty Ltd only acquired 10 QBE shares and Mr Chin only acquired 30 QBE shares in the relevant period. Assuming that Advance Industries Pty Ltd is entitled to compensation per share equal to the decline in the price of QBE shares following the alleged corrective disclosure (which is $4.63 per share on the applicant’s case), the funding commission payable by it under the proposed orders would be $13.89 (10 shares x $4.63 x 30%). The funding commission payable by Mr Chin would be $41.67 (30 shares x $4.63 x 30%). They are minor participants in the proceeding.
3. No class member filed an objection to the substantive proposal to impose a funding commission on unfunded class members (as distinct from in relation to the rate). The objections by Advance Industries Pty Ltd and Mr Chin were primarily directed to the rate of funding commission rather than to the imposition of a commission. Their objections to the 30% funding commission rate are of little significance to our decision as they will have an opportunity to be heard at a later stage when the Court approves a reasonable funding commission rate.
4. The applicant submits, and we accept, that:
5. in an opt out class action model, where the identity of class members is necessarily unknown when proceedings commence, the role of notices to class members is central. A court sanctioned notice is the official means by which class members are informed about the proceeding and the way in which it can impact upon their rights;
6. the Australian Law Reform Commission report which led to the introduction of the Part IVA procedure (Australian Law Reform Commission, *Grouped Proceedings in the Federal Court, Report No 46* (Canberra, 1988)) (**ALRC Report**) stated (at [126]):

A fair balance will be struck between the interests of group members and respondents if the proceedings can be commenced without the consent of group members as long as notice is given to group members and they have the opportunity to withdraw from the proceedings or litigate individually.

1. the Explanatory Memorandum accompanying the Bill which introduced Part IVA said of s 33X (and s 33Y) that the purpose of the provisions is to “set out the requirements for giving notice, in the most efficient and effective way, to group members of the commencement of the representative proceeding and of other events during the course of the proceeding which may affect their rights”: Explanatory Memorandum, *Federal Court of Australia Amendment Bill 1991* (Cth) at [33]. The Explanatory Memorandum went on to say that the reason that personal notice need not be given was due to the likely high cost of that form of notice (at [36]).
2. Part IVA operates on the basis that class members who do not opt out are bound by the proceedings and it is directed at removing the practical barrier to access to justice inherent in requiring people to take positive steps in relation to their rights. We consider that a notice in appropriate terms, approved by the Court, and published by means approved by the Court, is an adequate way of ensuring class members are sufficiently informed of what they need to know in order to exercise their rights.
3. The applicant contends that the absence of any substantive objection (beyond two class members who favour a lower rate of funding commission) is objective evidence that class members consider that the proposed Funding Terms are fair and reasonable and in their interests: *Darwalla Milling Co Pty Ltd & Ors v F Hoffman-La Roche Ltd & Ors (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 at [27] (Jessup J). We accept that contention, subject to our views as to the weight of that evidence.
4. The applicant goes further and contends that the structure and purpose of Part IVA and the role of the notice provisions in that Part means that, where a court approved notice informing class members of orders being sought has been given, if class members do not object they are bound to have accepted that the orders are appropriate. We do not agree.
5. We infer that class members are at least broadly aware of the terms of the proposed common fund order, although we note that the Notice said nothing about the comparative financial effect of such an order on class members compared to what might occur in the absence of such an order. We also accept that the absence of substantive objection is some evidence of class members’ assent to what is proposed. But in the circumstances of the present case the absence of substantive objection and the low level of objections are not significant to our decision.
6. Fundamentally we say this because the practical realities of class actions and the likely low level of engagement of many class members means that an absence of objection or a low level of objection to a particular proposition is often weak evidence of class members’ assent and carries little weight. It may be the case, as the applicant contends, that the absence of objection is “no small thing”, but care should be taken before approaching an application on the basis that class members’ silence is equivalent to their assent. It is the Court’s responsibility to protect class members’ interests and the absence of objections or a low level of objections does not relieve it of that task: *Kelly v Willmott Forests Ltd (In Liquidation) (No 4)* (2016) 112 ACSR 584; [2016] FCA 323 (***Kelly***) at [58] and [61] (Murphy J); *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers Appointed) (in liq)* (2015) 325 ALR 539; [2015] FCA 811 (***Blairgowrie***) at [181] (Wigney J); *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No 4)* [2010] FCA 1029 (***Dawson Nominees No 4***) at [23] (Finkelstein J).
7. We also say this because most of the class members who filed an Objection seem to have misunderstood the nature and purpose of the Notice and it is possible that other class members who did not respond misunderstood the Notice in a different way.

# QBE’S CONTENTIONS

1. In broad summary QBE makes the following contentions.
2. *First*, in many class actions in which the class has included funded and unfunded class members a funding equalisation order has been made as part of settlement approval. QBE contends that at the appropriate stage in the present case a funding equalisation order is likely to be made, and that such an order will mean that class members receive more (perhaps substantially more) of any settlement or judgment than if the common fund order proposed by the applicant is made. It argues that a common fund order will result in the Funder receiving a greater (perhaps substantially greater) aggregate funding commission and that both funded and unfunded class members will therefore receive less, which is not in the class members’ interests. It also submits that the significant increase in the aggregate funding commission under a common fund order will constitute a barrier to settlement which is not in the interests of class members or in the interests of justice in the proceeding.
3. In this regard QBE relies on hypothetical worked examples produced by both parties based on the assumption that the proceedings are settled or judgment is obtained for $400 million exclusive of legal costs. We have considered the worked examples but it is unnecessary to detail the minutiae of the calculations.
4. The worked examples show the amounts that will be received by the Funder, funded class members and unfunded class members under the proposed common fund order compared to a funding equalisation order. The comparisons differ depending upon the ratio of funded to unfunded class members’ shares and we will refer to worked examples which relate to four different ratios: 25:75, 50:50, 70:30 and 80:20.
5. In passing we note a difference between the parties as to the proper construction of the Funding Agreement. On the applicant’s construction, the Funder is permitted to charge funded class members a funding commission based on the “grossed up” amount of their Resolution Sums following the redistribution of amounts deducted from unfunded class members under a funding equalisation order. This results in the Funder receiving a greater funding commission. On QBE’s construction of the Funding Agreement, the funding commission cannot be calculated on the “grossed up” amount.
6. There is some force to QBE’s construction, but little turns on this issue because QBE contends that, whether or not the funding commission is charged on the grossed up amount, a common fund order will only benefit the Funder. The worked examples are calculated on the applicant’s premise that it is open to the Funder to charge a funding commission on the grossed up Resolution Sums of funded class members.
7. On the assumption that a $400 million settlement or judgment is obtained, under a common fund order with a 30% rate of funding commission, the Funder would receive an aggregate funding commission of $120 million.
8. The worked examples relate to the potential ratios of funded to unfunded class members’ shares. On the assumption that a $400 million settlement or judgment is obtained, under a common fund order with a 30% funding commission rate compared to a funding equalisation order at 35%, the comparative results (using approximations) are said to be the following:
9. at a ratio of 25:75 – under the common fund order the Funder would receive $72 million more, funded class members would receive $18 million less, and unfunded class members would receive $54 million less;
10. at a ratio of 50:50 – under the common fund order the Funder would receive $35 million more, and funded and unfunded class members would each receive $17.5 million less;
11. at a ratio of 70:30 – under the common fund order the Funder would receive $10 million more, funded class members would receive $7 million less, and unfunded class members would receive $3 million less; and
12. at a ratio of 80:20 – under the common fund order the Funder would receive $430,000 more, funded class members would receive $345,000 less, and unfunded class members would receive $85,000 less. However, if the funding equalisation order were made at the average funding commission rate in the Funding Agreements of 33.75%, under a common fund order the Funder would receive $4.18 million less, funded class members would receive $3.34 million more and unfunded class members would receive $840,000 more.
13. As is apparent, it is only when the ratio of funded to unfunded class members’ shares is in the order of 80:20 that there would no longer be a material difference in the amounts funded and unfunded class members would receive “in hand” under a common fund order at the rate of 30% compared to a funding equalisation order at the rate of 35% or 33.75%.
14. *Second*, QBE rejects the applicant’s contention that any detriment for class members through a common fund order is cured because class members have the right to opt out. It argues that class members should not be forced to opt out to escape an order that benefits the Funder at the expense of class members. It also argues that it is inappropriate that class members be asked to make a decision as to whether to opt out on the basis of Funding Terms that might be later varied.
15. *Third*, QBE contends that, given it is likely that the Court will make a funding equalisation order at the appropriate time, there is no problem or injustice to be remedied and no proper basis for an order under s 33ZF of the Act.
16. *Fourth*, QBE contends that the applicant’s reliance on common fund orders made in *Pathway Investments Pty Ltd v National Australia Bank Ltd* (Supreme Court of Victoria proceeding SCI 2010 6249) (***Pathway***) and *Farey v National Australia Bank Ltd* [2014] FCA 1242 (***Farey***) is misplaced. It argues that those cases are not analogues for the present application and that the appropriateness of those orders should be doubted in light of *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (***Modtech***) and *Blairgowrie*.
17. *Fifth*, QBE contends that the Court should not be satisfied that the funding commission rate in the Funding Agreements was the result of arms-length commercial negotiations between Maurice Blackburn and the Funder, nor should the Court be satisfied that the Funder will be able to meet its obligations under the Funding Terms.
18. *Sixth*, QBE contends that ss 33ZF and 23 of the Act do not empower the Court to make the proposed orders outside the context of settlement approval or delivering a judgment. It also contends that making such orders would not involve the exercise of judicial power.

# CONSIDERATION

1. Section 33ZF of the Act requires that the applicant establish that the proposed orders are appropriate or necessary to ensure that justice is done in the extant proceedings, rather than by reference to broad policy considerations. We have addressed the application on that basis, although the broader contextual setting of Part IVA is worth noting and is a matter that we briefly touch on at the end of our reasons.
2. In our view it is appropriate to ensure that justice in the proceeding is done by making orders in the terms of the alternative orders that the applicant proposes, but with an amendment to clauses 6(b) and (c) of the Funding Terms so that the funding commission rate is not set at 30% (and so that the funding commission rate for any appeal or defence of any appeal is not set at 5%) and minor amendments to clauses 16 and 17. The rate of funding commission in both instances is to be a matter for Court approval at a later stage. On the Funder, the applicant and the solicitors for the applicant giving an undertaking to comply with the Funding Terms which are Annexure A to these reasons, the Court will make the orders we set out at [9] above.
3. We have dealt with the application by reference to the interests of justice in the extant proceeding, but it is worth noting the backdrop against which the application falls to be considered.
4. *First*, it should be kept in mind that whether or not a common fund order is made will not affect QBE’s liability in the proceeding (if it has any), nor will it affect the quantum of damages which QBE may be required to pay. The orders we propose only go to how any pool of money paid by QBE in settlement or judgment is to be distributed.
5. *Second*, QBE’s submissions recognise that the funding commission is a cost of prosecuting the present proceeding, and that an amount equivalent to the funding commission ought to be deducted pro rata from the settlement amounts of all class members. The real difference in QBE’s position is that it argues that the amounts deducted from unfunded class members’ recoveries should *not* be paid to the Funder. On its construction of the Funding Agreement, if a funding equalisation order is made none of the deducted amounts will be paid to the Funder.
6. *Third*, QBE did not contend that it would be inappropriate for the Court to take a common fund approach to legal costs incurred in the proceeding. The courts have routinely ordered all class members to pay a proportionate contribution to the legal costs incurred in producing a settlement, whether or not they retained the applicant’s solicitors. In circumstances where, as we explain, litigation funding charges have become a standard cost in shareholder class actions, we can discern no reason in principle for treating litigation funding costs incurred to achieve a settlement differently from legal costs incurred to achieve the settlement.
7. *Fourth*, it is established that the Court’s supervision of legal costs charged to class members is appropriate (see *Kelly* at [324]-[348]) and we take a similar view in relation to supervision of litigation funding charges. It is appropriate that the Court exercise some oversight over litigation funding charges to class members when:
8. the largest single deduction from the recoveries of class members in funded class actions is usually the funding commission (or an equivalent amount under a funding equalisation order);
9. there is often a significant information asymmetry between the funder and the class members in relation to the costs and risks associated with the action;
10. at least for some claimants the only opportunity they have to recover losses suffered through alleged breaches of the law is through the funded class action; and
11. for small shareholders the opportunity for negotiation of the funding commission is limited or non-existent.
12. *Fifth*, since the first funded shareholder class action was filed in late 2003 (Morabito V, *An Empirical Study of Australia’s Class Action Regimes, Second Report* (September 2010) p 37) empirical research has shown that the use of litigation funding in class proceedings has significantly increased. In the last six years, 49.5% of all class actions filed in this Court were brought with the support of litigation funding: Morabito V, *An Empirical Study of Australia’s Class Action Regimes, Fourth Report* (Australian Research Council, July, 2016) p 8 (***Fourth Empirical Report***).
13. In relation to shareholder class actions, the prevalence of litigation funding is even more pronounced. Mr Varghese is a solicitor with significant experience and knowledge in relation to the conduct of class actions. He deposes that to his knowledge since 2003 there has only been one shareholder class action in Australia resolved without the involvement of a litigation funder.
14. In our view, litigation funding charges have become a standard part of the costs to be paid by class members in shareholder class actions. Such charges are paid by class members who entered into a funding agreement, but it is commonly the case that an equivalent amount is deducted from the settlement amounts of class members who did not do so.
15. There is nothing to indicate that the growth in litigation funding of class proceedings was foreseen by the drafters of the ALRC Report or by Parliament in enacting Part IVA. Indeed, the ALRC Report specifically recommended against funding being provided in consideration for a share of the proceeds of the action: ALRC Report at [318]. It is time that the Court gives further consideration to the interests of class members in relation to the reasonableness of litigation funding charges.
16. We now move to deal with QBE’s main contentions, which we address under the sub-headings below.

## Questions of power - general

1. Logically one should start with the question of the power to make the proposed orders and the appropriateness of the exercise of that power. The sources of power identified are principally ss 33ZF and 23 of the Act. QBE contends that there is no power to make the proposed orders but if there is such power, the condition for its exercise has not been met and/or it is not appropriate to exercise such power. QBE also raises a Chapter III question to the effect that the making of the proposed orders does not involve an exercise of judicial power or a power incidental thereto. We reject QBE’s contentions. But to explain why we do so, it is convenient to first address matters going to the substance and appropriateness of the proposed orders and to address the power question later in that more informed context (see section 9 below).

## The benefit of judicial approval of the funding commission rate

1. The central benefit for class members of the orders we propose is that the Court at an appropriate time will approve the funding commission at a rate that it considers reasonable, when the Court is armed with better information including as to the quantum or likely quantum of the settlement or judgment, probably at the stage of settlement approval or at the point of distribution of damages. Approval of the rate at such a later stage will protect class members’ interests and undermines QBE’s contention that class members will be worse off by the orders that we propose to make.
2. We do not seek to and cannot predetermine the relevant considerations for the approval of a reasonable funding commission rate. They will be a matter for the judge hearing the approval application and it will depend upon the circumstances. However, it seems likely that the relevant considerations would include the following:
3. the funding commission rate agreed by sophisticated class members and the number of such class members who agreed. That can be said to show acceptance of a particular rate by astute class members;
4. the information provided to class members as to the funding commission. That may be important to understand the extent to which class members were informed when agreeing to the funding commission rate;
5. a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market. It will be relevant to know the broad parameters of the funding commission rates available in the market;
6. the litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding;
7. the quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding;
8. the legal costs expended and to be expended, and the security for costs provided, by the funder;
9. the amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;
10. any substantial objections made by class members in relation to any litigation funding charges. This may reveal concerns not otherwise apparent to the Court; and
11. class members’ likely recovery “in hand” under any pre-existing funding arrangements.
12. The Funder may be discomforted by a result in which it will be obliged to fund the proceeding even though its consideration for doing so is not set and is subject to Court approval, and it might consider that its position under the proposed orders compares unfavourably with its entitlements under the Funding Agreements. It may decide not to offer the required undertaking and in that event the proposed orders will not be made. That is a matter for the Funder.
13. However, we expect that any such concerns on the part of litigation funders will diminish as the jurisprudence around approval of litigation funding charges develops. We expect that the courts will approve funding commission rates that avoid excessive or disproportionate charges to class members but which recognise the important role of litigation funding in providing access to justice, are commercially realistic and properly reflect the costs and risks taken by the funder, and which avoid hindsight bias.
14. The position of litigation funders in Australian class actions has some parallels with the position of plaintiff attorneys in class actions in the United States of America (**USA**). Both carry the substantial costs and disbursements of a class action in return for a contingent percentage fee based on the common fund of damages obtained and any settlement is subject to court approval at the end of the litigation. There is little sign in the USA that the requirement for court approval of the contingent percentage fee at the end of a class action has so reduced attorneys’ returns that they are reluctant to bring class action litigation.

### The position for funded class members

1. Pursuant to the Funding Agreements, funded class members are contractually obliged to pay a funding commission from their recoveries at a rate of either 32.5% or 35%. They had a choice whether to enter into the Funding Agreements, but small shareholders are unlikely to have had any real opportunity to negotiate that rate. It is likely that their only choice was between participating in the class action or not and the class action may have been their only real option if they wanted to pursue a claim.
2. Under the proposed orders, instead of being required to pay a funding commission at the rate of 32.5% or 35%, funded class members will pay a funding commission at such a potentially lower rate as the Court considers reasonable in all the circumstances. As we have said, while we make no attempt to bind the Court hearing the relevant application, in our view it is highly likely that the funding commission will be approved at a rate lower than 32.5% or 35%. That is plainly to the benefit of funded class members.
3. Further, under the Funding Agreements there is no cap on the aggregate funding commission, notwithstanding that there is unlikely to be a commensurate substantial increase in risk between a case with a quantum of, say, $200 million compared to a case with a quantum of $600 million. Assuming a settlement of $600 million and using the average funding commission rate of 33.75%, funded class members will pay an aggregate funding commission of approximately $101.25 million if the ratio of funded to unfunded class members’ shares is 50:50, $121.5 million if the ratio is 60:40, $141.75 million if the ratio is 70:30 and $162 million if the ratio is 80:20 (noting that these figures may have to be adjusted under any funding equalisation order).
4. We have heard no submissions on this and we express no view, but it would, at least, be open to argue that an aggregate funding commission of between $101 million to $162 million would be excessive or disproportionate to the risk taken by the Funder.
5. One of the important considerations in court approval of attorneys’ fees in class actions in the USA is the result actually achieved for class members: *Federal Rules of Civil Procedure*, rule 23(h), Committee Notes on Rules – 2003 Amendment. The *Manual for Complex Litigation* (4thed, Federal Judicial Centre, 2004) states (p 193, §14.121) that “[g]enerally, the factor given the greatest emphasis is the size of the fund created, because ‘a common fund is itself the measure of success … [and] represents the benchmark from which a reasonable fee will be awarded.’” (Citations omitted.) The *Private Securities Litigation Reform Act* *1995* (US) expressly provides that a fee award should not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class: see 15 U.S.C. §§ 77z-1(a)(6) and 78u-4(a)(6). The United States Court of Appeals, Third Circuit has noted that although there is no automatic correlation and a variety of other factors are relevant, percentage fee awards generally decrease as the amount of the recovery increases: *In re Prudential Insurance Co of America Sales Practice Litigation* 148 F3d 283, 339 (3d Cir 1998). That is borne out by empirical research: Eisenberg T and Miller G, “Attorney fees in class action settlements: An empirical study” (2004) 1 (No 1) *Journal of Empirical Legal Studies* 27-78.
6. Our proposed orders may benefit funded class members if a very large settlement or judgment is obtained because, when approving the funding commission rate, the Court may decide it is appropriate to take the quantum into account.

### The position for unfunded class members

1. Unfunded class members presently face the prospect (which QBE contends is likely through a funding equalisation order) that they will be saddled with a deduction from any settlement of an amount equivalent to the funding commission that would have been payable by them if they had signed a funding agreement, that is, at a rate of 32.5% or 35%. Unfunded class members have not agreed to those rates.
2. Under the common fund orders we propose, instead of facing deductions from their recoveries at a rate of 32.5% or 35%, unfunded class members will pay a funding commission at such a potentially lower rate as the Court considers reasonable in all the circumstances. That is to their benefit. It will also be to their benefit if the Court caps the aggregate funding commission.

### The Court’s power to refuse to approve a funding commission

1. QBE argued that the Court already has power to reject the funding commission rate under the Funding Agreement, although it did not develop that argument. It is unnecessary for us to express any concluded view on this issue and it suffices to note that there are questions as to the Court’s power to interfere with the terms of arms-length commercial agreements between the Funder and funded class members, and also as to whether it would be appropriate to do so. We note that in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41 (***Fostif***) Gummow, Hayne and Crennan JJ said at [92]:

[T]o ask whether the bargain struck between a funder and intended litigant is ‘fair’ assumes that there is some ascertainable objective standard against which fairness is to be measured and that the courts should exercise some (unidentified) power to relieve persons of full age and capacity from bargains otherwise untainted by infirmity.

1. Some judges have said in *obiter* that the Court has power to refuse to approve a settlement because the funding commission charged by a litigation funder is excessive or that the Court has power to approve a settlement with a condition limiting the funding commission, but no judge has yet taken the step of interfering with the funding commission rate charged to class members under a funding agreement.
2. In *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia (No 6)* [2011] FCA 277 at [43], Flick J observed that it is possible that the power in s 33ZF could be exercised to limit the amount payable from settlement to the funder. However, his Honour did not pursue his reservations as to the appropriate extent of scrutiny of the funding commission because he said the funding commission was lower than in other proceedings and the overwhelming number of class members had expressed no objection. In *City of Swan v McGraw-Hill Companies, Inc* (2016) 112 ACSR 65; [2016] FCA 343 at [29]-[30], Wigney J noted that there may be a case where the amount paid to the litigation funder was so disproportionate that the Court would decline to approve the settlement. However, his Honour declined to treat the “extremely large” funding commission in that case as providing a proper basis for the Court to decline to approve the settlement as the funding commission was the bargain the applicant and class members struck with the funder, the class members were aware of their obligation to pay that funding commission, and the class members did not oppose settlement approval. In *Pathway Investments Pty Ltd & Anor v National Australia Bank Ltd (No 3)* [2012] VSC 625, Pagone J said at [20] that it might be necessary in some circumstances for the amount paid to a funder to be justified before a court approves settlement, but that “[i]t is not for the court to express a view about the commercial desirability of the quantum paid to the litigation funder under [the funding] arrangements”.
3. In *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, Jacobson, Middleton and Gordon JJ set aside settlement approval orders which permitted a 35% “funding premium” to be paid to a subset of class members who had provided monies for the litigation. However, the solicitor for the applicant did not afford class members an equal opportunity to contribute to the funding, and the case did not involve arms-length negotiations with a commercial third-party funder. The decision is of no assistance on the present issue.
4. One of the benefits for class members of the proposed orders is that they will be made upon the Funder undertaking to be bound by Funding Terms which provide for Court approval of the funding commission rate. That avoids any argument as to the Court’s power and as to the appropriateness of interfering with contracts entered into between competent parties.

## Class members will not be worse off under the proposed common fund orders compared to a funding equalisation order

1. QBE contends that class members will be better off under a funding equalisation order than under the common fund orders that the applicant has proposed. It argues that a common fund order will leave class members worse off (perhaps substantially so) than a funding equalisation order because a common fund order will give the Funder a greater aggregate funding commission (perhaps substantially greater), and both funded and unfunded class members will therefore receive less than they would have under a funding equalisation order.
2. We do not accept that a funding equalisation order is necessarily to be preferred and therefore *likely* to be made, as QBE contends. However, for the reasons we explain, little turns on this. For the purpose of addressing the present contention, we will assume that a funding equalisation order is likely to be made in the present case as part of any settlement approval application. We will discuss the validity of the assumption later (see section 7 below).
3. It is appropriate to begin by noting that we do not accept the applicant’s submission that whether a common fund order should be made is to be decided as a matter of principle rather than by reference to the financial outcomes for class members. Class members will be vitally concerned about the effect of a common fund order on their recoveries “in hand”, and that must be significant to our decision.
4. QBE’s worked examples are calculated on the basis of a common fund order at 30% compared to a funding equalisation order at either 32.5% or 35%. As we have said, at these rates class members would be worse off under a common fund order, until the ratio of funded to unfunded class members’ shares is approximately 80:20 or higher.
5. However, in our opinion the safeguards in the orders we intend to make have the effect that the worked examples are no longer applicable. The comparative results in the worked examples are largely dependent on two factors: first, the proposed 30% funding commission rate under the proposed Funding Terms; and second, the ratio of funded to unfunded class members’ shares.
6. The Funding Terms under the proposed orders provide that the Court will approve the funding commission rate at a later stage. The approved rate may be less than 30% which means that the worked examples are of limited if any significance. Further, Order 2 of the proposed orders provides that no amount payable by the class members under the common fund orders is to exceed an amount that would otherwise be payable by them in the event that the orders were not made (one potential counterfactual scenario being where a funding equalisation order is made). These two safeguards fundamentally undermine QBE’s contention that class members will be worse off under the proposed orders.
7. There will remain a question, to be answered when the funding commission rate is approved, as to whether the Court-approved funding commission rate should be benchmarked against the comparative result for class members under a possible funding equalisation order. We express no final view as this will be a matter for the approval application, but it seems likely that the protection of class members’ interests will be best achieved by judicial approval of a reasonable funding commission by reference to all relevant matters, rather than just by such a benchmarking exercise.
8. We do not accept QBE’s contention that there is no utility in the proposed orders because there is little prospect of the ratio of funded to unfunded class members’ shares being anywhere near 80:20. First, we note that whatever the ratio, the interests of class members are effectively protected through the condition that class members not be worse off under a common fund order than they would be if such an order were not made. Second, although the ratio of funded to unfunded class members’ shares is unknown, in our view the proportion of funded class members’ shares is likely to be significantly higher than in Dr Zein’s report.
9. Dr Zein estimates that the ratio of funded to unfunded class members’ shares is between 25:75 and 47:53. However, he estimates that ratio by comparing the number of relevant shares acquired by funded class members against the relevant shares acquired by the universe of unidentified class members. That tells us little if anything about the ratio of funded class members to those (presently) unidentified class members who will receive settlement monies. It is common in shareholder class actions that a great many unidentified class members do not make a claim in the proceeding, because they either opt out or do not register in a class member registration process.
10. There are only limited empirical reports on the opt out rate in shareholder class actions, and no empirical reports on the rate at which class members who do not opt out go on to make a claim in the proceeding: Mulheron R, “The case for an opt out class action for European member states: A legal and empirical analysis”(2009) 15 *Columbia Journal of European Law* 409, 432-433. Having said this, the results in one significant Australian shareholder class action suggest that many of the presently unidentified class members in the present case will never come forward to make a claim. In the GIO class action (see *King v AG Australia Holdings* *(formerly GIO Australia Holdings Ltd)* [2003] FCA 980) there were approximately 67,000 shareholders who fell within the class description. Approximately 22,000 of those persons retained the solicitors for the applicant to make claims in the proceeding. Of the remaining approximately 45,000 unidentified class members, notwithstanding a number of notices to class members, only a further 2,795 persons (being 6.2% of unidentified class members) ever made a claim in the case: The Honourable M Moore, “10 years since King v GIO” (2009) 32(3) *UNSW Law Journal* 883, 889, 892; Morabito V, “Revisiting Australia’s first shareholder class action”, in Justice KE Lindgren (ed), *Investor Class Actions*, (Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney, 2009) p 53.
11. We also note Mr O’Brien’s evidence that in the two month period from 11 March to 4 May 2016 the number of funded class members increased by approximately 370, about a one-third increase on the existing number. The number of funded class members may continue to increase as class members communicate with the solicitors for the applicant, increasing the proportion of funded class members.
12. In summary, unless and until a class member registration process is undertaken, it will be difficult to make a reasonably accurate estimate of the ratio of the relevant shares acquired by funded class members compared to the shares acquired by those unfunded class members who participate in any settlement or judgment. It would be unsurprising if the ratio ended up being in the order of 70:30 or 80:20 following a class member registration process.

## The benefit of disclosing the obligation to pay a funding commission before class members decide whether to opt out

1. Another benefit of the proposed orders is that *before* class members are required to decide whether or not to opt out of the proceeding they will be informed that a Court-approved funding commission rate will be deducted from any settlement or judgment that is achieved. Class members who are concerned about an obligation to pay a reasonable Court-approved funding commission and a share of reasonable Court-approved legal costs will be properly informed and have adequate time before they must decide whether to opt out.
2. In the case of unfunded class members, disclosing such a possibility sooner rather than later is fairer than informing them as part of settlement approval. Unfunded class members may have made a different decision in relation to opt out had they been aware of a proposal to make a substantial deduction from any settlement or judgment they obtain.
3. For example, the common fund order in *Farey* was made before opt out and Jacobson J said (at [16]):

What seems to me to be critical is that all of the current and potential group members be properly informed of their rights and the potential impact on those rights by means of notices approved by the court.

We take the same view.

1. Having said this, equally we accept that it would be possible to inform class members, prior to opt out, that there was a prospect that at the settlement approval stage the Court would make a funding equalisation order requiring the deduction of an amount equivalent to the funding commission from any settlement or judgment.

## The contention that the detriment of the common fund orders cannot be “cured” by opt out

1. QBE contends that the detriment to class members through the proposed orders is not cured by opt out. It says that class members should not be forced to opt out of the proceeding to escape orders which substantially benefit the Funder, at their expense. In our view this contention has fallen away because our formulation of the proposed orders does not benefit the Funder at the expense of class members. We consider the orders are to the benefit of class members and will protect their interests.
2. In any event, we would not accept the broad contention that, where the applicant in class proceedings seeks orders that are detrimental to the interests of some class members, it is not possible to “cure” the detriment by providing a right to opt out. In our view that contention is too broad. Subject to class members being given proper notice and a right to object, a right to opt out can act to safeguard the interests of absent class members and can “cure” a detriment. Whether it does so will depend upon the nature and extent of the detriment and the surrounding circumstances.
3. There is a related theme permeating QBE’s submissions that it is convenient to deal with at this point.
4. The present case was commenced on an open class basis and the applicant, the applicant’s solicitors and the Funder must have known that the class would include both funded and unfunded class members. The Funder provided litigation funding in that knowledge. It seems likely that the applicant commenced the case as an open class proceeding with the intention of making the present application, perhaps doing so to reduce the likelihood of a competing class action.
5. QBE contends that the application seeks to impose a funding commission on unfunded class members when that was not the Funder’s “bargain” at the commencement of the proceeding. In our view a characterisation of the Funder’s decision to fund an open class proceeding as its “bargain” is of limited assistance in deciding the application. First, there is no bargain between the Funder and unfunded class members yet they face the prospect (and on QBE’s case it is likely) that they will suffer a deduction of an amount equivalent to the funding commission from their settlement amounts. Second, the existence of such a bargain may be doubted when the applicant announced its intention to bring a common fund application at the first case management conference and pursued it diligently thereafter.
6. A funded class action, brought on an open class basis will usually include funded class members and unidentified unfunded class members. The unidentified class members are entitled to expect that the applicant and the applicant’s lawyers will, at least, act in their interests (see *Kelly* at [220]) but it goes too far to say that it is impermissible for the applicant to take steps adverse to unidentified class members’ interests. The Court has accepted in numerous cases that, with proper notice to unidentified class members and an opportunity to object, subject to leave of the Court the applicant may take steps that are contrary to their interests: see for example *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 (***Williams***) at [22]-[23] and [41] (Goldberg J); *Bray v F. Hoffman La Roche Ltd* [2003] FCA 1505 at [15]-[16] (Merkel J).
7. In the circumstances of the present case, where the application was brought at an early stage, the proposed orders include safeguards to protect class members’ interests, and class members have been given proper notice and an opportunity to object, we consider that the fact that class members will be given an opportunity to opt out further safeguards their interests.

## Should class members be required to make a decision as to whether to opt out on the basis of funding terms that may later be varied?

1. On the footing that the proposed orders are interlocutory and amenable to variation at a later stage of the proceeding, QBE argues that it is undesirable that class members make their opt out decisions on the basis of Funding Terms which may later be varied. It contends that class members may have made a different opt out decision depending on the variation.
2. It seems likely that this contention has also fallen away because the amended Funding Terms provide for the Court to approve a reasonable funding commission rate and in our view that sufficiently protects class members’ interests.
3. In any event, we would not accept QBE’s broad contention that once litigation funding arrangements are in place they should be treated as unchangeable because they may have been relevant to class members’ decisions in relation to opt out.
4. If litigation funding of class proceedings is provided pursuant to a funding agreement, the terms are consensual and can be varied by agreement. For example, if the parties to a funding agreement decide that the risks involved in prosecuting the proceedings have increased, they can agree to increase the funding commission rate. Depending on the circumstances it may be appropriate to provide class members a further right to opt out.
5. Similarly, if litigation funding is provided on funding terms with which a litigation funder has undertaken to the Court to comply, then the possibility that the funder or class members might wish to alter those terms must be accepted. If the funding terms are to be changed in a way which is adverse to class members’ interests, they should be given notice and an opportunity to object and the change will require leave of the Court. Again, depending on the circumstances, it may be appropriate to provide a further right to opt out.
6. We do not accept that it is inappropriate for the Court to now make orders based on the Funding Terms in Annexure A.

## Is a funding equalisation order likely to be made at the appropriate stage?

1. To a large extent QBE’s opposition to the application is grounded on the premise that a funding equalisation order is to be preferred and it is therefore *likely* that the Court will make such an order at the appropriate stage.
2. We do not accept this contention. Although orders directed at achieving equality of treatment between funded and unfunded class members are likely to be appropriate at some stage, it is not necessarily the case that the appropriate order will be a funding equalisation order.
3. Whether a funding equalisation order is to be preferred to a common fund order (and therefore likely to be made) will in part depend on the terms of the common fund order. For example, in the present case we consider the safeguards in the proposed orders mean that class members’ interests are better protected than they will be under a funding equalisation order.
4. In our view, a funding equalisation order is just one method for achieving equality of treatment between class members, and whether that type of order, a common fund order or some other order directed to equality of treatment is appropriate will depend upon the circumstances of the case and the position taken by the parties.
5. A funding equalisation order was first made in the Aristocrat class action as part of settlement approval: see *Dorajay Pty Ltd v Aristocrat Leisure Limited* [2009] FCA 19 at [14] and [17] (Stone J). It was made at the applicant’s request, without opposition from the respondent and without a contradictor, on the basis that the class included funded and unfunded class members and that in the absence of such an order they would receive different amounts “in hand”. From the little Stone J said about that aspect of the settlement, there is nothing to support the view that a funding equalisation order is to be the preferred method of achieving equality of treatment between funded and unfunded class members.
6. A funding equalisation order was next made in *Dawson Nominees No 4*, as part of settlement approval. Again, the order was made at the applicant’s request, without opposition from the respondent and without a contradictor because the class included funded and unfunded class members who would receive different amounts “in hand”. Finkelstein J said (at [28]):

… fairness to the funded class members, without whom the proceedings could not have continued, requires that the non-funded group members are in no better position for having been unfunded for a matter of weeks prior to the in-principle settlement having been reached.  The effect of applying the “funding equalisation factor” is to redistribute an amount equivalent to the commissions that would have been payable by the non-funded group members between all group members.  I believe that, in the circumstances of this case, it would be unreasonable not to apply the proposed funding equalisation factor.  Other judges have adopted the same position:  see eg Dorajay Pty Ltd v Aristocrat Leisure Ltd [2009] FCA 19.

His Honour said nothing to indicate that a funding equalisation order should be seen as the preferred method of achieving equality of treatment of funded and unfunded class members.

1. The same can be said of the funding equalisation orders made in the large number of cases that have followed. Except for *Modtech,* QBE has not put forward any case in which a funding equalisation order has been made other than at the applicant’s request without opposition by the respondent and without a contradictor. We do not suggest that the orders were inappropriate, only that they reflect the parties’ agreement rather than the considered view of the Court after argument as to the availability of the different types of orders.
2. On two occasions, in *Pathway* (Pagone J) and *Farey* (Jacobson J), the courts have achieved equality of treatment of funded and unfunded class members by making a common fund order. *Pathway* and *Farey* were both commenced as funded closed class representative proceedings, which meant that there were no unfunded class members at commencement. Then orders were made to “open” the class definition, to require any new class members who wished to participate in any subsequent settlement to register in a class member registration process, and (upon registration) to accept an obligation to pay a funding commission under litigation funding terms approved by the court. The orders provided, in effect, for all class members to contribute equally to the litigation funding costs and legal costs in the proceeding whether or not they had signed a funding agreement or a retainer.
3. In *Pathway*, Pagone J did not give reasons for making the common fund orders. In *Farey*,Jacobson J gave reasons, but they do not indicate that there was argument as to the possibility of a funding equalisation approach as an alternative to a common fund approach. His Honour did not examine that issue. In both cases the orders were made at the applicant’s request, without opposition by the respondent, and without a contradictor. It is plain that in both cases the orders were made to facilitate settlement.
4. QBE asserts that the appropriateness of the orders in *Pathway* and *Farey* is subject to doubt in light of the Court’s analysis in *Modtech* and in *Blairgowrie* where the Court refused to make common fund orders. We do not agree. In *Modtech*, at [57]-[60], Gordon J refused to make a common fund order but accepted that whether a common fund order is appropriate will depend on the circumstances of the case. In *Blairgowrie,* Wigney J refused to make a common fund order but his Honour said that whether a common fund or funding equalisation approach was to be preferred will depend on the circumstances (at [166]).
5. We accept that the facts in *Pathway* and *Farey* are not analogous to the facts in the present case andthat *Pathway* and *Farey* have little precedential value, but we do not accept QBE’s bare assertions that the analysis in *Modtech* or *Blairgowrie* casts doubt on the common fund orders in *Pathway* and *Farey*. We will discuss *Modtech* and *Blairgowrie* further in a moment.
6. First, wenote that the respondent in *Pathway* and *Farey* is a large and sophisticated corporation which was represented by competent lawyers experienced in the conduct of class action litigation. We would not lightly infer that it would readily enter into a settlement which only advantaged the funder. We would more readily infer that, in the circumstances that existed at the time, the respondent and its lawyers considered that settlement was desirable and that common fund orders would facilitate settlement. Otherwise the respondent would not have agreed to the orders.
7. Second, it is noteworthy that Beach J expressly approved Jacobson J’s common fund orders when approving the settlement in *Farey*. In *Farey v National Australia Bank Ltd* [2016] FCA 340 at [30] Beach J said:

… these orders, appropriately in my view, equalised the contribution each group member made towards the costs of the prosecution of the proceeding (including IMF’s funding commission), irrespective of whether or not that group member had entered into an agreement with IMF. In effect, what was put in place was a common fund type mechanism to ensure that there were no “free riders”.

1. Third, in our view the facts in *Modtech* and *Blairgowrie* are distinguishable from those in *Pathway* and *Farey* and, more importantly, readily distinguishable from the present case.
2. *Modtech* was a funded open class proceeding and the class included funded and unfunded class members. After opt out had occurred, the trial heard and judgment reserved, the parties reached an “in principle” settlement. In the settlement approval application the applicant sought orders for a settlement distribution scheme that provided for the deduction of a funding commission from the settlement amounts of all class members and for that to be paid to the funder.
3. Importantly*,* it was not until they were given notice of the proposed settlement that unfunded class members were told of this proposal. At that point they could not opt out. Gordon J considered that the application was brought too late and with insufficient notice to class members. Her Honour said, correctly in our view, that those circumstances distinguished *Modtech* from *Pathway* and she refused to make a common fund order. Instead her Honour made a funding equalisation order so that unfunded class members did not receive a “windfall” (at [58]). Her Honour also observed that it is difficult to conceive of circumstances in which a common fund order would be appropriate (at [60]). We respectfully disagree. As her Honour said, it will depend on the circumstances.
4. Unlike *Modtech*, in the present case class members were given notice of the common fund application at an early stage, opt out has not yet occurred and the case has not been heard. If the proposed orders are made and any unfunded class members are unhappy with the obligation to pay a reasonable Court-approved funding commission it will be open to them to opt out and bring separate proceedings (either individually or in another class action). Further, unlike *Modtech*, if the proposed orders are made funded class members will be advantaged by any reduction in the rate of funding commission that they have to pay as later approved. These are critical differences from the scenario dealt with in *Modtech*.
5. *Blairgowrie* was also a funded open class proceeding, but only the applicants had signed a funding agreement. All class members were “unfunded”. At an early stage of the proceeding the applicant sought orders for approval of funding terms which included a requirement for all class members to pay a funding commission from any settlement they received in the litigation.
6. Wigney J refused the orders sought but declined to express a preference for a funding equalisation approach over a common fund approach (at [166]). His Honour’s reasons for refusal may be summarised as follows:
7. it was premature, and inconsistent with the statutory scheme in Part IVA, to make a common fund order at a stage when the reasonableness of the funding commission was indeterminate or inestimable and the only cap on the aggregate funding commission that might be payable was that it could not exceed the Resolution Sum (at [7], [53]-[58], [153]-[154]);
8. it was irrelevant that the funding commission was based on percentages that were said to be within the usual range of funding commissions paid to litigation funders as the reasonableness of the commission depended upon the particular facts and circumstances of the case including the potential recoveries to which the funding commission rate is likely to be applied and the risk taken on by the funder. Little was known about those matters at that early stage of the proceeding (at [155]-[156]);
9. under the funding terms the Court was being asked to declare that the applicants were entitled to be paid a percentage of the value of other class members’ claims out of their Resolution Sum amounts, and to charge the future property of class members in respect of the amounts the applicants had contractually bound themselves to pay to the funder (at [59]-[60]);
10. to the extent that a common fund order was appropriate and necessary to avoid any unequal treatment of class members that was a matter that could be addressed at the stage when any amounts recovered from the respondents were to be distributed amongst class members (at [142]-[143]);
11. there was no certainty that a common fund would be created from which the applicants could recover the reasonable costs and expenses incurred by them in getting in that fund (at [144]-[153]);
12. the applicants’ justification for the application for a common fund order at that stage was that it would not otherwise be commercially viable for the funder to continue to fund the proceeding and it would be necessary to “close” the class definition so that the only class members were those who signed a funding agreement. That was a problem of the applicants’ making which they must have known when they commenced the case and it showed that it was the commercial interests of the funder that lay at the heart of the application (at [158]-[160]); and
13. class members who chose to opt out of the proceeding as a result of the imposition of a funding commission would be highly unlikely to be able to commence their own proceedings before the limitation period expired, which meant that their right to opt out was of little benefit to them (at [182]).
14. It is pellucidly clear that *Blairgowrie* is distinguishable from the present case because in *Blairgowrie*:
15. class members who were unhappy with an obligation to pay the funding commission were effectively unable to opt out of the proceeding, whereas in the present case there is no such difficulty;
16. the funding terms differ in material respects from the Funding Terms in the present case. Unlike the present case, in that case the applicant contractually bargained with the Funder to give it a percentage of the value of other class members’ claims and purported to charge the future property of class members in favour of the applicant;
17. only the applicants signed a litigation funding agreement. In the present case one group of class members is collectively financing the action for another group of class members through their pooled promises to pay the funding commission; and
18. the applicants’ rationale for seeking the orders is different from the rationale in the present case.
19. One important similarity between *Blairgowrie* and the present case is that the Court was invited to approve a funding commission rate at an early stage in the proceeding. Wigney J’s primary concern related to the difficulty of setting a funding commission rate at a stage when the reasonableness of that rate could not be known, particularly because the quantum or likely quantum of any settlement was unknown.
20. Our proposed orders deal with this concern. The Funding Terms (see Annexure A) provide that the funding commission rate will be as approved by the Court. Approval will occur at a point when the Court is armed with better information, including information as to the quantum or likely quantum of settlement. In passing we note that other possible methods for addressing this issue include allowing a funding commission rate on a sliding scale and/or setting a cap on the aggregate funding commission.
21. We have no real difficulty in accepting that a 30% funding commission rate is within the range of rates commonly offered by litigation funders, and it may be that a 30% rate is ultimately approved by the Court. We saw some force in the applicant’s submission that the Funding Terms should set the funding commission rate at 30% but allow the Court to revisit that rate at the point of settlement approval. We have not taken that course but we do not suggest that it will always be necessary or appropriate to decline to set the funding commission rate until settlement approval. It will depend upon the circumstances.
22. We respectfully take a different view to Wigney J in relation to the likelihood of a common fund being created. Funding arrangements like those in the present case are a common enterprise between the applicant and funded class members and the litigation funder. In consideration of the funder agreeing to pay the legal costs of the proceeding and to meet any orders for adverse costs or security for costs, the applicant and funded class members pool their promises to pay a percentage funding commission from any settlement or judgment, doing so for the common purpose of securing legal services for the benefit of the class as a whole: *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11; [2009] FCAFC 147 per Dowsett and Sundberg JJ. In our view, if the present case is successful in any substantial way, it is likely to lead to the payment of monies which may be treated as a common fund created by the applicant and funded class members for the common benefit of all class members.

## QBE’s further contentions

1. QBE made some further contentions which can be briefly disposed of.
2. *First*, QBE points to the Funder’s financial statements and submits that the Court should not be satisfied that the Funder could satisfy its financial obligations under the Funding Agreements.
3. It is appropriate to treat this submission with some caution if not scepticism. There is no complaint by the applicant and funded class members in this regard and in our view it is no business of QBE to be “taking up the cudgels” on their behalf: see *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [119] (Mason P).
4. In any event, Mr Varghese’s evidence tends to show that the Funder has sufficient resources to meet its obligations under the Funding Agreements. We accept his evidence that the Funder has previously provided litigation funding in three large shareholder class actions in which it paid total legal costs of more than $17.4 million and provided bank guarantees for security for costs totalling more than $11.2 million, and that it is currently funding two other class actions before the Court. Further, the Funder has met its obligations to date in the present case by paying the applicant’s legal costs and disbursements and by providing $3.5 million in security for costs.
5. We can see no good reason to infer that the Funder is likely to be unable to satisfy its obligations under the Funding Terms.
6. *Second*, QBE contends that existing commercial relationships between Maurice Blackburn and the Funder (and entities associated with those entities), the absence of a tender process in relation to the Funding Agreements, and some alleged deficiencies in the evidence, mean that the Court should infer that the funding commission rate is not the result of arms-length commercial negotiation and should not be accepted as reasonable.
7. Again, we treat this submission with caution. These possible conflicts of interest were disclosed to the applicant and funded class members and they have made no complaint. In any event, the contention goes nowhere because our proposed orders do not set a funding commission rate.
8. Further, we accept Mr Varghese’s unchallenged evidence that these commercial relationships had no bearing on the view reached that it was appropriate for the Funder to fund the proceeding, that the terms of the Funding Agreement were appropriate and that the advice it provided to the applicant in relation to the present application was appropriate. We accept his evidence that the firm has extensive experience with the Funder and other funders of Australian class actions, and that based on his extensive experience he believed that no superior deal for class members would be forthcoming from another litigation funder even assuming that there was another funder with an interest in funding the litigation.
9. *Third*, QBE contends that it is appropriate to infer that the common fund application is an initiative of the Funder. This contention also goes nowhere because our proposed orders do not advantage the Funder at the expense of class members. In any event, we accept Mr Varghese’s unchallenged evidence that Maurice Blackburn proposed the common fund application to the Funder in about September 2015, at around the time the proceeding was commenced.

## Questions of power – specific arguments

1. QBE contends that the Court lacks power to make the orders sought. We disagree.
2. Section 33ZF provides as follows:

**General power of Court to make orders**

(1) In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

(2) Subsection (1) does not limit the operation of section 22.

1. In terms of the text of s 33ZF(1), we largely agree with the observations of Beach J in *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at [33] where his Honour said:

… although in a general sense s 33ZF(1) has been described as a plenary power, nevertheless it is not unlimited. It is in one sense both trite and question begging to assert that the power must be exercised judicially. But let me pass to the language of s 33ZF(1) itself. It uses the language “make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding”. Grammatically, “thinks” is to be applied distributively, so that it reads “thinks appropriate” or “thinks necessary”; there is no “is” before “necessary”. But as applied distributively, “thinks appropriate” has a lower threshold than “thinks necessary”. But in the composite phrase, the concept is “thinks appropriate... to *ensure* that justice is done in the proceeding” [my emphasis]. In other words, although the words “thinks appropriate” have a lower threshold than “thinks necessary”, nevertheless the relevant element of necessity in another guise is enshrined in the coupling of the words “to ensure that”. In summary, the question becomes whether I think it is appropriate, to ensure that justice is done in the proceeding, to make the orders sought by Newcrest. It is not whether I think it to be merely convenient or useful per se. Section 33ZF(1) is not a licence for me to impose my own expansive case management philosophy. Rather, I must be satisfied that any order that is made satisfies the statutory test. Now I accept that s 33ZF(1) is a very wide power and ought not to be construed narrowly (*McMullin v ICI Australia Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4 and *Owners of the Ship ‘Shin Kobe Maru’ v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421). Nevertheless, any exercise of power has to fit within the statutory formulation.

1. However, the word “necessary” and similarly the phrase “to ensure” depend upon and must be construed in their context. In *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at [101] Gummow and Crennan JJ approved a passage from *McCulloch v State of Maryland* 17 US 316 (1819) at 413-414 where the Supreme Court of the United States said of the term “necessary”:

Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. ... [The word ‘necessary’] has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports.

1. In *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim and Ors* (2012) 83 NSWLR 52; [2012] NSWCCA 125 at [8] Bathurst CJ said:

…Basten JA has expressed the view that the meaning of “necessary” depends on the context in which it is used. I agree that what is necessary in any given case will depend upon that context… Although it is not sufficient, in my opinion, that the orders are merely reasonable or sensible, I agree that the word “necessary” should not be given a narrow construction. What was said by Hodgson JA in *R v Kwok* [2005] NSWCCA 245; (2005) 64 NSWLR 335 at [[13]](http://www.austlii.edu.au/au/cases/nsw/NSWCCA/2005/245.html#para13) adopting the remarks of Mahoney JA in *John Fairfax Group Pty Ltd (Receivers & Managers Appointed) v Local Court (NSW)* (1991) 26 NSWLR 131, are equally applicable to the legislation in question.

“However, the requirement of necessity is not to be given an unduly narrow construction. I respectfully adopt what was said by Mahoney JA in *John Fairfax Group Pty Ltd (Receivers & Managers Appointed) v Local Court (NSW)* (at 161B):

This leads to the consideration of what is meant by ‘necessary to secure the proper administration of justice’ in this context. The phrase does not mean that if the relevant order is not made, the proceedings will not be able to continue. Plainly they can…”

1. Basten JA expanded on this at [45] and explained:

The word “necessary” can have shades of meaning; it is not of “a fixed character, peculiar to itself” but rather “admits of all degrees of comparison”, in the language of the United States Supreme Court in *McCulloch v State of Maryland* 17 US [(4 Wheat) 316](http://www.austlii.edu.au/cgi-bin/LawCite?cit=4%20Wheat%29%20316) at 414 (1819) cited by Gummow and Crennan JJ in *Thomas v Mowbray* [2007] HCA 33; (2007) 233 CLR 307 at [101]. The Court in *McCulloch*, in the same passage, noted at 413:

“If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another.”

1. In our view, in context, there is less of a difference between “appropriate to ensure justice” and “necessary to ensure justice” than might initially appear. In s 33ZF “necessary” identifies a connection between the proposed order and an identified purpose as to which the Court must be satisfied before making an order. The expression “necessary to ensure that justice is done” has shades of meaning and admits of degrees of comparisons and in context the expression should not be given a narrow construction. The requirement that a proposed order be “necessary to ensure that justice is done in the proceeding” does not require that the Court be satisfied that unless the order is made the administration of justice will collapse or that justice in the proceeding will not be “ensured” in the sense of being certain. Section 33ZF provides a wide power directed at enabling the Court to make orders to deal with the novel problems that might arise through a new statutory procedure for representative proceedings, and the expression “necessary to ensure that justice is done” requires that the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.
2. Even so, we do not have to trouble ourselves further on the ambit of the word “necessary” as the applicant does not suggest that the orders are presently “necessary”. Rather, it contends that the orders are “appropriate…to ensure that justice is done”.
3. For the reasons that we have set out, we consider it to be clear that the proposed orders are appropriate to ensure that justice is done in the proceeding. First, class members will be properly informed, prior to deciding whether to opt out, of the requirement to pay a reasonable Court-approved funding commission out of any settlement or damages. Second, it is in class members’ interests that there be Court scrutiny of the Funding Terms and Court approval of the funding commission rate. Third, it is likely that upon approval the applicant and funded class members will enjoy a lower funding commission rate (and unfunded class members will suffer a lower deduction than under a funding equalisation order). Fourth, for the reasons that we have set out, the proposed orders will ensure that all class members are treated equally, which will provide a more secure foundation for the funding of the proceeding and which is appropriate to ensure that justice is done in the proceeding. Fifth, the whole premise of QBE’s argument is that the proposed orders will be substantially detrimental to class members and that cannot be sensibly said to be the case when we are not setting the commission rate(s) and where a condition is imposed that class members not be worse off. Sixth, the potential for conflicts of interest between funded and unfunded class members and between the applicant’s solicitors and unfunded class members will be reduced. In our view both funded class members and unfunded class members will be advantaged by the proposed orders as we earlier explained, including in the summary at [11] above.
4. In our opinion, there is little doubt that the power under s 33ZF is enlivened and that it is appropriate to exercise such a power. There is also no discretionary reason for not exercising the power. Similar observations may be made concerning s 23.
5. QBE raises a number of other arguments relating to power.
6. *First*, it argues that there is no power to make the proposed orders now. Rather, it submits that they can only be made at the time of settlement approval under s 33V or judgment. However, there is no basis to read down s 33ZF by reference to ss 33V, 33Z, 33ZA or 33ZJ. Section 33ZF is of broad ambit and is not so temporally limited. Even if it be accepted that ss 33V, 33Z, 33ZA or 33ZJ address a narrower timeframe, that does not imply that s 33ZF is to be read down. Neither the text nor context requires it.
7. *Second*, it contends that the proposed orders do not involve an exercise of judicial power. This is a surprising argument. We accept that ss 33ZF and 23 are to be construed as not permitting the making of orders that do not involve the exercise of judicial power or are not incidental thereto. But the proposed orders do involve an exercise of judicial power. Under Part IVA, the Court has a supervisory function to protect the interests of class members. This is not unlike other protective jurisdictions that a Court may have, such as with persons under a disability. Moreover, the exercise of judicial power is analogous to that described in *Cominos v Cominos* (1972) 127 CLR 588 at 608 per Mason J (as he then was); see also *Precision Data Holdings Pty Ltd v Wills* (1991) 173 CLR 167 at 190 and 191. More generally, there is little doubt that a Court can make orders creating rights or liabilities as an exercise of discretionary power, provided the power is exercised according to legal principle and by reference to an objective standard. That is the present case, with s 33ZF(1) setting out that objective standard, albeit a broad one.
8. Relatedly, QBE argues that there is no extant *dispute* concerning existing rights or obligations and accordingly no exercise of judicial power. But there need be no *dispute* as such (cf a liquidator or a trustee seeking directions from a Court) for an exercise of judicial power. In any event, there is a dispute as to the application of s 33ZF(1) in the present context. Two class members have opposed the application as has QBE. There is an extant dispute now requiring the Court’s adjudication concerning what is in the interests of class members and in the interests of justice in the proceeding.
9. Further, even if QBE’s arguments were correct on judicial power as such, it is apparent on any view that the exercise of power under s 33ZF(1), if the terms of it were satisfied, would be an exercise of power *incidental* to the exercise of judicial power. The very condition of the power, viz, “to ensure that justice is done in the proceeding” makes that point good.
10. Finally, there seems to be a suggestion by QBE that to make orders now would be premature. We disagree. Amongst other things, it is appropriate for class members to be now informed that they will be subject to the deduction of a reasonable Court-approved funding commission from any settlement or judgment, before they are required to decide whether to exercise their right to opt out.
11. We reject QBE’s contentions on the question of power.

## Policy considerations

1. For the reasons that we have set out above, we consider that the proposed orders are appropriate to ensure that justice is done in the present case. We have not made our decision on the basis of broader policy considerations, but it is worth noting that a common fund approach to litigation funding charges and legal costs is consistent with the broad policy aims of Part IVA. It is appropriate to make some brief observations on the broader contextual setting.
2. The central aims of the Part IVA regime include enhancing access to justice and increasing the efficient use of judicial resources by allowing a common, binding decision to be made in one proceeding instead of in multiple proceedings: ALRC Report at [13]; Second Reading Speech, Federal Court of Australia Amendment Bill 1991 (Cth) pp 3174-75 (**Second Reading Speech**). Such purposes underpin class action regimes around the world: Mulheron R, *The Class Action in Common Law Legal Systems*, (Hart Publishing, 2004) pp 47 to 66.
3. In enacting a representative procedure, Parliament had to broadly choose between an opt out and an opt in model. The ALRC recommended an opt out procedure because it provided greater access to legal remedies on behalf of persons who were unable, because of cost or other barriers, to bring individual proceedings. The report recognised that many claimants may be unaware that they have a cause of action and may not be readily identifiable: ALRC Report at [106].
4. Parliament legislated an opt out model under which it is not necessary to obtain the consent of a person to be a class member (s 33E) and all persons who fall within the class definition are and remain class members unless they decide to opt out (s 33J). If a person falling within the class definition does not opt out then he or she is bound by the outcome of the proceeding (s 33ZB). It chose an opt out over an opt in procedure on grounds of “equity and efficiency”, because it considered that an opt out procedure “ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings”: Second Reading Speech, p 3175.
5. Despitethe intent of the legislature, the costs and risks associated with class action proceedings have placed such litigation beyond the resources of ordinary and even most wealthy Australians. Mr Varghese states and we accept that the legal costs of the applicant in complex class actions such as the present are commonly in the order of $10 million and the applicant is exposed to the risk of a substantial adverse costs liability. He states that in the absence of litigation funding the applicant in the present case would not have the means to satisfy, or the willingness to incur, the substantial legal costs or the risk of a substantial adverse costs order. It would be surprising if it were otherwise.
6. Even if an applicant was able to find and retain a law firm prepared to take on the significant costs and risk of bringing a class action on a “no-win no fee” basis, the applicant would still face a substantial adverse costs liability, which would act as a strong disincentive to taking on that role. As Strathy J pithily observed in the Canadian decision of *Dugal v Manulife Financial Corporation* 2011 ONSC 1785 at [28]:

The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own.

1. These costs and risks posed (and continue to pose) a serious obstacle to the enhancement of access to justice envisaged by the legislature. Empirical research shows that the usage of the Part IVA procedure began to decline with the period 2004 to 2006 marking the nadir in the number of class actions filed: *Fourth Empirical Report*, pp 6 to 7. In the view of prominent commentators, Professors Waye and Morabito, this occurred because “[c]lass actions were simply becoming too expensive and too risky for Australian law firms, which are prohibited from charging contingency fees, and which generally have limited access to capital markets.”: Waye V and Morabito V, “Financial Arrangements with Litigation Funders and Law Firms in Australian Class Actions” (Paper presented at the Litigation Costs Funding and Behaviour Symposium, Leiden University, December 2015) p 7.
2. Litigation funders stepped in to fill this gap and the High Court endorsed their role in doing so. In *Fostif* Gummow, Hayne and Crennan JJ at [65] (with Gleeson CJ at [1] and Kirby J at [147]-[148] agreeing) endorsed the views of Mason P in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203 at [105] where his Honour said:

The law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled. (citations omitted). As I explain below, the present litigation attracts the following principle recently stated by Lord Phillips MR giving the judgment of the English Court of Appeal in *Gulf Azov Shipping Co Ltd v Idisi* [2004] EWCA Civ 292 at [52]: “… Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation”.

1. Empirical research shows that since 2003 the use of litigation funding in class actions, particularly in shareholder class actions, has significantly increased: *Fourth Empirical Report* p 8. As we have said, litigation funding charges have become a standard cost for class members in shareholder class actions.

### The use of closed class representative proceedings, and the practice of “opening” and “closing” class definitions

1. As Mr Varghese states, litigation funders are generally only prepared to fund shareholder class actions where the class is limited to those persons who enter into a litigation funding agreement, known as a closed class representative proceeding. The restriction of the class to those claimants who are willing to enter into a funding agreement (as well as a retainer agreement with the applicant’s solicitors) has been an integral part of the involvement of funders in class actions: see generally, Waye, V and Morabito V, “The dawning of the age of the litigation entrepreneur” (2009) 28(3) *Civil Justice Quarterly* 389-433; Victorian Law Reform Commission, *Civil Justice Review*, *Report 14* (Victorian Law Reform Commission, Melbourne, 2008) (**VLRC Report**) p 616.
2. The economic drivers for the preference of funders for “closed” class actions are obvious. The funder has an interest in maximising the number of class members who accept an obligation to pay a percentage funding commission. The lower the claim value, the lower the aggregate funding commission, and if too few class members enter into a funding agreement then the funder’s return may be insufficient to justify the expense and risk that the funder has taken on. If funded proceedings are commenced on an open class basis then unfunded class members can enjoy a “free ride” which is contrary to the funder’s interest in that class action and in any subsequent class actions in which the funder is involved. If “repeat players” like institutional investors are able to get a “free ride” in a class action why would they agree to enter into a funding agreement in a subsequent case: Walker J, Khouri S and Attrill W, “Funding criteria for class actions” (2009) 32(3) *UNSW Law Journal* 1036; Legg M, “Litigation funding in Australia” (2010) *UNSW Law Research Series* 12.
3. There does though appear to have been an increase in funded open class proceedings in recent times, probably in an attempt by funders or plaintiff law firms to discourage competing class actions. This does not signal any change in the economic drivers for litigation funders. Over the life of such open class proceedings the funder and/or the applicant’s solicitors continue to recommend to class members that they enter into a funding agreement, and the funder seeks that sufficient class members enter into funding agreements to allow it to achieve what, in its view, is an appropriate return on its investment in the litigation.
4. Mr Varghese says and we accept that funded shareholder class actions that are commenced on a closed class basis generally do not continue on that basis throughout the proceeding. It has become a standard practice for the parties to consent to orders:
5. to “open” the class definition so that it covers all persons who acquired shares during the relevant period;
6. to allow the class to remain open for a short period during which class members are notified of their right to opt out of the proceeding and the requirement to register with the applicant’s solicitors through a class member registration process should they wish to make a claim in the proceeding; and
7. to provide that all class members (except for those that opt out) will be bound in any settlement or judgment but that only those class members who registered (known as “registered” or “participating” class members) are entitled to any benefit under the settlement (and sometimes also under any judgment).
8. Further, funded open class representative proceedings generally do not continue as such. Generally, the parties in such cases consent to orders under which class members are notified of their right to opt out of the proceeding and the requirement to register with the applicant’s solicitors in a class member registration process should they wish to make a claim in the proceeding. The orders provide for all class members (except for those that opt out) to be bound in any settlement or judgment but that only registered or participating class members be entitled to any benefit under the settlement or judgment. By this device an open class representative proceeding is converted to what is, in effect, a closed class proceeding in that the respondent’s obligation to pay compensation is limited only to registered class members (at the same time as precluding subsequent claims by unregistered class members).
9. Such orders have the benefit of providing the respondent with greater finality on any settlement. As Grave, Adams and Betts note, such orders allow respondents “to identify all group members so that any settlement payment is “capped” by reference to a precise number of potential claimants and to ensure finality to the proceeding, including limiting exposure to future claims”: Grave D, Adams K and Betts J, *Class Actions in Australia* (2nd ed, Lawbook Co, 2012) (***Class Actions in Australia***) at [14.410]. They also tend to facilitate settlement by allowing both sides to have a better understanding of the total quantum of class members’ claims.
10. If the parties consider doing so will facilitate settlement, it is likely that orders will be sought in the present case to “close” the open class definition.

### The difficulties with closed class representative proceedings

1. It is undeniable that funded class actions brought on a closed class basis have provided access to justice to a great number of claimants. The huge costs and risks of such cases mean that many of them would not have proceeded in the absence of litigation funding. However, the growth in closed class representative proceedings has also given rise to a number of significant problems.
2. *First*, it must be accepted that closed class representative proceedings provide a reduced level of access to justice from that which Parliament intended by its choice of an opt out regime. Limiting the ambit of class actions to those who have agreed to enter into a litigation funding agreement undermines one of the key rationales for an opt out class action procedure. As Jacobson J said in *Multiplex Funds Management Ltd* *v* *P Dawson Nominees Pty Ltd* (2007) 164 FCR 275;[2007] FCAFC 200 at [116]-[117]:

Professor Morabito pointed out … that restricting the ambit of class proceedings to those persons who have taken the step of expressly instructing the class representative’s solicitors to act on their behalf, constitutes:

… a far cry from the class action landscape … envisaged by the ALRC and by the Federal Parliament when they selected the opt out mechanism.

The same observations may be made about the ambit of representative proceedings brought on behalf of a group defined by the criterion of the positive step of signing a litigation funding agreement with a named funder. It is difficult to see how this can be reconciled with the goals of enhancing access to justice and judicial efficiency in the form of a common binding decision for the benefit of all aggrieved persons.

1. The Victorian Law Reform Commission has noted that closed class representative proceedings have “a number of undesirable policy consequences given that the class action procedure was designed as a means of obtaining a remedy for ‘all’ of those adversely affected by the conduct giving rise to the litigation”: VLRC Report, p 616.
2. *Second*, while closed class representative proceedings have some advantages (including that the parties are better able to estimate the total quantum of class members’ claims) they also create a barrier to settlement because, if the class action is successful, potential claimants who are not class members may bring subsequent proceedings. The concern of respondents in relation to such an outcome is an important driver of the class “opening” and “closing” devices we described earlier.
3. *Third,* while up-to-date empirical data is lacking, the emergence of closed class representative proceedings has the potential for a greater incidence of overlapping or competing class actions in relation to the same wrong: *Class Actions in Australia* at [17.740]. While the risk of competing class actions is inherent in the Part IVA regime, closed class proceedings tend to exacerbate their incidence. Competing class actions in this Court are the subject of active case management but they can still cause increased legal costs for both sides, wastage of court resources, delay, and unfairness to respondents, particularly when they are commenced in different courts (such as in both the Federal Court of Australia and a State Supreme Court).
4. *Fourth,* the use of closed class definitions in funded class proceedings with the associated devices to open and close the class definition, and the use of similar devices in funded open class proceedings, increases the potential for conflicts of interest. In both closed and open class funded proceedings the devices create at least three types of class member. One significant group will be funded class members who are clients of the solicitors for the applicant and who are deemed to have “registered”, and another will be unfunded class members who are not clients of the solicitors and who have not registered. There is also usually a small group of unfunded non-client class members who register.
5. The standard class opening and closing orders that we have described operate so that unfunded unregistered class members cannot claim any benefit under a settlement or judgment but they are nevertheless bound in any settlement or judgment. In the settlement of such proceedings a conflict of interest may arise in relation to the interests of the funded applicant and registered class members on the one hand, and the interests of the unfunded unregistered class members on the other. A conflict of duty and interest may also arise between the duty of the applicant’s solicitors to the applicant and client class members on the one hand, and to non-client class members on the other hand. Conflicts of interest between the class lawyers and non-client class members have been a significant problem in class actions in the USA and there are some examples of such conflicts in Australian class action jurisprudence: see for example *Kelly* at [315]-[322]; *Williams* at [22].
6. The incidence of such conflicts is likely to reduce if a funder is permitted to charge a court-approved funding commission to all class members because there will be less incentive to encourage class members to enter into a funding agreement and sign a retainer agreement. Having said this, the parties’ interest in better understanding the total quantum of class members’ claims and respondents’ interest in ensuring finality by limiting exposure to future claims is likely to continue to drive usage of the devices we have described.
7. These difficulties have led to commentators and law reform bodies favouring a common fund approach in funded class proceedings.
8. In 2008, the VLRC recommended allowing a litigation funder to claim a share of the total amount recovered by litigation on behalf of an opt out class, without necessarily requiring each of the group members to enter into separate contractual arrangements with the funder on commencement of the proceeding. It recommended the creation of a public fund which would work proactively with commercial litigation funders on that basis: VLRC Report, pp 616, 620 and 622.
9. In 2009, the Honourable Murray Wilcox QC, a distinguished author of the ALRC Report and a former judge of this Court who heard some of the earliest class actions, made the following comments about closed class representative proceedings on the occasion of the launch of the book, *Investor Class Actions*, (Justice KE Lindgren (ed), Ross Parsons Centre of Commercial, Corporate and Taxation Law Monograph Series, Sydney, 2009) at the Federal Court of Australia in Sydney on 3 August 2009:

… in virtually all significant commercial cases (at least), we now have an opt in class action system; the statutory scheme has been subverted…

Although I deplore that we have arrived at an opt-in system governed by subscription to solicitor’s costs agreements, I find it difficult to criticise the solicitors for developing that system. They have had little choice.

1. He recommended that funders be required to satisfy the Court of their probity and financial integrity, and that there is no financial connection between them and the solicitors they intend to engage to conduct the case. Once the funder was approved by the Court it would engage the solicitors, pay legal fees calculated at usual rates, furnish any security for costs and indemnify the applicant against adverse costs. In return:

…the litigation funder would be entitled to receive a percentage of the total recovery calculated in accordance with a sliding scale: for example X% of the first $10 million, Y% of the next $40 million, Z% of the next $50 million and so on.

1. In 2011, Professor Michael Legg argued that because closed class proceedings provide reduced access to justice and could result in multiple class actions, the legislature should allow a common fund approach to litigation funding with the funding commission being subject to judicial oversight: Legg M,“Reconciling litigation funding and the opt out group definition in Federal Court of Australia class actions – The need for a legislative common fund approach”(2011) 30(1) *Civil Justice Quarterly* 52 p 63; see also Legg M, “Institutional investors and shareholder class actions: The law and economics of participation” (2007) 81(7) *Australian Law Journal* 478; Hoffman-Ekstein J, “Funding open classes through common fund applications” (2013) 87(5) *Australian Law Journal* 331.
2. In our view the proposed orders have the additional benefit that they will enhance access to justice by encouraging open class representative proceedings. If litigation funders are permitted to charge a commercially realistic but reasonable percentage funding commission to the whole class it is less likely that funders will seek to bring class actions limited to those persons who have signed a funding agreement. The encouragement of open class representative proceedings should reduce the potential for conflicts of interest between funded registered class members and unfunded class members and between the solicitors for the applicant and unfunded non-client class members. Open class proceedings will also act to inhibit competing class actions and avoid the multiplicity of actions which they represent. Competing class actions can cause significant delay, increased costs and wastage of the resources of the parties and the courts. As we have said, this is not a factor in the present case but it may be in other cases.

# CONCLUSION

1. As we have said, upon receipt of an undertaking by the Funder, the applicant and the solicitors for the applicant to comply with their obligations under the Funding Terms attached as Annexure A, we intend to make the orders set out at [9] above. However, we will give the parties an opportunity to make further submissions on the precise form of the orders and the undertaking, including the Funding Terms.

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| I certify that the preceding two hundred and six (206) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Murphy, Gleeson and Beach. |

Associate:

Dated: 26 October 2016

**ANNEXURE A**

**FUNDING TERMS**

**Definitions**

1. The following definitions apply in these Funding Terms:

(a) “**Applicant**” means Money Max Int Pty Limited (ACN 152 073 580), as trustee for the Goldie Superannuation Fund, and any other person who is a lead applicant or representative party in the Proceedings;

(b) “**Claims**” means the claim or claims the Applicant and the Group Members have or may have against some or all of the Respondent and Other Parties arising out of, or connected with, an alleged failure to immediately publicly disclose information relevant to the price or value of QBE Shares and/or misleading or deceptive conduct in relation to QBE Shares in the period 20 August 2013 to 6 December 2013 (inclusive) or such other period as the Lawyers advise and the Funder accepts;

(c) “**Common Benefit Work**” means Legal Work for the common benefit of Group Members, or a sub-group of Group Members;

(d) “**Costs Order**” means an order made by a court requiring one or more parties to the Proceedings to pay the costs incurred by another party or parties to the Proceedings;

(e) “**Disbursement**” means any expense the Lawyers incur whether as principal or as agent on the Group Members’ behalf in relation to the Legal Work, including (without limitation) barristers and other experts’ fees, searching fees, lodging fees, travel expenses, courier fees and photocopying fees;

(f) “**Funding Agreements**” means the funding agreement between the Funder and the Applicant signed by the Applicant on 3 September 2015 and any funding agreements between the Funder and other Group Members in relation to the Claims;

(g) “**Funding Period**” means the period commencing on the date orders are made pursuant to the Interlocutory Application filed on 3 December 2015;

(h) “**Gross Recovery**” means the gross amount payable by way of Settlement or judgment in respect of the Claims, excluding any costs;

(i) “**Group Members**” means all persons who are identified as group members in the Proceedings, and who do not opt out of the Proceedings by the time specified by the Court for doing so;

(j) “**GST**” means goods and services tax;

(k) “**Individual** **Legal Work**” means Legal Work in connection with the specific Claims of a specific Group Member, not including Common Benefit Work;

(l) “**Lawyers**” means the lawyers, Maurice Blackburn Pty Ltd (ACN 105 657 949), or any firm of lawyers appointed in their place by the Applicant after consultation with the Funder;

(m) “**Legal Work**” means such advice and legal services to the Group Members or for the Group Members’ benefit, including the Common Benefit Work and any Individual Legal Work, as the Lawyers may consider reasonably necessary to: (a) investigate the Claims; (b) prosecute the Claims; (c) negotiate a Settlement of the Claims; and (d) negotiate to secure and maintain funding on behalf of the Group Members in relation to the Claims;

(n) “**Other Parties**” means any other entity which the Lawyers recommend be joined to proceedings commenced or to be commenced against the Respondent, the joinder of whom the Funder agrees to fund;

(o) “**Proceedings**” means any legal proceedings to prosecute the Claims and includes a proceeding brought in contemplation of Proceedings, including without limitation proceedings for preliminary discovery;

(p) “**QBE**” means QBE Insurance Group Limited (ACN 008 485 014);

(q) “**QBE Share**” means an ordinary fully-paid share issued by QBE;

(r) “**Resolution**” means when all or any part of the Resolution Sum is received and, where the Resolution Sum is received in parts, a “Resolution” occurs each time a part is received;

(s) “**Resolution Sum**” means the amount or amounts, or the value of any goods or services, for which the Claims are settled, or for which judgment is given, including the value of any favourable terms of future supply of goods or services and including any interest and including costs recovered pursuant to a Costs Order or by agreement;

(t) “**Respondent**” means QBE and any Other Parties named as defendants or respondents in the Proceedings;

(u) “**Retainer Agreements**” means the retainer and costs agreement between the Lawyers and the Applicant signed by the Applicant on 3 September 2015 and any retainer and costs agreements between the Lawyers and other Group Members in relation to the Claims; and

(v) “**Settlement**” means any settlement, compromise, discontinuance or waiver of the Claims or part of the Claims and “**settles**” shall be construed accordingly.

**Obligations of the Funder**

1. The Funder must:

(a) pay to the Lawyers all reasonable Disbursements upon receipt of each bill from the Lawyers, including any amounts in relation to GST payable by the Lawyers, in so far as the Disbursements were incurred either before or during the Funding Period;

(b) pay to the Lawyers 75% of the Lawyers’ reasonable professional fees upon receipt of each bill from the Lawyers, including any amounts in relation to GST payable by the Lawyers, in so far as the professional fees were incurred either before or during the Funding Period;

(c) pay to the Lawyers interest on any billed and unpaid professional fees or Disbursements, at a rate that is equal to the percentage (or maximum percentage) specified by the Reserve Bank of Australia as the cash rate target, plus 2%, from the period beginning at the end of the month in which the relevant item of work was performed to which those professional fees or Disbursements relate, plus any amounts in relation to GST payable by the Lawyers;

(d) upon Resolution, pay to the Lawyers any unpaid portion of the Lawyers’ reasonable professional fees and reasonable Disbursements and an additional amount equal to 25% of the unpaid portion of any reasonable professional fees, including any amounts in relation to GST payable by the Lawyers, in so far as the professional fees were incurred either before or during the Funding Period;

(e) pay any Costs Order which the Court makes in the Proceedings against the Applicant or other Group Member in favour of the Respondent and Other Parties (or any one or more of them), in so far as those costs were incurred either before or during the Funding Period; and

(f) provide any security for costs in the Proceedings, in the form that the Court orders, or in the absence of any order, in such other form as the Funder determines and the Respondent and Other Parties accept, relating to costs incurred during the Funding Period.

**Receipt and Application of Resolution Sum**

1. Any Resolution Sum will be received by the Lawyers and paid immediately into an account kept for that purpose.
2. If the Applicant or any Group Member obtains any Settlement or obtains any judgment in respect of the Claims, it will:

(a) treat any money, other asset or benefit received from the Respondent in connection with the Settlement or judgment as the Resolution Sum; and

(b) cause the money, or an amount being the reasonable market value of the asset or benefit, to be delivered to the Lawyers to be dealt with as part of the Resolution Sum.

1. Subject to any Court order, the Lawyers will pay to the Funder out of the account referred to in paragraph 3 above all payments referred to in paragraph 6 below, with the balance to be distributed to the Group Members on a pro rata basis by reference to the Gross Recovery of all Group Members in accordance with any distribution scheme approved by the Court.

**Costs and Commission**

1. Upon Resolution, the Funder or its nominee shall be paid the following amounts from the Resolution Sum, prior to any distributions to Group Members:

(a) an amount equal to the total monies paid by the Funder pursuant to paragraph 2 above;

(b) an amount, as consideration for the funding of the Proceedings, expressed as a percentage of the Resolution Sum as approved by the Court;

(c) if the Funder funds an appeal, or the defence of an appeal, or any further appeal or the defence of any further appeal, a further amount expressed as a percentage of the Resolution Sum as approved by the Court, in respect of each appeal so funded; and

(d) an additional amount, on account of GST, being the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by the Funder for any taxable supply made to the Applicant by the Funder under or in connection with these Funding Terms.

1. The amounts referred to in paragraph 6 above will not become due or owing by the Group Members to the Funder unless and until Resolution, and then will not exceed the Resolution Sum. In the event that the total of the amounts referred to in paragraph 6 above exceeds the Resolution Sum, the total amount which the Funder is entitled to be paid shall be reduced so as to equal the Resolution Sum.

**Relationship Between the Applicant, Lawyers and Funder**

1. The Lawyers’ professional duties are owed to the Applicant and not to the Funder. The Applicant, as the representative applicant in the Proceedings, will give binding instructions to the Lawyers and make binding decisions on behalf of the Group Members in relation to the Claims up to the time of any court approval of settlement of the Claims or the delivery of judgment in respect of the common issues in the Proceedings (including, but not limited to, instructions and decisions in relation to Settlement), save where, in the reasonable professional opinion of the Lawyers, separate instructions are required from the Group Members.
2. The Lawyers will:

(a) provide the Funder with confidential updates of the progress of the Proceedings;

(b) consult with the Funder with regard to any significant issue in the Proceedings;

(c) properly consider the Funder’s views as to the conduct of the Proceedings; and

(d) promptly respond to any reasonable request by the Funder for information relating to the Proceedings.

**Confidentiality**

1. The Funder shall strictly maintain the confidentiality of any information provided to the Funder by the Applicant or the Lawyers for a purpose connected to the Proceedings, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

**Settlement**

1. If there is a disagreement between the Funder and the Applicant as to the appropriate terms for settlement of the Proceedings:

(a) the Lawyers will brief Senior Counsel to provide an advice as to whether the proposed settlement is reasonable having regard to all the circumstances;

(b) a representative of the Funder may attend any conference with Senior Counsel at which the issue is to be discussed;

(c) the legal costs of obtaining the advice shall be met by the Funder as part of the reasonable costs of the Proceedings; and

(d) the advice of Senior Counsel will be final and binding on both the Applicant and the Funder.

1. Under paragraph 11 above, in determining whether a proposed settlement is reasonable having regard to all the circumstances, Senior Counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her advice, but any such determination shall include the following considerations:

(a) the strengths and weaknesses of the claims of all Group Members;

(b) the quantum of the claims of all Group Members and any difficulties which might exist in proving that quantum;

(c) the recoverability of a judgment sum from the Respondent;

(d) the extent to which further legal costs incurred in the Proceedings are likely to be recoverable from the Respondent;

(e) the risk of the Funder being ordered to pay adverse costs and the quantum of such costs. Counsel will have regard to this factor as though all Group Members carried such risk rather than the Funder;

(f) the matters set out in paragraph [248.95] of the Australian Securities and Investments Commission’s *Regulatory Guide 248: Litigation schemes and proof of debt schemes: Managing conflicts of interest* (April 2013); and

(g) any other matter Senior Counsel considers relevant.

**Termination**

1. The funding arrangements under these Funding Terms may only be terminated by order of the Court, granted on application made by the Applicant, the Funder or a Group Member, upon notice given to the Applicant, the Funder and such other persons as ordered by the Court.
2. If an application is made by the Funder under paragraph 13 above, and the Court grants that application, then (subject to any contrary order of the Court):

(a) the Funder will not be entitled to receive any payment from any Resolution Sum pursuant to paragraph 6(b) and 6(c) above;

(b) the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to paragraphs 6(a) and 6(d) above;

(c) all obligations of the Funder under these Funding Terms will cease on the date the Funder’s termination becomes effective, save for the following obligations accrued to the date of termination:

(i) payment of any outstanding costs pursuant to paragraph 2 above incurred up to the date of termination;

(ii) indemnification of the Group Members for any costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and

(iii) payment of any quantified Costs Order against any Group Members in the Proceedings in respect of costs which arise in, or are attributed to, the period ending on the date the Funder’s termination becomes effective.

1. If an application is made by the Applicant or a Group Member under paragraph 13 above, and the Court grants that application, then (subject to any contrary order of the Court):

(a) the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to paragraph 6 above;

(b) all obligations of the Funder under these Funding Terms will cease on the date the Funder’s termination becomes effective, save for the following obligations accrued to the date of termination:

(i) payment of any outstanding costs pursuant to paragraph 2 above incurred up to the date of termination;

(ii) indemnification of the Group Members for any costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and

(iii) payment of any quantified Costs Order against any Group Members in the Proceedings in respect of costs which arise in, or are attributed to, the period ending on the date the Funder’s termination becomes effective.

**Funding Agreements and Retainer Agreements**

1. These Funding Terms prevail over any inconsistent provision in the Funding Agreements.
2. These Funding Terms prevail over the terms of the Retainer Agreements to the extent of any inconsistency.