AUSTRALIAN CLASS ACTION SETTLEMENT DISTRIBUTION SCHEME DESIGN — DECIDING WHO GETS WHAT

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Class actions are legal proceedings brought on behalf of numerous persons, known as group members. When a class action settles for a monetary payment to compensate the group members, the payment needs to be divided among the group members. The division and distribution takes place pursuant to a court-approved settlement distribution scheme ('SDS'). Although the SDS is central to the determination of the actual amount that an individual group member receives from a class action settlement, the design and operation of SDSs have attracted little critical attention. This article seeks to start the process of elucidating the operation of SDSs by explaining three main types of class action SDS: (1) global sum with formula; (2) global sum with individualised assessment; and (3) process approach. The article then draws on those SDS models and class action settlement decisions to develop guiding principles or steps for the design of an SDS.

I INTRODUCTION

Class actions are legal proceedings brought on behalf of numerous persons, known as group members. Settlement of class actions is the most common way in which this form of litigation is resolved. A key step in the settlement process is the distribution of the settlement funds to the group members. This requires the settlement sum to be divided among the group members who have suffered loss. In some situations, it may also require as a preliminary step the determination of liability, or that the group member has a recognised claim. The division and distribution takes place pursuant to a court-approved settlement distribution scheme ('SDS'). Although each SDS is central to the determination of the actual

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amount that an individual group member receives from a class action settlement, the design and operation of SDSs have attracted little critical attention.[1]

This article seeks to start the process of elucidating the operation of SDSs by explaining the operation of three main types of class action SDS: (1) global sum with formula; (2) global sum with individualised assessment; and (3) process approach. The first type of SDS is used extensively in shareholder class actions. The second and third are predominantly used in mass-tort or product-liability class actions.

The article then draws on the SDS models and case law to develop guiding principles or steps for the design of an SDS. It sets out four such principles or steps: first, the foundational law that guides the extent to which the substantive law that governs the claims that have been brought is applied in the settlement context through concerns such as substantive fairness, cost and delay; second, the choice of SDS model, which is mainly influenced by whether an individualised process is needed, and to a lesser extent whether the defendant has a role to play; third, the balancing of fairness, cost and delay in applying the law and finding the facts within the SDS chosen; and, fourth, ensuring that an SDS affords procedural fairness to claimants.

II Background

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

The majority of class actions settle.[3] However, a class action may not be settled or discontinued without the approval of the court.[4] This includes examining 'the structure and workings of the scheme by which … [the overall

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1 The first Australian article dealing with SDS was Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89, which identified the problem of providing accurate compensation. This article seeks to respond to that problem, and the issue of fairness more generally, through suggesting principles or steps for SDS design.

2 In Victoria, Part 4A of the *Supreme Court Act 1986* (Vic) took effect from 1 January 2000. In New South Wales, Part 10 of the *Civil Procedure Act 2005* (NSW) took effect from 4 March 2011. In Queensland, Part 13A of the *Civil Proceedings Act 2011* (Qld) commenced on 1 March 2017.

3 Vince Morabito, *An Empirical Study of Australia's Class Action Regimes — Fifth Report* (July 2017) 37.

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

settlement sum] is proposed to be distributed among group members'.[5] The court considers whether the settlement is fair as between the group members, as well as between the plaintiff and the defendant; in other words, settlement approval requires consideration of the settlement *inter se* as well as *inter partes*.[6] The court examines whether the distribution of the settlement among group members pursuant to the SDS is fair and reasonable.[7] Consequently, the SDS needs to be approved by a court order as part of the settlement approval process.[8] This in turn means that the terms of the SDS need to be explained and justified as part of the evidence filed and submissions made seeking judicial approval of the settlement.[9] SDS design is a critical component of the class actions settlement process.

III Global Sum with Formula-Based Settlement Distribution Scheme

A global sum with formula-based SDS contains two components. A global sum to settle the class action is negotiated between the plaintiff and the defendant. The class action is settled for a specific amount so that the amount available for distribution is capped at that amount, albeit with any interest earned also being available for distribution. A formula is then employed to allocate the global sum as between group members in a manner that reflects their respective compensable losses.

Global sum with formula-based SDSs usually involve the following steps: court appointment of an administrator; collection of group member information; application of a loss-assessment formula; a process for group members to check the accuracy of information utilised; an opportunity to challenge the assessment of loss; and the payment of funds to group members.[10]

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5 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, [41] ('*Darwalla [No 2]*'). See generally Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 605–8.

6 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468, [5] ('*Camilleri*'). See also *Foley v Gay* [2016] FCA 273, [7] ('*Foley*'); *Farey v National Australia Bank Ltd* [2016] FCA 340, [31]; *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119, [39]; *Mitic v OZ Minerals Ltd [No 2]* [2017] FCA 409, [8] ('*Mitic [No 2]*') endorsing the approach.

7 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [7]; *Mitic [No 2]* (n 6) [8]; *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [32].

8 See, eg Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 25 October 2016, [14.1(b)(ii)].

9 Ibid [14.5].

10 See, eg *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2009] FCA 19, [20] ('*Dorajay*'); *Hobbs* (n 17) [22]; *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671, [23] ('*Jarra Creek*'); *Inabu Pty Ltd v Leighton Holdings Ltd [No 2]* [2014] FCA 911, [13].

The operation of this type of SDS may be illustrated by the shareholder class action.[11] The group member information required is personal information such as name, address and bank account, as well as share-trading data, including the dates on which the shares were bought and sold, the price paid and received, and the number of shares transacted. In some cases, shareholders may still hold their shares so that there is no sale data. The opportunity for a group member to check the accuracy of the share-trading data used by the administrator may occur before application of the loss-assessment formula or after an assessment has occurred.

The loss-assessment formula is central to the distribution of the settlement. It is also usually the subject of confidentiality orders by the court.[12] Consequently, while the general operation of formulae is clear, the detail of specific schemes is usually not publicly known. The formula usually seeks to measure the extent to which the share price at a particular time was inflated so as to determine the loss suffered by a group member.[13] The construction of the formula will involve an assumption as to when disclosure ought to have been made by the defendant so as to determine that the market was misinformed (start date).[14] It will also require an assumption as to the end date when the market ceased to be misinformed. These dates will be alleged in the claim and usually form part of the parameters for group definition, namely, persons who purchased shares in the company between the two dates. However, the start date when disclosure should have been made will usually be hotly contested prior to any settlement. The achievement of a settlement then requires the application of principles of law to the facts to determine the date for disclosure, which in turn will affect whether a group member has a compensable claim. In most cases the date for disclosure that is employed in the formula will be the date alleged by the plaintiff. This is only likely to change if the lawyer for the plaintiff, and in turn the court, are convinced that the allegation would not have been made out and a different date should be used in the SDS.[15]

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11 The global sum with formula-based SDS is also frequently used in cartel class actions; see, eg *Jarra Creek* (n 10); *Wright Rubber Pty Ltd v Bayer AG [No 3]* [2011] FCA 1172 ('*Wright Rubber [No 3]*').

12 See, eg *Dorajay* (n 10) [15]; *Kirby v Centro Properties Ltd [No 6]* [2012] FCA 650, [17]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec & mgr apptd) (in liq) [No 3]* [2017] FCA 330, [34] ('*Blairgowrie [No 3]*').

13 See, eg *Clime Capital Ltd v Credit Corp Group Ltd [No 3]* [2012] FCA 218, [11] (in shareholder class actions based on breaches of disclosure to the market it is necessary to calculate the 'true' value of the securities compared to what they were trading at).

14 *Foley* (n 6) [16].

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

Causation is a necessary element of the causes of action employed in a shareholder class action.[16] However, the means of satisfying causation is unsettled in shareholder class actions. There exists a debate as to whether only direct reliance is capable of satisfying the causation requirement, or whether a lesser standard, usually called indirect causation or market-based causation, is sufficient.[17] Recent decisions tend to indicate that the lower standard, where a misleading statement or failure to disclose affects the share price in the market and the group member relied on the share price being accurate, is at least arguable[18] and appears to be sufficient for group members to succeed.[19] Indeed, it has been observed that market-based causation 'is almost always invoked by the plaintiff in every investor class action'.[20] The loss-assessment formula usually assumes or accords most weight to market-based causation. Further, group members who bought shares during the relevant period are assumed or required to certify that they relied on the share price.

Once the parameters of the relevant period have been determined, a number of methods are available to calculate the inflationary component of the share price. Similar to causation, the law has not resolved the correct approach for determining loss, nor which method or methods may be employed to determine the amount of price inflation. The legal tests put forward for calculating loss may be summarised as the *Potts v Miller* measure (difference between the price paid and the true value of the shares — that is, the underlying value of the company — at the time of purchase),[21] a variation on *Potts v Miller* (where the true value is replaced by the market price that would have prevailed if disclosure had been made), the left-in-hand measure (difference between the price paid and the price sold or, if the shares are still held, the difference between the price paid and the price of an assumed sale of the shares by the date on which the share is no longer inflated by the conduct that is the subject of the action). A further measure of loss

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16 *Corporations Act 2001* (Cth) ss 1041I ('by'), 1317HA(1) ('resulted from'), 1325(2) ('because'); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GF ('by'); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.

17 See, eg *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* [2010] FCA 1029, [15]–[17] ('*Dawson Nominees [No 4]*'); *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801, [9]–[10] ('*Hobbs*'); *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433, [68] ('*Earglow*').

18 *Caason Investments Pty Ltd v Cao* [2015] FCAFC 94 (finding market-based causation arguable in the context of an interlocutory pleading dispute); *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2015] FCA 149, [219]–[220] (accepting market-based causation in obiter statements).

19 *In the matter of HIH Insurance Ltd (in liq)* [2016] NSWSC 482 (court recognised and applied indirect causation in a non-class action shareholder claim).

20 *Crowley v WorleyParsons Ltd* [2017] FCA 3, [36].

21 *Potts v Miller* (1940) 64 CLR 282, 297–300.

is a 'no-transaction' case, which assumes that the shareholder would not have purchased the shares at all had the market been properly informed.[22]

The methods for determining price inflation may be summarised as including: (a) the event study method; (b) the percentage price inflation method; and (c) the dollar price inflation method.[23] 'Event studies' is a form of regression analysis that seeks to measure materiality and the magnitude of the impact of a misrepresentation on the share price by removing other unrelated events such as general market or industry-wide events.[24] In simple terms, an expert determines per-share damages by constructing a 'value line' that represents the market price of the security on each day of the class period if the market was properly informed and comparing that price with the price actually paid by a group member. The loss suffered is the difference between the price paid and the value line, multiplied by the number of shares purchased.[25] The percentage price inflation method determines the percentage price drop of the company's share price at the time of the disclosure of the information and uses that percentage as the inflation in the share price for the relevant period. The dollar price inflation method looks at the dollar price drop of the company's share price at the time of the disclosure of the information and uses that amount as the inflation in the share price for the relevant period.[26]

The event study is a more rigorous approach, as it seeks to determine the impact of non-disclosure throughout the relevant period, including by excluding other causes of price movements.[27] The percentage and dollar price inflation methods are more simplistic, as they assume a constant level of inflation and ignore other causes of price movements. Equally, their simplicity makes them less costly to prepare. In practice, a full event study will only be used for settlement distribution where it has already been undertaken to quantify loss as part of the litigation. Where a matter settles early, a less sophisticated approach may be

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22 *Kirby v Centro Properties Ltd* [2010] FCA 1115, [33]; Michael Garner and Helen Mould, 'Measuring and Proving Loss in Securities Class Actions' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia* (Ross Parsons Centre, 2017) 171; Justice Jonathan Beach, 'Some Current Issues in Securities Class Actions' (2017) 36(2) *Civil Justice Quarterly* 146, 158–63.

23 Beach (n 22) 158.

24 See *Taylor* (n 15) [21]–[22]; A C MacKinlay, 'Event Studies in Economics and Finance' (1997) 35 *Journal of Economic Literature* 13.

25 Janet Alexander Cooper, 'Rethinking Damages in Securities Class Actions' (1996) 48 *Stanford Law Review* 1487, 1491–3; Michael Legg, 'The Aristocrat Leisure Ltd shareholder class action settlement' (2009) 37 *Australian Business Law Review* 399, 403–4; *Earglow Pty Ltd v Newcrest Mining Ltd* [2015] FCA 328, [88] ('*Earglow*').

26 Beach (n 22) 158.

27 Michael Kaufman and John Wunderlich, 'Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation' (2009) 15 *Stanford Journal of Law, Business & Finance* 183, 192–3; *National Australia Bank Ltd v Pathway Investments Pty Ltd* [2012] VSCA 168, [94]; *Earglow* (n 25) [88]; Garner and Mould (n 22) 193–7.

employed. A loss assessment formula may also combine methods, namely, by taking the average of two methods or adopting some form of weighting such as 80–20.[28]

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

Once the amount to be paid to a group member is determined, they will be afforded an opportunity to challenge the calculation. This will invoke a dispute-resolution process that involves a recalculation of the amount.[29] When the challenged assessments are complete, the settlement is distributed to individual group members.

IV Global Sum with Individualised Settlement Distribution Scheme

The global sum with an individualised assessment is the most common form of SDS used for mass-tort and product-liability class actions. Claims have been brought in relation to a wide array of products and incidents, including medical devices, pharmaceutical products, food and drink, tobacco, consumer goods such as cars, agricultural products, and disaster incidents such as floods and bushfires.[30] In brief, it involves two steps: first, a settlement for a specified sum that is to compensate all group members; and, second, the allocation of that sum through assessing each group member's loss or harm individually. To comprehend the choice of SDS for mass-tort and product-liability claims, it is first necessary to understand the nature of those claims and causes of action.

Product-liability actions are commonly based on a suite of federal statutory causes of action that make a manufacturer strictly liable for injury that was caused by goods whose safety was not such as persons were generally entitled to expect,[31] or statutory warranties or guarantees in relation to goods supplied to a

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28 *Vernon v Village Life Ltd* [2009] FCA 516, [31]; *Dawson Nominees [No 4]* (n 17) [25]; *Earglow* (n 17) [80].

29 See, eg *Hobbs* (n 17) [22]; *Foley* (n 6) [13]; *Earglow* (n 17) [88].

30 See, eg S Stuart Clark and Christina Harris, 'The Past, Present and Future of Product Liability and Other Mass Tort Class Actions in Australia (2009) 32 *University of New South Wales Law Journal* 1022; Rebecca Jancauskas, 'Product Liability Class Actions in Australia' (2015) 129 *Precedent* 23; Morabito (n 3) 28.

31 *Competition and Consumer Act 2010* (Cth) ('CCA') sch 2 ('ACL') pt 3-5, formerly *Trade Practices Act 1974* (Cth) ('TPA') pt VA. See, eg *Courtney v Medtel Pty Ltd* (2003) 126 FCR 219, [9] ('*Courtney*'); *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145, [5] ('*Merck Sharp*'); *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [4] ('*Downie*').

consumer, in particular that goods are of 'acceptable quality' and that they are reasonably fit for a disclosed purpose.[32] Other statutory causes of action that are sometimes pleaded in product-liability class actions are the proscriptions against misleading or deceptive conduct,[33] unconscionable conduct,[34] false and misleading representations,[35] supplying consumer goods not compliant with a safety standard,[36] or manufacturing, possessing or having control over vehicles that were not compliant with a safety standard.[37] In addition to statutory causes of action, product-liability class actions are often also based on the tort of negligence.[38] Class actions relating to disasters such as floods and bushfires are usually based on the tort of negligence.[39]

The second step in an SDS for mass-tort and product-liability class actions usually provides for some form of threshold determination as to eligibility and/or liability and/or causation. This could include, for example, a process for determining whether the putative participant was a consumer or recipient of the relevant product, whether the product failed in the manner alleged or for some other reason, and whether that failure caused the injuries in respect of which compensation is sought.[40] Once the threshold requirement is met, the quantum of the loss must then be determined.

Settlements of mass-tort and product-liability claims involving personal injuries need to take account of statutory thresholds, caps and reductions that apply to claims involving death or personal injury. At the federal level, Part VIB of the *Competition and Consumer Act 2010* (Cth) imposes a threshold for eligibility for non-economic loss damages[41] and caps the quantification of certain heads of damages.[42] Where negligence is pleaded, settlements also need to have regard to state and territory legislation that modifies the single common law that applies throughout Australia to the quantification of damages. Some states and territories have applied thresholds for eligibility for non-economic loss damages and placed

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32 ACL pt 3-2, formerly TPA ss 74B, 74D (goods are fit for purpose and of merchantable quality). See, eg *Courtney* (n 31) [9]; *Merck Sharp* (n 31); *Capic v Ford Motor Co [No 3]* [2017] FCA 771, [4].

33 ACL s 18, formerly TPA s 52. See, eg *Merck Sharp* (n 31) [4].

34 ACL s 21, formerly TPA s 51AB.

35 ACL s 29, formerly TPA s 53(a).

36 ACL s 106(1), formerly TPA s 65C.

37 ACL s 106(3), formerly TPA s 65C.

38 See, eg *Merck Sharp* (n 31) [4]; *Downie* (n 31) [4].

39 See, eg *Johnston v Endeavour Energy* [2015] NSWSC 1117; *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority [No 9]* [2017] NSWSC 1116, [5].

40 See, eg *Downie* (n 31) [58]; *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452, [62] ('*Stanford [No 6]*').

41 CCA s 87S.

42 CCA ss 87M (caps non-economic loss damages), 87U–87V (caps on economic loss claims), 87W–87X (caps on gratuitous attendant care services).

caps on damages for non-economic loss, gratuitous care and economic loss.[43] In addition, different interest rates and discount rates apply to the quantification of personal-injury damages among jurisdictions. When negligence is pleaded and group members suffer injuries in different states and territories, the SDS needs to provide for which law or laws will apply to the quantification of damages. Usually, a uniform regime will be adopted rather than one that seeks to incorporate variations based on the different regimes and practices that apply in each state and territory.[44] However, multiple regimes could be adopted if desired. SDSs that apply to settlements involving personal injuries sometimes also provide for what should happen if the settlement participant dies before their compensation amount is determined or paid because this too can vary from one Australian jurisdiction to another.[45]

Settlements involving personal injuries also need to consider the likelihood that some participants in the settlement will have some reimbursement obligations pursuant to statute and/or contract for treatment expenses, social security, and income-continuance payments that have been made in relation to the injuries the subject of the claim.[46]

Under this form of settlement, the global sum is divided among group members by the scheme administrator. There is no role for the defendant or adversarial component as occurs in the process settlement discussed below. The division is achieved through assessing each group member's claim and paying them a proportion of their claim reduced to the same degree by which the global settlement sum is lower than the full recovery that might have been achieved at trial. The individual assessment requires the claimant to provide information about their injury or loss to which the scheme administrator or someone appointed by the scheme administrator then applies the relevant law.

The process may be illustrated through the personal injury and dependency ('I-D') claims in the Kilmore East Kinglake bushfire class action. For I-D claims, a claim book was prepared through obtaining information from claimants via an electronic survey and a questionnaire, which was then provided to a barrister who specialised in personal injury. That barrister then conferred with the claimant and evaluated the claim. The barrister delivered a statement of reasons and an initial assessment of the value of the claim in accordance with the laws of Victoria.[47] The

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43 See, eg *Civil Liability Act* 2002 (NSW) pt 2; *Wrongs Act* 1958 (Vic) pts VB, VBA.

44 See, eg *Stanford [No 6]* (n 40) [142] (provisions of the CCA adopted rather than state-based legislation).

45 See, eg *Stanford [No 6]* (n 40) (DePuy ASR Implants (Hips) Class Action) SDS s 6.6.

46 See, eg *Health and Other Services (Compensation) Act 1995* (Cth) (medicare); *Social Security Act 1991* (Cth) pt 3.13 (social security benefits); Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 181; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131, [19] ('*Matthews [No 40]*').

47 *Matthews [No 40]* (n 46) [6].

assessment involved determining the usual heads of damages for personal injury, namely, pecuniary loss resulting from lost capacities (eg lost earning capacity and loss of domestic capacity), pecuniary loss resulting from special needs (eg medical expenses and the cost of care), and non-pecuniary loss (eg pain and suffering, loss of amenities of life and loss of expectation of life).[48]

Part VBA of the *Wrongs Act 1958* (Vic) requires a claimant to have suffered a 'significant injury' (defined as above five per cent impairment for physical injuries, or above 10 per cent for psychiatric injuries) as a precondition to entitlement for damages for pain and suffering. The determination of significant injury is to be assessed by an approved medical practitioner or medical panel.[49] As a result, the SDS made provision for a medico-legal assessment to determine if the threshold for a significant injury was met.

The claimant could seek a review if dissatisfied with the assessment, including challenging whether the threshold for recovery had been met. The assessment, which may be modified by the review, then determined the value of the claim.[50]

V Process Settlement Distribution Scheme

Mass-tort class action settlements may as an alternative to a global sum settlement adopt a process settlement. The total settlement amount is usually not capped but the maximum recoveries for each loss or injury may be specified. The process usually involves two steps that take place in a form of adversarial alternative dispute resolution process. The first is determination of whether an individual group member's situation results in the scheme recognising that they have a compensable claim. At a general level, this type of scheme involves an exchange of information, and potential argument, about each person's claim, which may see liability accepted or a process for the determination of liability by an independent person or panel triggered. If liability is accepted or found by the independent person or panel, then the second step occurs: the calculation and negotiation or determination of compensation, in accordance with an agreed protocol.

The process settlement may be illustrated by the LCS® Duofix™ Femoral Components class action that dealt with components of a knee-replacement implant where alumina particles from the manufacturing process may damage

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48 Michael Tilbury, *Civil Remedies — Volume II Remedies In Particular Contexts* (Butterworths, 1993) 14; Barnett and Harder (n 46) 167.

49 *Matthews [No 40]* (n 46) [16]. See also *Downie* (n 31) [60]; *Deitrich v Pulse Pharmacy Northcote Pty Ltd* [2014] VSC 307, [34].

50 *Matthews [No 40]* (n 46) [6].

the implant.[51] The class action settled on the basis that the negotiated protocols, known as the liability protocol and the compensation protocol, would be applied.

The liability protocol set out an overarching criterion for liability, namely, 'if it is more likely than not that alumina particles from an Affected Implant caused Abnormal Wear (the Characteristic)'. There were then a series of presumptive evidentiary criteria for finding that the Characteristic was satisfied and a number of exclusionary criteria. The criteria were adopted by the parties based on expert advice. If the lawyers for the group member and the defendants agreed that the group member was eligible for compensation, then the compensation protocol was applied. If no agreement was reached, then the claim was referred to an orthopaedic surgeon with experience in removing knee implants, who considered the available materials and applied the criteria in the liability protocol to determine whether compensation was payable.[52]

The compensation protocol provided for: (a) compensation for non-economic loss and gratuitous care; and (b) compensation for financial losses. The operation of a process SDS can be explained by looking at compensation for non-economic loss and gratuitous care, which was to be determined in accordance with four categories: A, B, C and D. The amounts of compensation for categories A, B and C were fixed at $30,000, $40,000 and $65,000, respectively.[53] Category D involved individual assessment. Categories B, C and D were in ascending order of the number of consequential surgeries. Category D also included group members that experienced extraordinary or significant complications or injury greater than those group members in categories A, B or C. Category A was for group members who did not meet the criteria for any other category. The lawyers for the group member and the defendants then attempted to agree on the category that applied to a group member. Failure to agree resulted in the group member's treating surgeon being asked to provide a report. If that further information did not result in agreement, then a report was sought from another orthopaedic surgeon, and if agreement was still not reached, then the applicable category was determined by independent counsel. For category D, where compensation was individually assessed, the provisions and principles in Part VIB of the *Trade Practices Act 1974* (Cth) were applied, with requirements for the provision of certain documentation, such as medical history and reports, and the defendants

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51 *Casey v DePuy International Ltd [No 2]* [2012] FCA 1370 ('*Casey [No 2]*'). Other examples include the Victorian bushfire cases: *Thomas v Powercor* [2011] VSC 614 (Horsham fire); *Perry v Powercor Australia Ltd* [2012] VSC 113 (Coleraine fire); *Place v Powercor Aust Ltd* [2013] VSC 6 (Weerite fire).

52 *Casey [No 2]* (n 51) [6]–[8]; Casey v DePuy International Ltd and Johnson & Johnson Medical Pty Ltd, Liability Protocol, 24 August 2012, and amended pursuant to the Court's direction on 31 August 2012.

53 In this respect, this SDS resembles a matrix- or grid-style SDS, which is frequently used in the United States of America. See Paul Rheingold, 'Mass Torts — Maturation of Law and Practice' (2017) 37(2) *Pace Law Review* 617, 632.

being able to request the group member to attend reasonable medical examinations.

VI Design Principles for Settlement Distribution Schemes

Drawing on the three main types of SDS above, the principles or steps in the design of an SDS may be elucidated. There are four principles or steps that inform SDS design: first, the foundational law that guides the extent to which the substantive law that governs the claims that have been brought is applied in the settlement context through concerns such as substantive fairness, cost and delay; second, the choice of SDS model, which is mainly influenced by whether an individualised process is needed, and to a lesser extent whether the defendant has a role to play; third, the balancing of fairness, cost and delay in applying the law and finding the facts within the SDS chosen; and, fourth, ensuring that an SDS affords procedural fairness to claimants.

A *Foundational Considerations*

The first principle is substantive fairness and follows from the SDS being designed in the shadow of the law, as it is legal principles that the court with responsibility for approval must consider. Consequently, the Federal Court has held that it will consider 'whether the assessment methodology … is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle'.[54] Similarly, the Supreme Court of Victoria has stated that in assessing the fairness of a settlement

> it is necessary to form a view as to the correlation between the amount individual group members will recover under the settlement distribution scheme and the amount they might recover after a trial, [although] any such comparison can only be performed in a broad manner.[55]

Consistent with the principle that the law provides compensation commensurate with the loss or harm suffered, the SDS needs to allocate compensation consistent with the harm or loss experienced by the group member.[56] Those who suffered greater compensable harm or loss should be compensated more than those who suffered less. In practice that means that it is rare that a settlement sum can

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54 *Camilleri* (n 6) [43], [47]; *Earglow* (n 17) [87].

55 *A v Schulberg [No 2]* [2014] VSC 258, [12] ('*Schulberg [No 2]*'); *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [40] ('*Matthews*').

56 Legg (n 1) 96–97.

simply be evenly divided among group members so that they all receive the same amount.[57]

The SDS should also seek to take account of the prospects of success, or the risk that a claim would not be made out vis-à-vis other claims. If the claims and their prospects are homogeneous, this would be reflected in the discount that is factored into the settlement amount compared to the amount claimed. No further steps would be necessary. However, where claims and their prospects are heterogeneous, then this needs to be considered in allocating compensation. The amounts paid to group members 'should have some relationship to the individual compensation that reflects the merit of the individual claims'.[58] Weaker claims should not recover to the same degree as stronger claims.[59]

The objective of substantive fairness must also take account of cost and delay in the SDS. This is consistent with the recognition in the judicial system more broadly that '[s]peed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings'.[60] In the Kilmore East Kinglake bushfire class action, Forrest J stated:

> [T]he settlement of a class action and the process of assessment and review is by no means perfect. It is not intended to be so: it is intended to provide a reasonable process by which claims of Group Members can be processed fairly and efficiently without the need for court intervention.[61]

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

> Fairness and reasonableness are moderate standards, rather than ones which require absolute certainty or confidence in a particular point of view about legal issues, if there can ever be such certainty in the law in any event.[62]

The standard may permit the SDS to avoid a close 'intellectual engagement with the various legal and factual arguments' where competing views are possible.[63] Indeed, efficiency may require it. Moreover, the determination of prospects of success by a court 'requires an element of guesswork and judicial intuition'.[64]

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57 *Downie* (n 31) [95].

58 *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379, [32]. See also *Smith v Australian Executor Trustees Ltd [No 4]* [2018] NSWSC 1584, [89] ('*Smith [No 4]*').

59 *Darwalla [No 2]* (n 5) [66].

60 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 213 [98]. See *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379, [33]; *McKenzie v Cash Converters International Ltd (No 4)* [2019] FCA 166, [13].

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

62 *McAlister v New South Wales [No 2]* [2017] FCA 93, [32].

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

64 *Downie* (n 31) [100].

Nonetheless, the SDS should 'achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible'.[65]

The concern with cost and delay reflects the fact that it is not possible to replicate the process or the outcome of a trial; nor is it desirable to attempt to do so in most cases because it would consume resources that would otherwise be available to compensate the group members. The application of the law and prospects of success, as well as the determination of the harm or loss experienced, must also take account of 'whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution'.[66] Concerns with cost and delay are embedded in the application of substantive fairness. The need for trade-offs or balancing is explained further in each of the sections below.

B *SDS Model Choices*

Two initial decisions that need to be addressed prior to designing the detail of an SDS are: (1) whether the allocation of compensation can be done by formula, or whether the nature of the claims and the resulting harm requires an individualised process; and (2) whether the defendant is to be part of the SDS process.

1 *The Need for Individual Assessment*

All SDS are aimed at determining the amount of compensation to be paid to individual group members. However, as illustrated through the different types of SDS, that determination can be more or less individualised in the approach employed. Whether an individualised assessment is required, in keeping with the foundational considerations, will significantly affect how an SDS may be designed.

Shareholder class actions adopt SDSs that are usually less individualised in approach compared to the SDS employed in a mass-tort or product-liability class action. This is because shareholder claims are dealing with financial losses from the same security that largely affects all group members in the same or similar way. Consequently, the SDS is able to employ a formula that calculates losses using the relevant inputs that are applicable to all group members, or to large groups within the whole group. In a shareholder SDS, this would be the number of shares bought (and sold) in the relevant period and a calculation that compared the actual price paid with the price adjusted for price inflation. The group member

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65 *Camilleri* (n 6) [5]; *Stanford [No 6]* (n 40) [118]. See also *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204, [37]–[39].

66 *Camilleri* (n 6) [43]. See also *Matthews* (n 55) [420].

only needs to provide their particular inputs, that is, shares bought (and sold) in the relevant period.

In contrast, a mass tort that results in personal injury is seeking to compensate the harm suffered by an individual that is specific to that individual, such as lost earning capacity, pain and suffering, loss of the amenities of life, and loss of expectation of life. The impact of the mass tort on each group member may vary in terms of not just applicable heads of loss, but also severity or gradation of harm.

The need for individual assessment, like SDS design generally, is driven by a need to balance fairness — here meaning precision of the assessment — with cost and delay. The nature of the economic loss alleged to have been suffered in shareholder cases is amenable to a more formulaic approach. Consequently, it would be nonsensical to incur the cost and delay of individualised assessments when they are not needed. However, in the mass-tort context a lack of precision may have serious consequences because there is greater variation in claims. A formula that takes account of some but not all relevant factors will produce a result that is less accurate. In some situations, a lack of accuracy may give rise to the injustice of strong claims or serious harm being undercompensated, while weaker claims or less serious harm is overcompensated.[67]

However, the need to recognise and adopt some form of trade-off continues, as shown by the comments of Hoeben CJ at CL in the Springwood fire class action in New South Wales:

> An important aspect of the scheme is that the relatively modest compensation which the group members will receive not be reduced by expensive and time-consuming individual assessments of group member claims.[68]

Similarly, in a personal injury class action in relation to hepatitis C being contracted during a surgical procedure in Victoria, Beach JA approved the use of a formula for the distribution of compensation because

> it is not in the interests of the group as a whole (or any individual group member) that there be any further inroad into the money available for distribution by requiring the costs of common law assessments of damages to be undertaken in individual cases.[69]

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67 Legg (n 1).

68 *Johnston v Endeavour Energy* [2016] NSWSC 1132, [36] ('*Johnston*'). See also *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd [No 3]* [2018] FCA 1842, [262], [264] ('*Petersen Superannuation [No 3]*').

69 *Schulberg [No 2]* (n 55) [13]. The formula determined the strength of a claim and the compensation to be paid by taking into account the following factors (ibid [6]): whether or not a group member has been diagnosed with hepatitis C antibodies only ('only' in the sense of not having been diagnosed with live hepatitis C virus); whether or not a group member has been diagnosed with live hepatitis C virus; matters of past history; level of past symptoms (physical and psychiatric); duration of treatment; likelihood of future symptoms; and extent of future treatment.

While non-individualised approaches in mass-tort class actions are rare, the above two examples demonstrate that there may be times when the cost and delay of the more accurate distribution is not warranted. This is particularly so when there is a significant compromise of the value of the claim under a settlement and a relatively small amount to distribute. However, it must be recognised that such an approach may negatively affect the achievement of substantive justice.

2 *Role of the Defendant*

Where an SDS involves the distribution of a global or certain sum, the defendant usually plays no role. The settlement sum is usually paid into a bank account by the defendant when the settlement agreement is signed or once the class action settlement has been approved. The distribution of the settlement sum is undertaken by a scheme administrator, which is usually the law firm or lawyer that acted for the plaintiff in the class action.

The exception to the above approach is the process SDS, where the settlement sum is not capped and the total payment will only be known once all claims have been assessed. The process SDS requires that, as a first step, the liability of the defendant to each group member be proved by reference to specified criteria. The defendant may dispute that liability has been shown and the issue will need to be determined by an assessor. The SDS therefore incorporates an adversarial component into the process.

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

However, there are also disadvantages. The SDS may be costlier and more time-consuming on a per-claim basis due to the adversarial approach. A defendant is incentivised to carefully consider each claim and contest those that it believes are not eligible, as the more ineligible the claims, the lower will be the compensation amounts payable. The LCS® Duofix™ Femoral Components class

action took over three years to deal with about 400 claims.[70] In contrast, the much larger Kilmore East Kinglake bushfire SDS, with 1481 I-D claims and 9174 economic loss and property damage ('ELPD') claims, took about two years and five months.[71]

C *Balancing Substantive Fairness and Efficiency in the SDS*

1 *Legal Uncertainty*

The application of the law to achieve substantive fairness assumes that the law is clear. However, in many instances that assumption does not hold. Legal uncertainty is illustrated by the position described above in relation to causation and the calculation of damages in shareholder class actions. It also exists in other areas such as the quantification of damages in cartel class actions.[72] The law in relation to these issues has not been determined by Australian courts and one or more competing approaches exist. The courts have held that an SDS may adopt any approach that is arguable and has been pleaded.[73] Equally, the SDS may be structured so as to combine approaches, as has sometimes occurred in shareholder class actions, where a group member's loss is an average of two or more available measures of loss.[74]

The approach taken to legal uncertainty is often driven by the data or information that is available and the cost to adopt more sophisticated or precise approaches. As a result, indirect causation in a shareholder class action SDS may be justified on the basis that it is an arguable measure at law and allows for causation to be treated as a common issue, which removes the need for costlier

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70 Rebecca Gilsenan, 'Class Actions: Settlement Distribution' (Seminar Paper, UNSW CLE Seminar — Class Actions: Case Management, Mediation and Settlement Distribution in Focus, 15 March 2016) 3.

71 The settlement was approved on 23 December 2014 and, as at 9 June 2017, only three I-D claimants and 36 ELPD claimants had not received a payment. In most of the cases of non-payment, that was due to circumstances beyond the control of the SDS administrator. See *Matthews v AusNet Pty Ltd [Ruling No 46]* [2017] VSC 360, [6]–[15].

72 Brooke Dellavedova and Rebecca Gilsenan, 'Challenges in Cartel Class Actions' (2009) 32(3) *University of New South Wales Law Journal* 1001, 1013–18; I Wylie, 'Cartel compensation — a consumer perspective' (2011) 39 *Australian Business Law Review* 177, 181. For an in-depth discussion of the methods for assessing cartel damages, see James Brander and Thomas Ross, 'Estimating Damages from Price-Fixing' in Stephen Pitel (ed), *Litigating Conspiracy: An Analysis of Competition Class Actions* (Irwin Law, 2006) 335.

73 *Camilleri* (n 6) [43], [47]; *Earglow* (n 17) [87].

74 See Bernard Murphy and Andrew Watson, 'Negotiations and Settlement — 2010 Multiplex Debrief' (Seminar Paper, LexisNexis Shareholder Class Action Masterclass, 18 October 2010) 11.

individualised proof of causation.[75] Similarly, some damages calculation methods require greater data, cost and time to construct. A case where settlement occurs after expert evidence has been filed, expert conclaves have been held, or the representative party's loss has been determined has better information and guidance for the SDS than a case that settles early. Experts could be retained to construct sophisticated loss models, but this will incur costs that reduce the fund available for distribution.[76]

2 *Factual Uncertainty*

In addition to uncertain law, there may also be uncertain facts. The underlying facts relevant to a claim will be a combination of common and individual factual issues, consistent with the class actions framework that requires common issues but permits or accepts the existence of individual issues.[77] The facts relevant to the common issues will need to be developed for trial and as a result will be the subject of pre-filing investigation, pleadings, discovery and evidence. However, these steps may not occur if a settlement is reached before one or more of those steps takes place. It may also be that the facts are controverted by the defendant or through material obtained from third parties. The SDS will be constructed using the facts relevant to the common issues as known at the time of the settlement. The later the settlement, the greater the likelihood that detailed work will have been undertaken to a standard (and cost) that is suitable to use at trial. Where that work has not already been undertaken, settling parties are likely to pursue something less precise and less expensive to form the basis of settlement distribution so as to reduce cost and delay.

Information about individual factual issues will need to be obtained from group members. Where a closed class is employed and group members interact with the lawyers for the representative party, some or all of these details may be obtained prior to commencement. Alternatively, information can be obtained through a registration or class-closure process where the group member needs to provide requested information.[78] For example, in a shareholder class action the group member needs to advise of the number of shares held, the date of purchase and the date of sale. In mass-tort claims, information may be requested that demonstrates the use of, or exposure to, the product, or in cases like bushfire class actions, the presence of property or the person in the area where the harm

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

76 See, eg *Wright Rubber [No 3]* (n 11) [23].

77 *Timbercorp Finance Pty Ltd (in liq) v Collins* (2016) 339 ALR 11; 91 ALJR 37; [2016] HCA 44, [50]–[51].

78 See, eg *Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474, [59].

occurred. However, further individual information may need to be obtained at a later stage, as the class-closure process should not be unduly onerous, as otherwise it may dissuade participation in the class action.[79] Much will depend on the nature of the class action and what information it is reasonable to expect a group member to hold or collect. Consequently, only once a settlement has been achieved should more granular individual information be required. For example, in mass-tort cases, individualised information may be obtained through questionnaires, interviews, medico-legal assessments and valuations.[80]

The effect of pre-trial factual development on the SDS is illustrated by the Corrugated Fibreboard Packaging class action ('CFP class action'). In the CFP class action a claim was made for aggregate damages and, in support of that claim, evidence was prepared for trial that assessed damages for the entire class.[81] A full dataset had been disclosed through discovery, which formed the basis of the loss assessment. Group members were not required to provide claim information to participate in the SDS. Further, an expert economist had assessed the losses in the CFP class action through a bespoke formula that utilised multiple-regression analysis and had regard to individual differences and pricing.[82] The pre-existing work that was undertaken for trial in the CFP class action was able to be carried over to the SDS.

Equally, trial preparation may demonstrate that even when individual factual information can be obtained, it may not be efficient to do so. As part of trial preparation, evidence is developed to resolve the entirety of the representative party's claim, including their individual issues.[83] This process may indicate the cost and delay that would be involved in fully working up the facts for all group members' claims and therefore provide guidance as to where the balance between precision and expense lies.[84]

3 *Proof of Causation*

An example of the different approaches that may be used in an SDS to take account of a substantive issue that combines both legal and factual elements, while also considering cost and delay, is causation.

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

80 *Matthews* (n 55) [342]; *Matthews [No 40]* (n 46) [6].

81 *Jarra Creek* (n 10), [99]–[100].

82 Ibid [40]–[52].

83 See, eg *Stanford [No 6]* (n 40) [26]; *Perera v Getswift Ltd* [2018] FCA 732, [206].

84 *Petersen Superannuation [No 3]* (n 68) [262] (relying on costs incurred by accountants to ascertain the losses of a subset of group members in a financial product class action as supporting a more limited approach to the factual information required for the SDS).

In the Bonsoy soy milk product-liability class action, the settlement employed a distribution scheme that required an administrator to determine 'whether, on [the] balance of probabilities, consumption of Bonsoy within the Relevant Period caused the injuries claimed'.[85] As a result, it was necessary for a group member to establish a causal link between the consumption of Bonsoy and thyroid dysfunction. Failure to demonstrate the causal link resulted in no recovery.

This can be contrasted with the Kilmore East Kinglake bushfire class action. In that class action, claims were made against the State parties alleging that planned burning had been insufficient, allowing for the spread of the fire to be greater than it otherwise would have been, and also that there had been a failure on the part of the State parties to provide proper and adequate warnings to the claimants, resulting in the I-D claimants suffering injury loss and damage.[86] The State defended the case on a number of bases, including causation.[87] As part of the settlement approval judgment it was said that it 'may be doubted that the Court could safely reach a conclusion that the loss and damage occasioned by the spread of the bushfire was likely to have been materially reduced by the planned burning ultimately identified'.[88] Further, in relation to the warnings case, 'a substantial proportion of the individual I-D claims would fail on the basis of causation'.[89] The SDS dealt with the problems around causation, and the causes of action against the State parties generally, by providing that the I–D claims were capped at an 80 per cent recovery rate.[90] Rather than require I-D claimants to try and demonstrate causation, which would have required an assessor to evaluate causation, the potential recovery was discounted across all I-D claims.

In shareholder class actions, causation is effectively assumed provided the group member provides the information necessary to be part of the group — that is, that they bought shares in the relevant company during the relevant period and they certify that they relied on the share price. This approach is permitted because the pleadings will almost always seek to rely on indirect or market-based causation, which in simplified form is relying on the share price.[91]

Each of the above approaches has advantages and disadvantages. Requiring proof of causation is costlier and time-consuming but removes group members who do not have a claim. Making an adjustment to all group members' recoveries to take account of difficulties in establishing causation reduces cost and delay, but it also means that there may be some group members who may have been able to

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85 *Downie* (n 31) [156]. See also [58]–[59].
86 *Matthews* (n 55) [254]–[256], [270]–[274].
87 Ibid [275].
88 Ibid [267].
89 Ibid [289]–[291], [294].
90 Ibid [413].
91 See section III above.

prove causation in their particular circumstances but do not recover commensurately under the SDS. The reverse situation is experienced through the shareholder class action approach, where the low threshold for proving causation may mean that some group members who may have failed to meet the threshold if required to prove individual reliance nevertheless still recover. The best approach will turn on knowledge of the group and their claims and striking a balance between precision and efficiency. Over-compensating the undeserving or under-compensating the deserving may be necessary as part of a cost-benefit assessment. However, as stated above in relation to an SDS generally, but which is also applicable to an element such as causation, the approach must take account of 'whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution'.[92] Applying this to Kilmore East Kinglake bushfire class action, the approach to causation was only adopted in relation to the claims against the State parties. The I-D claimants, who may have been able to prove causation but were not afforded the opportunity to do so, were still afforded compensation through being able to recover against the other defendants.

D *Procedural Fairness*

Procedural fairness has been adopted in each form of SDS through a focus on the choice of an appropriate person to administer the SDS, and that group members have a reasonable opportunity to lodge claims and to challenge assessments.[93] The court also plays an import role in ensuring procedural fairness, first through being required to approve the SDS as part of approving the settlement, and then, after approval, through providing oversight of the administration of the SDS. Equally, just like substantive fairness, there is a need to balance fairness with minimising cost and delay. The more opportunities to challenge the operation or result of an SDS, the greater the cost and delay of the process.

The court will typically appoint an administrator to manage and oversee the SDS.[94] The court may also maintain jurisdiction over the proceedings while the SDS is administered, and/or it will make orders permitting the relisting of the

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92 *Camilleri* (n 6) [43].

93 Ibid [44].

94 The power relied on by the court to appoint an administrator is *Federal Court of Australia Act 1976* (Cth) s 33ZF, *Supreme Court Act 1986* (Vic) s 33ZF, and *Civil Procedure Act 2005* (NSW) s 183. See, eg *Earglow Pty Ltd v Sigma Pharmaceuticals Ltd* [2012] FCA 1496 (order 6) ('*Earglow*'); *Camilleri* (n 6) (order 9); *Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 312, [6] ('*Camping Warehouse*'); *Smith [No 4]* (n 58) [100].

matter for dealing with issues arising from the administration of the SDS.[95] However, the court does not administer the SDS.

The primary source of the administrator's role and powers comes from the terms of the SDS and the orders made by the court. The administrator is required to distribute the settlement fund in accordance with the SDS approved by the court.[96] The SDS usually states that the administrator is to act on behalf of the group members as a whole and not as the lawyer for any individual group member.[97] The SDS may grant the administrator discretion in relation to the various elements of the SDS, such as whether to make an interim distribution. The reason for such discretion is 'to provide the Scheme Administrator with the agility to deal with issues as they arise'.[98] Beyond these requirements, administrators' responsibilities and the source of those responsibilities are still developing. It is unclear whether the SDS administrator should be seen as a *sui generis* court creation designed to meet the exigencies of the class action SDS,[99] or as an example of, or at least analogous with, a pre-existing legal category such as a court-appointed referee, receiver or trustee. In many SDSs the administrator holds the monies that are to be distributed on trust for the group members participating in the SDS.[100] In the Springwood fire class action the New South Wales Supreme Court stated:

> The administrator and administrator's staff are under a duty to the Court to administer the scheme fairly according to its terms and are obliged under the scheme

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95 See, eg *Earglow* (n 94) (no orders dismissing the proceeding, orders allowing the administrator and the parties to apply for directions); *Matthews v AusNet Electricity Services Pty Ltd* — S CI 2009 4788, Supreme Court of Victoria, *General Form of Order*, 23 December 2014 ('*Matthews*') (order dismissing the proceeding upon completion of distribution pursuant to the SDS and allowing the plaintiff, group members and administrator to apply for orders 'in respect of any issue arising in relation to the administration of the [SDS]'); *Stanford [No 6]* (n 40) (orders dismissing the proceeding but allowing the parties to apply for orders consequential to the SDS); *Blairgowrie [No 3]* (n 12) (orders dismissing the proceeding but allowing the administrator to apply for directions).

96 See, eg *Matthews* (n 95) (order 4); *City of Swan v McGraw-Hill Companies Inc* [2016] FCA 343 (order 4); *Hopkins v AECOM Australia Pty Ltd [No 8]* [2016] FCA 1096 (order 2); *Blairgowrie [No 3]* (n 12) (order 5).

97 See, eg Amcor/Visy class action SDS cl 3.2; *Pathway Investments Pty Ltd v National Australia Bank Ltd [No 3]* [2012] VSC 625 (SDS [4.2] annexed to the judgment); Kilmore Bushfire Class Action Settlement Distribution Scheme, 10 November 2014, [C(i)]; *Downie* (n 31), Annexure A, para 4.3; *Earglow* (n 17) [84].

98 *Matthews v Ausnet Pty Ltd [Ruling No 44]* [2016] VSC 732, [19]. See also *Johnston* (n 68)[40].

99 The courts' reliance on the general class actions power to do justice supports this view; see (n 95).

100 *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, Annexure A, para. 4.5; *Blairgowrie [No 3]* (n 12) [34]; *HFPS Pty Ltd (Trustee) v Tamaya Resources Ltd (in liq) [No 3]* [2017] FCA 650, [52]; *Watson as trustee for Murrindindi Bushfire Class Action Settlement Fund v Commissioner of Taxation* [2019] FCA 228, [9].

> to act properly on behalf of the group members as a whole. The administrator has the same immunities from suit as a Judge of the Supreme Court of New South Wales.[101]

There are also interesting questions around how the appointment as administrator impacts on the person's pre-exiting status as lawyer for some or all members of the group.

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

First, in the SDSs described above there were review mechanisms that provided at least one opportunity for a group member to challenge a determination under an SDS. This can be relatively straightforward, as with shareholder class actions, where there will usually be an opportunity for group members to check that calculations are undertaken correctly, including the accuracy of inputs such as the number of shares held.[102] More complex mechanisms may also be provided, such as with the ELPD claimants in the Kilmore East Kinglake bushfire SDS. There the claimant was given an opportunity to correct errors and then subsequently seek a review, which included providing written contentions.[103] These appeal mechanisms may require the group member to pay a form of bond, which may be refunded if there is an error or an assessment is increased.[104]

The second mechanism is court oversight of settlement distributions. Court oversight has been most obvious in relation to the Victorian bushfire class actions where, in the Kilmore East Kinglake class action, the Court held numerous case-management conferences to supervise the settlement distribution process.[105] Going forward, court oversight would appear to be standard practice, as shown by the Federal Court's Class Actions Practice Note, which since its reissue on 25 October 2016 requires that the court be advised at regular intervals of the progress of an SDS to ensure 'that distribution of settlement monies to the [plaintiff] and class members occurs as efficiently and expeditiously as practicable'.[106]

The scope of the court's power in undertaking oversight is still developing. On one view, as the SDS is approved by a court order as part of the settlement

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101 *Johnston v Endeavour Energy* [2016] NSWSC 1132, [37]. The granting of judicial immunity to the administrator was also included in the Bonsoy product liability SDS: *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, Annexure A, para 4.2(c).

102 See, eg *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194, [37].

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

104 *Jarra Creek* (n 10) [38] (non-refundable fee for review).

105 Supreme Court of Victoria, Kilmore East Kinglake Black Saturday bushfire class action settlement website:<https://www.supremecourt.vic.gov.au/case-summaries/common-law-classactions/settlement-supervision/kilmore-east-bushfire-settlement>.

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

approval process, the terms of a SDS cannot be challenged after approval. Rather, the court's role is 'to ensure that the scheme is administered properly, consistent with the terms of the SDS'.[107] The court can be asked to provide 'judicial advice' in relation to the administration of the SDS.[108] However, it has been said that the court cannot review an individual assessment provided the SDS procedures have been followed.[109] In overseeing the Kilmore East Kinglake bushfire SDS, Forrest J explained:

> The only remedy available, as I see it, is that of judicial review — but that would need a party to establish that there was either jurisdictional error or procedural unfairness on the part of the administrator or the reviewer.[110]

However, courts have been prepared to amend an SDS, which would seem to provide a method by which an SDS that gave rise to some form of unfairness or inefficiency could be addressed.[111] As Flick J explained in obiter in the Pan Pharmaceuticals class action:

> It would be … surprising if the ability of this Court subsequent to approval being given pursuant to s 33V [of the *Federal Court of Australia Act 1976* (Cth)] is confined to merely supervising the distribution of settlement monies in accordance with that approval and not to address unexpected unfairness arising from the approved distribution scheme.[112]

The third mechanism for review or appeal relates to costs. Costs incurred in administering the SDS must be approved by the court. To assist in this approval process the Victorian courts have appointed costs consultants as special referees to report on the costs claimed for administering an SDS.[113] The special referee's role is 'to ensure that there [is] an independent audit of the administration costs claimed by [the scheme administrator] (for professional costs and disbursements

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107 *Matthews v Ausnet [Ruling No 42]* [2016] VSC 394, [4].

108 *Camping Warehouse* (n 94) [12]–[16] (the administrator's ability to approach the court for advice was part of the SDS and court orders at the time of settlement approval). See also *Richards v Macquarie Bank Ltd [No 5]* [2013] FCA 1442, [41] (making orders for the administrator to approach the court for advice but also noting that there may 'be an ability to approach a State Court under State legislation providing for trusts').

109 *Matthews [No 43]* (n 61) [30]; *Matthews v AusNet Pty Ltd [Ruling No 45]* [2017] VSC 187, [40]. For a contrary view expressed obiter, see *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia [No 11]* [2012] FCA 105, [19] ('*Pharm-a-Care [No 11]*').

110 *Matthews [No 43]* (n 61) [31].

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

112 *Pharm-a-Care [No 11]* (n 109) [19].

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

such as counsels' fees or loss assessors' fees) and that the claims were reasonable'.[114]

Procedural fairness is built into the SDS process in a number of ways, but there is a lack of clarity as to the obligations of the administrator and court, as well as the extent to which a group member can seek review by approaching the court exercising oversight or going outside of the SDS process. Further clarity could be achieved through expressly dealing with the issue in the SDS and in court orders. However, certainty may only be achieved once a group member pursues a challenge to an SDS or an administrator's or court's action or inaction.

VII Conclusion

This article has described the design and operation of a range of class action SDSs that have previously not been the subject of study and analysis. The description is detailed so that the reader can appreciate the range of options that have been utilised. The article has also developed four guiding principles or steps for designing an SDS. However, the application of these principles or steps is not straightforward. The class action SDS operates in a unique context. It is a settlement and not a court adjudication, yet it is subject to court approval. Consequently, the substantive law and the compensation that the law would award significantly influences the terms of the SDS, as the substantive law is the court's guiding light. It also follows that to gain the imprimatur of the court, which is itself required to do justice, an SDS is expected to afford some degree of procedural fairness to the group members who have their claims determined by the SDS process. There is also a trade-off in seeking to balance fairness with minimising costs and delay. This trade-off can be more or less difficult depending on the underlying causes of action and losses. However, there is no single correct approach, but rather a need to strike an appropriate balance between fairness, which includes precision in the calculation of compensation according to law, and efficiency in the circumstances of the particular case.

114 *Matthews [No 41]* (n 133) [27].