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A Model for the Nation?

FOUR YEARS OF VICTORIA'S SECTION 33ZDA

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ABOUT THE MCKELL INSTITUTE

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ACKNOWLEDGEMENT OF COUNTRY

This report was written on the lands of the Wurundjeri people of the Kulin nations. The McKell Institute acknowledges Aboriginal and Torres Strait Islander peoples as the Traditional Owners of Country throughout Australia and their continuing connection to both their land and seas.

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PART 1: INTRODUCTION

The Federal Court of Australia—as well as the supreme courts of five of Australia's eight mainland jurisdictions—maintain near-identical class action regimes. These regimes allow groups of plaintiffs, united by common issues of law or fact, to bring a group proceeding. They provide important economies of scale to litigation, and advance access to justice by allowing for the consolidation of smaller claims that would otherwise be too costly to bring individually. To this end, the regimes are broadly successful. As Justice Bernard Murphy and Professor Vince Morabito noted in 2017:

> The Part IVA regime and its State counterparts have provided a flexible and adaptable procedure for dealing with mass civil claims, which has provided practical access to justice for an enormous number of claimants of many kinds or types, and allowed them to bring cases based in diverse causes of action arising out of a huge range of circumstances. In most cases the claimants would have been unable to bring their claims before the courts if the class action mechanism was not available to them, and many of them have enjoyed significant success in doing so. … In our view there can be no doubt the regime has significantly enhanced access to justice. [1]

Yet the regimes are not perfect. A recurring issue is, and has been historically, the willingness of a representative plaintiff to bring the claim forward when faced with the prospect of a relatively small damages award if the claim is successful, and a disproportionately large adverse costs order if the claim is unsuccessful. This has been remedied, to some extent, by the increasing involvement of litigation funders, who indemnify the representative plaintiff against any adverse costs order in return for a percentage of the final damages award or settlement. However, the increasing presence of litigation funders, along with often significant legal bills which must be met, has put increased pressure on legal costs, leading to lower proportions of damages returned to claimants in class actions.

In 2020, in response to these concerns, the Parliament of Victoria passed s 33ZDA of the *Supreme Court Act 1986* (Vic), empowering the Supreme Court of Victoria to make 'group costs orders' **(GCOs)**. These orders allow law firms, in limited circumstances, to play the role of litigation funder and lawyer, by acting for and indemnifying the representative plaintiff, and also receiving a fee contingent on, and proportional to, the final damages award or settlement. GCOs are a statutory exception to an otherwise blanket prohibition on lawyers entering into agreements which charge contingency fees.[2]

This paper seeks to assess the operation of Victoria's GCO regime, and determine its appropriateness for the rest of the Commonwealth. Part 2 of this paper provides a background to Australia's various class action regimes and the basic problem of the representative plaintiff. Part 3 introduces the business of litigation funding, and contrasts it to Victoria's contingency GCO regime. Part 4 critically traverses the arguments for and against the use of contingency fees in class actions. Part 5 then critically and empirically assesses the operation of the GCO regime against the arguments in Part 4. Finally, Part 6 concludes on the effectiveness of the regime, and whether it would be suitable for implementation across the Commonwealth.

PART 2: BACKGROUND

In 1992, the Keating Government introduced pt IVA of the *Federal Court of Australia Act 1976* (Cth) ***(FCAA)***. While some so-called representative proceedings were available before 1992,[3] the *FCAA* pt IVA regime was the first modern, detailed and prescriptive regime of its kind in Australia.

It gave groups of seven or more persons, with claims arising out of the same, similar or related circumstances, giving rise 'to a substantial common issue of law or fact' the ability to collectively bring their claims against a defendant.[4] The regime vested the Federal Court with significant supervisory, procedural and case management powers over such proceedings. Part IVA exhaustively set out a 'prescriptive regime containing detailed provisions for the commencement and conduct of class actions',[5] including threshold and standing requirements,[6] settlement and discontinuance procedure,[7] as well as a broad power to make orders in the interests of justice.[8]

Recognising the success of the *FCAA* pt IVA regime since 1992, state parliaments have since sought to effectively 'transplant' the pt IVA regime: with Victoria's regime commencing in 2000,[9] New South Wales' in 2010,[10] Queensland's in 2017,[11] Tasmania's in 2019,[12] and Western Australia's in 2023.[13] The 1992 introduction of pt IVA—as well as its transplantation into the various *Supreme Court Acts*—has been motivated by concerns around efficiency, the cost of litigation, and, perhaps most saliently, access to justice concerns.[14] Yet across the Commonwealth, and in spite of the availability of class actions for over 30 years, concerns remain. There is still a considerable backlog of civil cases in courts across the Commonwealth,[15] and the cost of legal services—particularly for civil litigation—is still out of reach for many working Australians.[16] As Western Australia Chief Justice Wayne Martin once noted:

> The hard reality is that *the cost of legal representation is beyond the reach of many, probably most, ordinary Australians* … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance (emphasis added).[17]

In Australia's 'cost-shifting' or 'loser pays' system, designed to dissuade speculative claims and protect those bringing legitimate claims, *the prospect of an adverse costs order looms large over would-be plaintiffs*. This risk is particularly pronounced with respect to the 'representative plaintiff' in typical class action litigation because of the *extreme disproportionality* between the likely small benefit if the litigation succeeds when assessed relative to the potentially disastrous consequences of an adverse costs order which the r*epresentative plaintiff must meet in its entirety.*[18] For example, in the AMP/GIO shareholder class action, the representative plaintiff's claim was only $3,000, yet the costs of opposing the claim totalled approximately $30 million.[19] An adverse costs order against the representative plaintiff under these conditions would have simply been ruinous.

These concerns have prompted a number of developments at common law, as well as more recent statutory innovations, which have attempted to reduce disincentives for plaintiffs, promote the bringing of meritorious claims, and ensure claims are feasible to run for the lawyers who run them.

THE TWO PRIMARY DEVELOPMENTS WHICH HAVE ATTEMPTED TO MAKE THE CLASS ACTION REGIME MORE ACCESSIBLE AND ATTRACTIVE FOR PLAINTIFFS ARE THE EMERGENCE OF LITIGATION FUNDING AND VICTORIA'S GCO REGIME

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PART 3: THE STATE OF PLAY

The two primary developments which have attempted to make the class action regime more accessible and attractive for plaintiffs are (1) **the emergence of litigation funding** and (2) **Victoria's GCO regime** which commenced in 2020 under the *Supreme Court Act 1986* (Vic) s 33ZDA.

Litigation funding

Litigation funding typically refers to an agreement (the 'litigation funding agreement' (LFA)) or court-ordered arrangement in which a third party litigation funder 'pay[s] the applicant's legal costs, including professional fees and disbursements [and agrees] to meet any adverse costs order awarded against the applicant, and to provide security for costs'.[20] In the event the claim is unsuccessful, the litigation funder is not entitled to recover any funds, and if the matter resolves successfully, the litigation funder is entitled to recover a payment which is usually in the form of costs invested and commission . This commission payment is usually formulated as a 'percentage of any funds recovered by the litigant either by way of settlement or judgment'.[21] In other words, the litigation funder typically receives a fee which is *contingent* on the success of the claim, and *proportionate* to the amount obtained.

The practice of litigation funding is peculiar in that it involves three parties with interests in the outcome of the proceedings: the representative plaintiff (and other class members), their lawyers, and the litigation funder. Where an LFA is in place, the agreement between the litigation funder and the plaintiff is contractual in nature.[22] Since Australia's class action regimes proceed on an 'opt-out' basis in which those affected can form part of the class without their consent,[23] there is a basic 'free rider' problem in which class members could otherwise simply avoid signing a funding arrangement and keep the entirety of their benefit under the claim, leaving only signatories to pay.

This problem originally led to practices of 'book-building' in which litigation funders sought to sign up as many class members as possible and the plaintiff lawyers then sought to narrow the class of plaintiffs to only those who had signed funding arrangements.[24] In *Dorajay Pty Ltd v Aristocrat Lesure Ltd* the practice of narrowing an already open class in this way came under scrutiny. [25] However the Full Court of the Federal Court subsequently held that classes defined by reference to entry into a funding agreement were not inconsistent with the Part IVA regime, and they remained a common feature of the class actions landscape until 2016.[26]

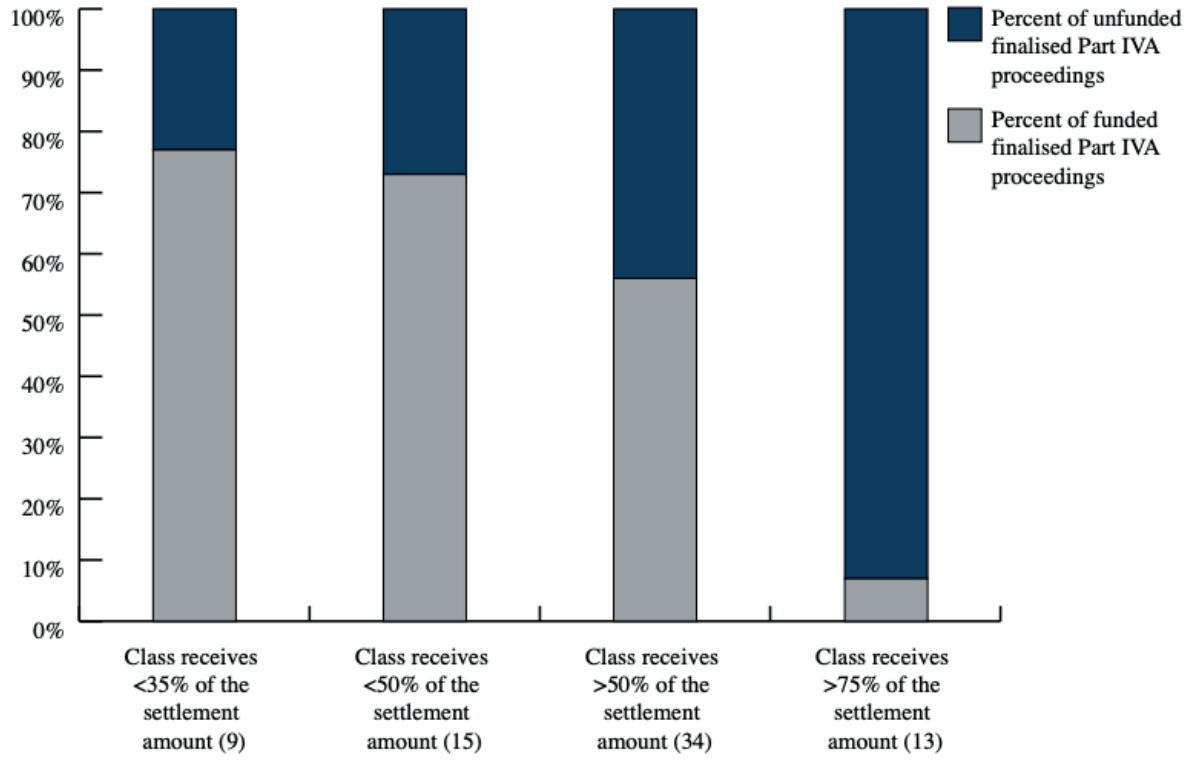
Although a recent decision of the High Court has renewed debate about whether and when such orders could be made,[27] in 2016 this free rider problem was mitigated by a decision recognising the court's ability to grant so-called 'common fund orders' **(CFOs)** under their broad jurisdiction to oversee class action settlements,[28] and make orders in the interests of justice. [29] Such common fund orders, when granted, bind *all class members* by 'fixing … an amount to which a litigation funder will be entitled from the proceeds of any judgment or settlement'. [30] The court considers a myriad of factors in approving a CFO rate,[31] including information provided to class members as to any previously contractual agreed funding rate.[32] The Full Federal Court in 2016 said that they expected such orders to

be set at rates which '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 risk taken by the funder'. [33]

Since its legitimation by the High Court in 2006,[34] the practice of litigation funding has flourished. According to the Australian Law Reform Commission's **(ALRC)** 2018 Report into Class Action Proceedings and Third-Party Litigation Funders,[35] while only 15 per cent of class action proceedings filed in the Federal Court were funded between March 1992 and March 2013, this figure had grown to *64 per cent of filed cases* for the period between 2013 and 2018, and 78 per cent of all proceedings filed in 2018.[36]

The increasing prevalence of LFAs is not, however, a solely positive development. While it provides increasing security for plaintiffs and lawyers, its natural corollary is that when proceedings do succeed, the amount payable to the affected class decreases. This is manifest in the data on class action settlements, where there is a clear relationship between the presence of a litigation funder, and lower amounts payable to the affected class.

Figure 1: Proportion of class return in finalised class actions and percent that received third party litigation funding (1997–October 2018) [37]



A crucial feature of litigation funding is that commissions are usually payable in addition to legal fees, meaning that class members will receive the remainder of any settlement after the litigation funder and lawyers have been paid. So-called 'unfunded' class actions therefore leave a larger sum available to class members when compared to 'funded' class actions:

Table 1: Settlement amount, legal fees, funding commission and class return for finalised class actions 2013–18 [38]

	Median settlement amount	Median % of settlement in legal fees	Median % of settlement for funding commission	Median % of settlement returned to class
All finalised class actions (2013–18)	$29 million	17%	22%	57%
All finalised class actions (funded) (2013–18)	$32.5 million	17%	30%	51%
All finalised class actions (unfunded) (2013–18)	$20 million	15%	N/A	85%

Unfunded class actions, despite becoming less and less prevalent, left *on average 85 per cent* of the final settlement to the class over the 2013–18 period, whereas funded class actions *left only 51 per cent*. It was these concerns about the amount being returned to claimants which, in part, motivated Victoria to establish its GCO jurisdiction.

Group costs orders

In 2020, prompted by the Victorian Law Reform Commission's **(VLRC)** 2018 Report into Litigation Funding and Group Proceedings,[39] the Victorian Parliament added s 33ZDA to the *Supreme Court Act 1986* (Vic). Section 33ZDA relevantly provides that:

33ZDA Group costs orders

(1) On application by the plaintiff in any group proceeding, the Court, if satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding, may make an order—

(a) that the legal costs payable to the law practice representing the plaintiff and group members be calculated as a percentage of the amount of any award or

settlement that may be recovered in the proceeding, being the percentage set out in the order; and

(b) that liability for payment of the legal costs must be shared among the plaintiff and all group members.

(2) If a group costs order is made—

(a) the law practice representing the plaintiff and group members is liable to pay any costs payable to the defendant in the proceeding; and

(b) the law practice representing the plaintiff and group members must give any security for the costs of the defendant in the proceeding that the Court may order the plaintiff to give.

(3) The Court, by order during the course of the proceeding, may amend a group costs order, including, but not limited to, amendment of any percentage ordered under subsection (1)(a).

(4) This section has effect despite anything to the contrary in the Legal Profession Uniform Law (Victoria).

Available only for class actions in the Supreme Court of Victoria, GCOs are a form of order which allows *lawyers* to charge fees as a proportion of a final settlement sum on condition that they provide indemnification and security for the representative plaintiff against an adverse costs order.

In other words, s 33ZDA allows lawyers to apply to the court for an order allowing them to perform the role of *both litigation funder and lawyer*, and to receive a proportional amount of the final settlement if the claim is successful. This consolidates what would otherwise be two different fees in a funded arrangement and provides express judicial oversight of those fees, while still removing the adverse costs disincentive for representative plaintiffs. As John Dixon J explained in *Bogan v Smedley*:

> [T]he purpose of s 33ZDA is to confer on the court the power to affect the manner in which legal costs in the proceeding are calculated and funded. This is central to the question of whether a proceeding can and will viably provide the opportunity for group members to seek vindication of their rights. *Enabling a law practice to charge [proportionate fees for class actions], can promote access to justice by removing the disincentive to representative plaintiffs of disproportionate exposure to financial risk compared to the value of their own claim, to reduce costs to group members by having a single fee, and to provide transparency and simplicity* (emphasis added). [40]

If a law firm has sufficient financial wherewithal to indemnify the representative plaintiff and provide security for costs (if required), then s 33ZDA may obviate the need for a litigation funder at all.

That being said, litigation funding and GCOs are not mutually exclusive avenues for funding class actions. There are cases ongoing in the Supreme Court of Victoria which involve GCOs where litigation funders continue to play a role. These arrangements are

typically sought where the funder and plaintiff's law firm have agreed to share the risk of the proceeding, and may involve an agreement by the funder to pay part of the law firm's up-front costs, and/or share part of the risk of adverse costs, in return for a proportion of the GCO amount which is payable to, and would otherwise be retained by, the law firm.[41] For example, as Osborne J noted when making a GCO in the case of *Raeken Pty Ltd v James Hardie Industries PLC* in April 2024:

> The large-scale budgets required to run class actions are effectively in the millions, and for a law firm to fund such cases (and assume the necessary adverse costs risk) *they would need to be of a significant scale and have significant assets. The [agreement between law firm and funder] is the cheapest means by which [the law firm] can take on the risks of this proceeding for the benefit of the plaintiff* (emphasis added). [42]

But as s 33ZDA(4) intimates, lawyers in Victoria,[43] and across the Commonwealth,[44] are otherwise not allowed to enter into agreements to charge fees by reference to the final settlement amount unless provided for under a GCO. It is worth, then, considering the rationale for this prohibition, and whether such a prohibition is desirable or necessary, particularly in the context of class actions. In other words, it is worth asking whether other jurisdictions should follow Victoria's lead by legislative a provision similar to s 33ZDA, or by getting rid of their legislative prohibition on contingency fees altogether.

PART 4: THE CONTROVERSY AROUND CONTINGENCY FEES

Section 183 of Victoria's *Legal Profession Uniform Law* provides that:

> **183 Contingency fees are prohibited**
>
> (1) A law practice must not enter into a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates.

This prohibition is replicated across the legal professional rules throughout the Commonwealth. It applies to all costs agreements, not just those in class actions.

Section 33ZDA is a quasi-exception to this prohibition in that it *allows* legal professionals to charge fees 'calculated by reference to the amount of any award of settlement', but this arrangement is limited to class action proceedings and contingent on an order of the court which will only be made 'if satisfied that it is appropriate or necessary to ensure that justice done in the proceeding'. Nevertheless, the general prohibition on such fees in Australia is peculiar, and not replicated in many other common law jurisdictions. [45]

When one assesses the arguments which have historically been deployed against contingency fees in class actions, and the myriad of arguments in support, the rationale behind the prohibition becomes even more difficult to see. And, as will be seen in Part 5, this view is only bolstered when one looks empirically to the GCO funding rates from 2020 onwards in Victoria as compared to historic rates charged under LFAs in other jurisdictions.

The recurrent arguments against contingency fees

Opponents of contingency fees, particularly in class actions, fear that they will motivate a **flood of unmeritorious and vexatious claims** in a 'US-style' torrent of litigation. This claim, however, is insufficiently attentive to the crucial difference between Australian and American litigation practice: that is, in Australia the loser pays the costs of litigation, and in the US, costs 'lie where they fall'. Indeed, Australia's 'loser pays' rule has been 'shown by theory, and proven by practice, to reduce the overall amount of litigation' and is 'far more successful at decreasing frivolous lawsuits than is the American rule'.[46] Indeed, economic models of contingency fees 'do not generally support the conventional view that contingency fees promote excessive litigation'. [47]

Cost-shifting aside, it is difficult to see how contingency fees would lead plaintiff lawyers to recklessly initiate class actions if their remuneration is contingent on the size of the award or settlement. Australian lawyers are already allowed to charge fees which are *conditional on a successful outcome* (so-called 'conditional fees'),[48] yet the floodgates remain closed. This argument against contingency fees was rightly rejected by the VLRC in their 2018 report.

Another argument frequently deployed against any form of contingency fee arrangement

is that it will **create unacceptable conflicts of interest** wherein the lawyer has an inappropriately strong financial interest in the outcome, all while retaining the ability to manage and settle the proceedings. But this argument, again, seems misguided. Conditional fees also create a financial interest in the outcome of litigation for the law firm and there are few if any complaints about Victoria's conditional fee system. [49] In fact, contingency fees would seem to align lawyer-client interests more than either conditional fees or traditional time-based billing, in that under a contingency arrangement, the better the result law firms achieve for clients or group members, the more they will get paid. Given the obvious conflicts between the client's interests and the law firm's economic incentives which exist in traditional time-based billing, it is perhaps surprising that the issue of conflict is raised in support of a prohibition on a form of cost recovery that, by aligning interests, reduces the scope for agency problems to arise.

It may be argued that contingency fees create incentives for lawyers to settle cases cheaply, but any settlement agreement would still be safeguarded by the requirement that any class settlement be approved by the court.[50] While not applicable to contingency fees *generally,* the Supreme Court of Victoria under s 33ZDA(3) also retains the ability to amend any GCO rate if 'appropriate or necessary to *ensure that justice is done* in the proceeding' (emphasis added).[51] There are no suggestions that lawyers in cognate jurisdictions with contingency fees, such as the UK or Canada, are facing any difficulties meeting their professional obligations. The VLRC, again in their 2018 report, were right to conclude that they were 'not persuaded that there would be a fundamental change to the lawyer/client relationship if the ban [on contingency fees] were lifted'.[52] Finally, it is also worth bearing in mind that, in contrast to time-based billing, settling a case too cheaply when a contingency arrangement is in place results in direct economic detriment to the law firm as well as group members.

On the other hand, and as will be further demonstrated in Part 5, the arguments in favour of contingency fees for class actions are cogent and well-supported by the data.

The many reasons for

The introduction of a national class action contingency fee regime based on Victoria's s 33ZDA would, and to some extent already has in Victoria, lead to a number of benefits both to prospective plaintiffs specifically and the justice system more broadly.

Through its likely effects on access to justice, transparency, claimant returns and competition, such a regime, if implemented across the Commonwealth, would serve to align Australia's various class action regimes with their purpose of serving 'bona fide claimants who are unable to fund an action and who are unwilling to expose themselves to vast liabilities for adverse costs orders to try to get a relatively modest sum'. [53]

Firstly, such a regime would increase the avenues available to plaintiffs seeking **access to justice.** Class actions themselves promoted access to justice because they allow for the 'sharing of costs, economies of scale and can overcome the collective action problem'.[54] A regime like Victoria's GCO attempts to even further promote access to justice by 'reducing potential barriers to commencing class actions'.[55] Yet in the current class action landscape, unless a class of claimants can secure litigation funding, they will simply be unable to proceed.

Because of the economics of litigation funding, only the largest claims tend to receive funding under the traditional model. Introducing contingency arrangements may therefore facilitate meritorious claims being vindicated which would not otherwise be brought. Indeed, as the Productivity Commission rightly noted in their 2014 *Access to Justice Arrangements* Report, contingency fees 'can increase access to legal advice where lawyers *take on claims they would not have accepted under other forms of billing*' (emphasis added).[56]

Secondly, contingency fee arrangements (whether under s 33ZDA or not) have the effect of increasing **transparency and certainty for claimants** in class actions. Under the traditional litigation funding arrangement—while there will typically be certainty about the fee taken by the *litigation funder*—lawyers still bill on a time-basis. Given the inherently unpredictable nature of these costs, there remains scope for significant variation in legal costs, leading to considerable uncertainty about final returns to claimants. Indeed, for class actions finalised between 2013 and 2018, the proportion attributable to legal fees ranged between *2 and 50 per cent*.[57]

Contingency fees, however, provide substantial certainty and transparency for claimants. They fix a fee at the outset, meaning claimants are not ambushed by unforeseen costs at conclusion, and can keep more of what they are owed. In this sense, as Nichols J said in *Allen v G8 Education*, such fees 'engender simplicity and transparency from the outset, *which is in the interests of group members*' (emphasis added).[58] The fact that such considerations are important to group members has been borne out by evidence led in the course of applications for GCOs: for example, in the context of a representative proceeding against Crown Resorts, an affidavit was filed from the representative plaintiff expressing a preference for the certainty of a GCO, and a survey was conducted which also found support for the model among the wider group.[59]

Thirdly, as will be discussed in detail in Part 5, **contingency fees improve returns for class members.** Inherent in the nature of a class action is some *wrong* done to a group of claimants. Accordingly, in almost all class action suits in Australia—particularly for mass torts and misleading or deceptive conduct—the *goal of* any compensation is to place the claimant class back in the position they would have been in *but for* the wrongful conduct. Allowing class members to keep more of their award or settlement means awards and settlements better serve their reparative function.

Victorian judges, in making GCOs under s 33ZDA, generally accept that contingency fees under such orders are better for claimants. As Nichols J said in granting an order in *Allen v G8 Education*, 'if a [GCO] were not granted, third party funding would be sought. There is no guarantee that they will obtain that funding *but there is a real prospect that they will do so on terms that will deliver a worse financial outcome to group members than if a GCO were made*' (emphasis added).[60] This is a recurring theme in many orders. Monash University's Professor Vince Morabito has identified that decisions regarding GCOs since 2020 'reveal a universal judicial acceptance of the fact that *the GCOs would provide a far better financial return for class members than what would be received by them in funded class actions*' (emphasis added).[61]

Finally, and as again will be explored in Part 5, removal of the prohibition on contingency fees **promotes competition** (and in some cases cooperation) between litigation funders

and law firms. If law firms—many of which are able and willing to charge contingency fees—are allowed to compete with litigation funders, there will be downward pressure placed on the costs of litigation meaning greater access to justice and better returns for claimants. The VLRC recognised this in 2018 when it said:

> In theory, enabling lawyers to charge contingency fees would foster competition to fund the types of claim that litigation funders currently invest in, and make funding available to claims that do not presently attract funding.[62]

Justice Beach opined as much when he said in *Blairgowrie Trading Ltd v Allco Finance Group Ltd* that 'if one reflects for a moment, *contingency fees are pro-competitive* against the fees of litigation funders' (emphasis added).[63] Yet these 'pro-competitive' fees are not just limited to competition *between* litigation funders and law firms, but also promote greater competition between law firms themselves.

Where there are multiple class action proceedings afoot for the same wrong being represented by different firms with different funding models, a court must 'determine which proceeding going ahead would be in the best interests of group members' in a so-called 'carriage application'.[64] Yet the GCO process under s 33ZDA for proceedings in the Supreme Court of Victoria allows for a 'quasi-tender' process in which firms compete to offer claimants the most advantageous rate. As Osborne J said in *Maglio v Hino Motor Sales Australia Pty Ltd*:

> [A]s a result of the competitive processes associated with the carriage applications, the proposed rate has been revised in a manner which is more beneficial to class members. *The proposed rate therefore has been the product of a quasi-tender process given the carriage application. This process gives comfort as to the lowest market price available to fund the proceedings* (emphasis added). [65]

And that this process was not a static one, but allowed for live competitive tendering:

> The orders further contemplated that after seeing the "tender" proffered by the other *each plaintiff party would then have the ability to submit a further tender in response*. The process therefore includes a competitive element with the possibility that one or the other could submit a second proposal more advantageous to group members (emphasis added).[66]

Now that Victoria's s 33ZDA has been in operation for almost four years, the arguments put forth both for and against contingency fee arrangements in class actions more broadly need not be evaluated in the abstract, but can instead be assessed to a limited extent against available data.

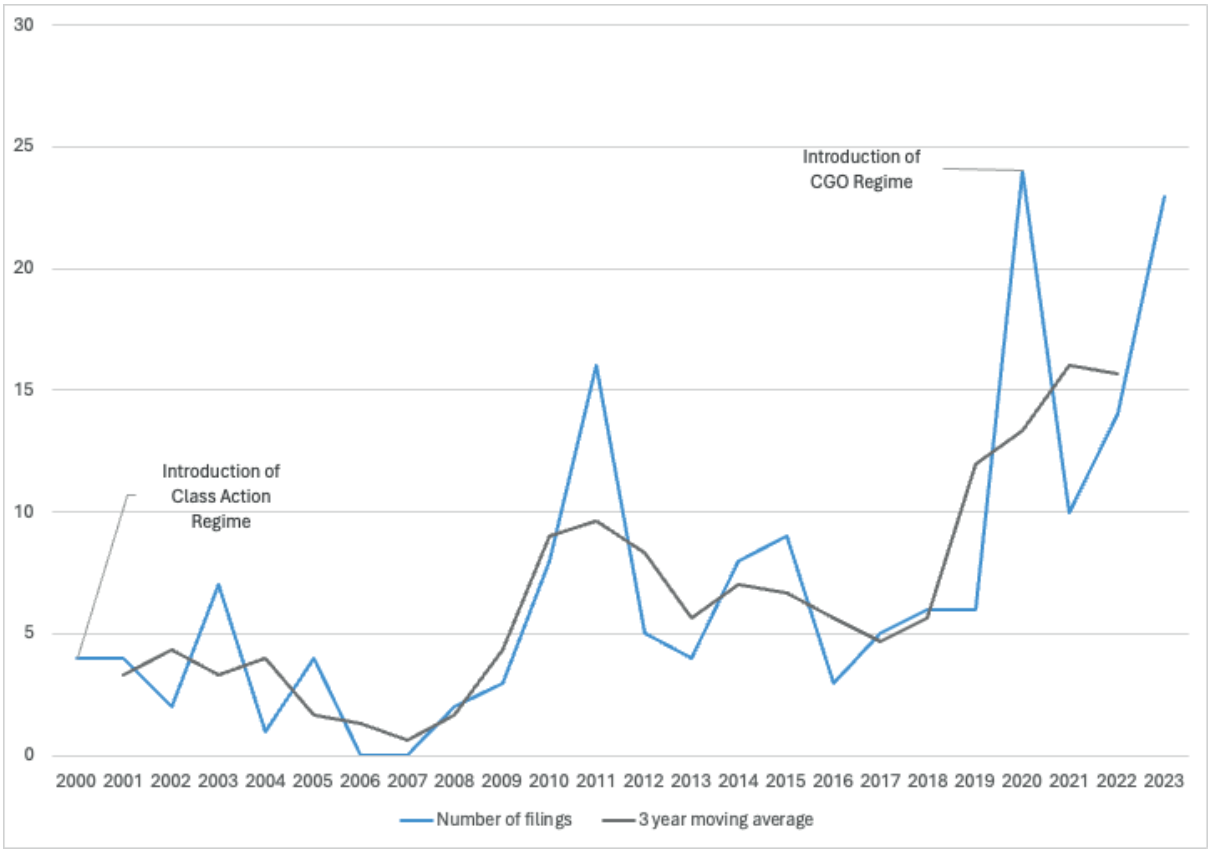
PART 5: THE VICTORIAN EXPERIENCE SO FAR

Based on data published in early 2024,[67] combined with limited data on GCO orders made throughout 2024, several conclusions can be drawn about the operation of Victoria's GCO regime in relation to the arguments presented in Part 4.

More class actions are being filed in the Supreme Court of Victoria

Since the commencement of the GCO regime on 1 July 2020, the number of class action filings in the Supreme Court of Victoria has increased vertiginously. While only four class actions were filed in the first year of Victoria's class action regime, this had increased to 23 for the 2023 calendar year. The dramatic increase in the number of class action filings coincides with the commencement of the GCO regime. In fact, as of 31 December 2023, 38.6 per cent of all filings in the Supreme Court of Victoria had occurred post-GCO, despite the post-GCO period constituting only 14.6 per cent of the total time in which the regime has been in operation.

Figure 2: Class Actions filed in the Supreme Court of Victoria 2000–2023 [68]



While 17 of the 65 claims filed throughout this period were 'duplicates' in that they overlapped with other claims, the increase in claims post-GCO 'still represents a significant improvement in [access to justice] when compared to the pre-GCO period'.[69]

Notably, while the number of class actions filed in Victoria has increased in the post-GCO period, there has been a general decline in the number of class actions filed in other jurisdictions over the same period. In fact, class actions filed nationally (and in the Federal Court specifically) are now at their lowest level since 2016–17.[70] The increase in filings in the Supreme Court of Victoria therefore suggests that class members and law firms consider the Victorian regime better-suited to vindicating group members' rights, rather than as simply a forum for speculative 'floodgates' litigation which would not have occurred but for the GCO regime.

Further, as will be seen, the presence of duplicate proceedings being filed in Victoria is not at all disadvantageous to claimants. Rather, it engenders competition between law firms and/or litigation funders, ultimately resulting in better returns for claimants.

It is important to note that the increase in the number of filings in the Supreme Court of Victoria is not simply confined to wrongs which occurred solely in Victoria. The increasingly national scale of mass wrongs—in particular shareholder, consumer protection and product liability claims—means that a potential representative plaintiff can consider filing, if certain threshold requirements are met, in any one of Australia's states with its own class action regime or in the Federal Court of Australia. The fundamental point is that claimants and law firms can, for many wrongs, choose the most suitable jurisdiction for their needs in which to file.

Funding commissions across Australia have fallen since the introduction of GCOs

The national scale of mass wrongs, and the ability for claimants to file in the Supreme Court of Victoria has had spill over effects on competition between litigation funders and laws firms *across the Commonwealth*. This is understandable, given that for national scale class actions litigation funders will now have to compete with plaintiff law firms able to charge on a GCO basis in the Supreme Court of Victoria. Such competition should, in turn, decrease funding rates charged by litigation funders as they seek to provide a viable alternative for claimants who have the option of running their claim with a law firm on a GCO basis.

This decrease in funding rates is observed in the available data on litigation funding commissions charged before and after the introduction of GCOs between the period from 2016 to 2023. [71]

Figure 3: GCO and funding rates pre- and post-commencement of the GCO regime [72]

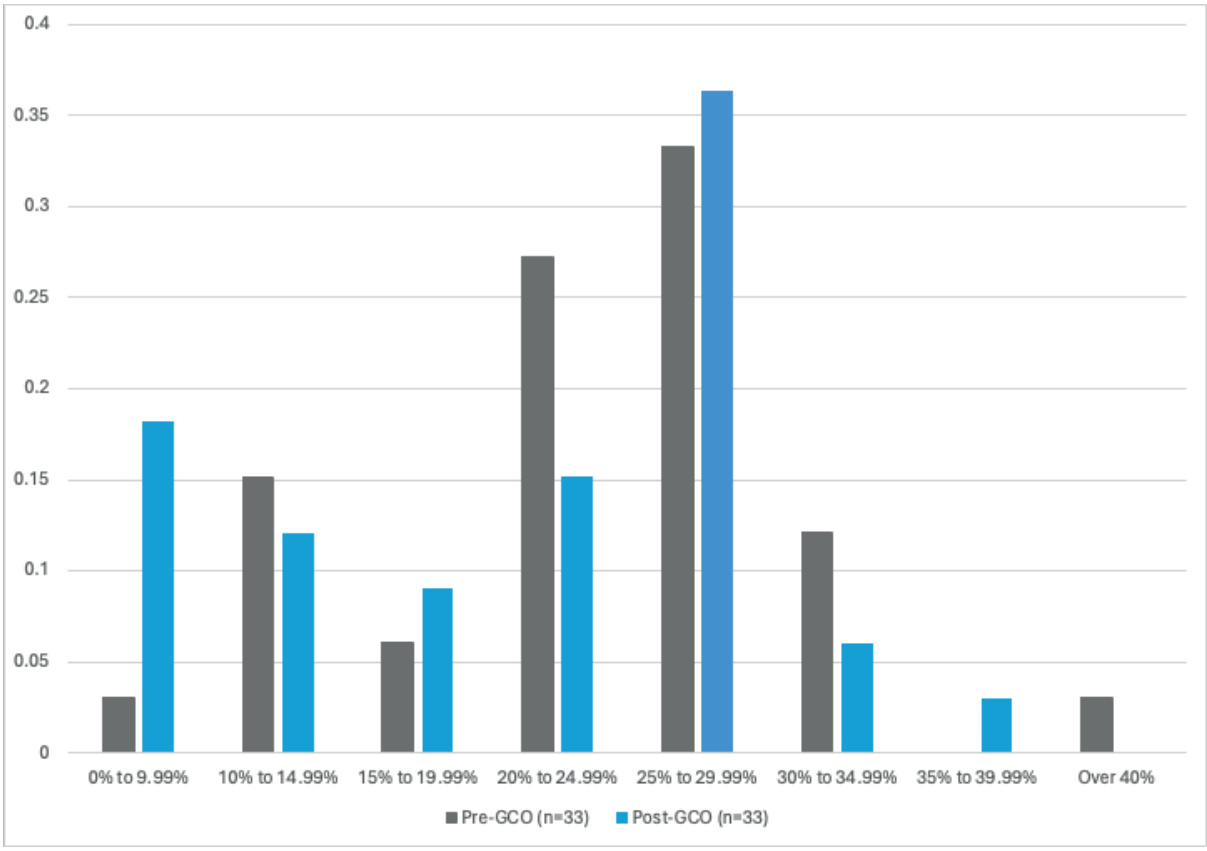


Table 2: Number of funding agreements, maximum funding rates and median funding rates pre- and post-commencement of the GCO regime [73]

	Pre-GCO	Post-GCO	Change
Number	33	33	±0
Maximum funding rate	42.8%	35.0%	-7.8%
Median funding rate	24.9%	22.7%	-2.2%

Based on available data, the median funding rate has fallen by over two per cent since the commencement of the GCO regime in July 2020. But as explained earlier, this rate is typically charged *in addition* to legal fees billed on a time basis, which can vary significantly. For legal fees—assuming that the average rate of 17 per cent charged between 2013 and 2018 remains—the *effective* deduction would be 39.7 per cent, representing the sum of 22.7 per cent (the median post-GCO funding rate) and 17 per cent (the median legal fee deduction rate). Regardless of this decrease, rates applicable to GCO orders since July 2020 reveal that GCOs offer claimants a vastly superior return.

GCO rates are more advantageous to claimants than prevailing funding rates

From the commencement of the GCO regime until April 2024, 19 GCOs have been made, though only one class action in which a GCO has been made has been finalised.[74] **The median GCO rate of these 19 orders is 24.5 per cent,** though some are 'ratcheted' rates in that the applicable rate decreases as the award or settlement increases.[75] This median rate of 24.5 per cent is marginally higher than the post-GCO median litigation funding rate, yet is substantially less than the estimated total deduction (inclusive of legal fees) of 39.7 per cent identified above. To this end, it is worth quoting Professor Vince Morabito at some length:

> [T]he GCO regime provides a vastly superior outcome for class members. … [T]o date the median GCO rate has been only slightly higher than the median funding commission received by commercial litigation funders pursuant to settlements in Australian funded class actions judicially-approved during the post-GCO era; and the GCO rate … *But, as already noted, the most crucial fact is that the GCO rate constitutes the only deduction from the gross settlement sum—before a distribution of the settlement proceeds is made to class members—whilst in funded class actions the funding commission is only one of the deductions to be made, although it is usually the biggest deduction.* Further deductions include legal costs, settlement administration costs and, on some occasions, After-the-Event Insurance (emphasis added).[76]

The GCO rate further varies when one looks to competition between law firms, and cases in which a litigation funder is also present.

GCO rates are even better when competition is present

As previously discussed, in *Maglio v Hino Motor Sales Australia Pty Ltd* Osborne J spoke of the 'competitive process' which emerged when two or more law firms sought to run the same claim. Justice Osborne said that this process would result in the 'lowest market price available to fund the proceedings'. Indeed, the early data suggests that this may be emerging to be the case.

Of the 16 GCOs made between 1 July 2020 and 31 December 2023, the presence of competing class actions is associated with very slightly lower GCO rates. This effect is much greater in the four cases where the GCO application was considered as part of a carriage motion in which the court determines which action should proceed.

Table 3: Number, range of GCO rates and median GCO rate for class actions with no competition, competition, and competition where GCO considered as part of a carriage motion[77]

	Number	Range of GCO rates	Median GCO rate
No competing class actions	9 (56.2%)	22–40%	24.5%
Competing class actions	3 (18.7%)	22–24%	24%
Competing class actions where GCO application considered as part of carriage motion	4 (25%)	14–24.5%	21.2%

This level of open quasi-tender competition between law firms seeking GCOs in carriage motions appears to improve yet further the returns available to claimants.

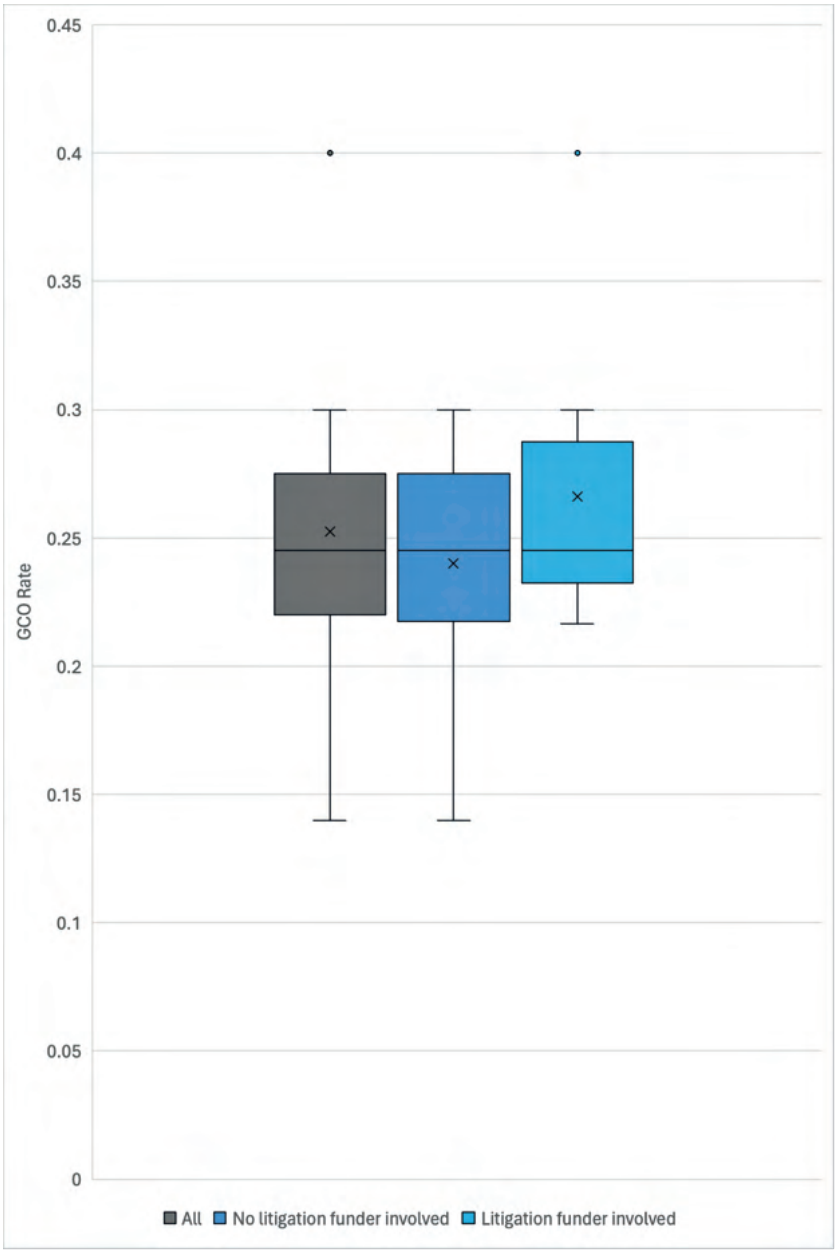
...and where there is no traditional litigation funding arrangement involved

As mentioned previously, a peculiarity of the GCO system is the fact that litigation funders may still be involved behind the scenes in some form of risk-sharing arrangement. In these cases, the general approach is that the entirety of the proportion of award or settlement is payable to the law firm as a GCO, with the law firm contractually obliged to pay some part of the amount received to the litigation funder in return for sharing the risk.[78]

Empirically, however, the presence of litigation funders in the background of GCOs does not appear to be beneficial for claimants. Of the 19 GCOs made between 1 July 2020 and April 2024, the average GCO rate when a litigation funder is involved is 26.6 per cent, when compared to only 24.0 per cent when no litigation funder is involved.[80] Even when the outlier of 40 per cent is removed, the rate when a litigation funder is involved remains slightly elevated at 25.0 per cent.

This result is understandable, given under these circumstances that both law firms and litigation funders are seeking to take a cut from the same fund.

Figure 4: GCO rate box plots by involvement of litigation funder[79]



PART 6: TOWARDS A UNIFIED NATIONAL APPROACH

Litigation funding emerged as a welcome response to plaintiffs' genuine concerns about the consequences of representative plaintiffs facing adverse costs orders in class action litigation. Yet the increasingly important role of litigation funders in providing access to justice under the traditional funding model has come at an unnecessarily high cost to class members. Indeed, the fact that, outside of the GCO world, funding commissions are deducted in addition to legal fees meant that classes of claimants see compounding deductions from the compensation awarded to them to redress the harms they suffered.

Victoria's legislative innovation in providing for GCOs under s 33ZDA of the *Supreme Court Act 1986* (Vic) has provided an alternative to the traditional litigation funding model. It has done so by allowing law firms to both conduct the substantive claim, and play the role of litigation funder by indemnifying the plaintiff against an adverse costs order and charging a fee proportionate to the final award or settlement.

While not strictly a contractual 'contingency fee', the s 33ZDA regime is a statutory exception to the baseline position that lawyers are not allowed to charge their clients on a contingency basis. Yet before even considering the practical operation of 33ZDA, the typical arguments used against contingency fees both generally and in the particular context of class actions appear misplaced. There is no good reason to think that contingency fees would lead to a flood of US-style litigation, nor to any conflict of interest between lawyer and client. In fact, there is every reason to believe that contingency fees on a GCO basis for class actions result in better alignment between lawyers' and clients' interests than traditional time-based billing, and at the same time promote access to justice, transparency and certainty, more competition, and better returns for claimants—particularly when subject to strong judicial oversight.

While Victoria's GCO regime is still relatively young and comprehensive data is not yet available, the limited data that is available shows a model which is both popular, more beneficial for claimants, and vindicates the arguments in favour of contingency fees generally. Since its commencement in July 2020, the Supreme Court of Victoria has seen a much larger number of filings indicating it is now the jurisdiction of choice for claimants.

Better yet, the GCO regime in Victoria seems to have engendered much greater competition between law firms and litigation funders, with funding rates dropping across the country after the commencement of s 33ZDA. What is more, GCO rates approved by the Supreme Court of Victoria are similar to prevailing litigation funding rates, yet constitute the only deduction from the final award or settlement—leaving claimants much better off. GCO rates fall further when there is greater competition to bring a single claim.

Despite being operational for not even four years, the results of Victoria's GCO regime speak for themselves. They fundamentally advance the purpose of the class action regime by providing for more competitive and transparent returns to claimants. While GCOs are not a panacea—nor are they perfect for every claim—they are an important tool for advancing access to justice, and should be available to lawyers and their class action clients and group

members in cases deemed appropriate by the court.

There is no reason in practice or principle to prevent law firms from charging on a contingency basis in class actions under a GCO model. It is submitted that Victoria's GCO model should, in the interests of access to justice, be replicated across all of the Commonwealth's class action regimes. Claimants would have almost nothing to lose, and plenty to gain by having access to another option for pursuing mass wrongs.

ENDNOTES

1. Bernard Murphy and Vince Morabito, 'The First 25 years: Has the Class Action Regime Hit the Mark on Access to Justice' in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia 1992–2017* (Herbert Smith Freehills, 2017) 13, 42.
2. However, in the Federal Court, there is some recent authority to suggest that contingency payments to law firms (referred to as 'solicitors' common fund' orders) are permissible despite the absence of an express statutory provision. This possibility has arisen because the prohibition on contingency fees is expressed in terms of the structure of the costs agreement lawyers can enter into, while costs awarded by the Court in representative proceedings are not subject to the same rules. See *KlemWeb Nominees Pty Ltd v BHP Group Ltd* [2019] FCAFC 107, [139] (Lee J). This issue was recently referred to in the Full Court of the Federal Court in *R&B Investments Pty Ltd v Blue Sky Alternative Investments Ltd (in liq)* [2023] FCA 1499, [3] (Lee J).
3. See, eg, Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 401–2.
4. *Federal Court of Australia Act 1976* (Cth) s 33C.
5. The Hon Justice Bernard Murphy, 'The Operation of the Australian Class Action Regime' (Speech, Bar Association of Queensland: The Changing Face of Practice – Adapting to the New Landscape, 8–10 March)
6. *Federal Court of Australia Act 1975* (Cth) ss 33C, 33D.
7. *Federal Court of Australia Act 1975* (Cth) s 33V.
8. *Federal Court of Australia Act 1975* (Cth) s 33N.
9. *Supreme Court Act 1986* (Vic) pt 4A.
10. *Civil Procedure Act 2005* (NSW) pt 10
11. *Civil Proceedings Act 2011* (Qld) pt 13A.
12. *Supreme Court Civil Procedure Act 1932* (Tas) pt VII.
13. *Civil Procedure (Representative Proceedings) Act 2022* (WA).
14. See Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 45, 1988).
15. See, eg, Productivity Commission, *Report on Government Services: C Justice, 7 Courts* (Dataset, 2024) < https://www.pc.gov.au/ongoing/report-on-government-services>.
16. See, eg, Productivity Commission, *Access to Justice Arrangements* (Report No 72, vol 1, 5 September 2014) < https://www.pc.gov.au/inquiries/completed/access-justice/report>.
17. The Hon Wayne Martin AC, 'Creating a Just Future by Improving Access to Justice' (Speech, Community Legal Centres Association WA Annual Conference, 24 October 2012) 3 (emphasis added).
18. Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (Report, March 2018) 115 [5.1].
19. Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 30(2) *Melbourne University Law Review* 399, 414.
20. Kaitlin Ferris, 'The Increasing Role of Class Actions: Developments in Litigation Funding' (2018) (48) *Precedent* 153.
21. Michael Legg, 'The Rise and Regulation of Litigation Funding in Australian Class Actions' (2021) 14(3) Erasmus Law Review 221, 223.
22. Michael Legg, 'The Rise and Regulation of Litigation Funding in Australian Class Actions' (2021) 14(3) *Erasmus Law Review* 221, 232.

23. See, eg, *Federal Court of Australia Act 1976* (Cth) s 33E; Supreme Court Act 1986 (Vic) s 33E.

24. See, eg, The Hon Justice Bernard Murphy, 'Navigating through the Principles and Practicalities of Group Cost Orders, Common Fund Orders and No Win No Fee' (Speech, Commercial Law Association Seminar: The Evolving Class Actions Landscape in Australia: Impacts of Recent Judgments, Legislative Reforms and International Exposure, 18 March 2022).

25. See *Dorajay Pty Ltd v Aristocrat Leisure Ltd* (2005) 147 FCR 394, 433 [135] (Stone J).

26. See generally *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

27. *BMW Australia Ltd v Brewster* (2019) 269 CLR 574.

28. See *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191. Common fund orders continue to be made in the Federal jurisdiction, although considerations as to timing and the source of power have changed following the High Court's decision in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574: see *Elliott-Carde v McDonald's Australia Ltd* (2023) 327 IR 1; *Federal Court of Australia Act 1976* (Cth) s 33V.

29. See *Federal Court of Australia Act 1976* (Cth) s 33ZF. See also *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208 [78] (Murphy, Gleeson and Beach JJ).

30. *Elliott-Carde v McDonald's Australia Ltd* (2023) 327 IR 1, 40 [249] (Beach J).

31. *Money Max Iny Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 208–9 [80] (Murphy, Gleeson and Beach JJ).

32. *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [80(b)] (Murphy, Gleeson and Beach JJ).

33. *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191, 209 [82] (Murphy, Gleeson and Beach JJ).

34. See *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

35. Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018).

36. Australian Law Reform Commission, *Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 74 (Table 3.2).

37. Australian Law Reform Commission, Integrity, *Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 86 (Figure 3.2).

38. Australian Law Reform Commission, Integrity, *Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report, December 2018) 83 (Table 3.7).

39. Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (Report, March 2018).

40. *Bogan v Smedley* [2022] VSC 201, 93 (John Dixon J) (emphasis added).

41. See, eg, *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173, [37] (Osborne J).

42. *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173, [52] (Osborne J).

43. *Legal Profession Uniform Law 2015* (Vic) s 183.

44. *Legal Profession Act 2006* (ACT) s 285; *Legal Profession Uniform Law 2015* (NSW) s 183; *Legal Profession Act* (NT) s 320; *Legal Profession Act 2007* (Qld) s 325; *Legal Practitioners Act 1981* (SA) sch 3 s 27; *Legal Profession Act 2007* (Tas) s 309; *Legal Profession Uniform Law 2015* (Vic) s 183; *Legal Profession Act 2008* (WA) s 285.

45. See, eg, Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (Report, March 2018) [1.37].

46. Jaime Leigh Loos, 'The Effect of a Loser-Pays Rule on the Decisions of an American Litigant' (2005) 7(4) *Major Themes in Economics* 31, 43–4.

47. Thomas J Miceli, 'Do Contingent Fees Promote Excessive Litigation' (1994) 23(1) *The Journal of Legal Studies* 211, 224.

48. See *Legal Profession Act 2006* (ACT) s 283(3); *Legal Profession Uniform Law 2015* (NSW) s 181; *Legal Profession Act 2006* (NT) s 318(3); *Legal Profession Act 2007* (Qld) s 323(3); *Legal Practitioners Act 1981* (SA) sch 3 s 25, *Legal Profession Act 2007* (Tas) s 307(3); *Legal Profession Uniform Law 2015* (Vic) s 181; *Legal Profession Act 2008* (WA) s 283.

49. See, eg, Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (Report, March 2018) [3.49].

50. *Federal Court of Australia Act 1976* (Cth) s 33V.

51. *Supreme Court Act 1986* (Vic) s 33ZDA(1) (emphasis added).

52. See, eg, Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (Report, March 2018) 61 [3.51].

53. *Gladstone Ports Corporation Ltd v Murphy Operator Pty Ltd* (2020) 6 QR 497, 535 [92] (Sofronoff P, Morrison JA and Davies J).

54. Michael Legg, 'Evaluating Class Action Effectiveness' (2015) 46(1) *Precedent* 10.

55. *Allen v G8 Education* [2022] VSC 32, [23] (Nichols J).

56. Productivity Commission, *Access to Justice Arrangements* (Report No 72, vol 2, 5 September 2014) 625 (emphasis added).

57. Australian Law Reform Commission, Integrity, *Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, December 2018) 84 [3.50].

58. *Allen v G8 Education* [2022] VSC 32, [41] (Nichols J) (emphasis added).

59. *Lieberman v Crown Resorts Ltd* [2022] VSC 787, [28], [38] (Stynes J).

60. *Allen v G8 Education* [2022] VSC 32, [93(f)] (Nichols J).

61. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 23 (emphasis added).

62. See, eg, Victorian Law Reform Commission, *Access to Justice—Litigation Funding and Group Proceedings* (Report, March 2018) 53 [3.6].

63. *Blairgowrie Trading Ltd v Allco Finance Group Ltd* (in liq) (No 3) [2017] FCA 330, [142] (Beach J).

64. *Wigmans v AMP Ltd* (2021) 270 CLR 623, 649 [52] (Gageler, Gordon and Edelman JJ).

65. *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757, [109] (Osborne J).

66. *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757, [63] (Osborne J).

67. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 15–8.

68. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 9.

69. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 11.

70. King and Wood Mallesons, *The Review: Class Actions in Australia 2022/2023* (Report, October 2023) 6, 10.

71. Data is only available from after the case of *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191. It was only after this ruling that trial judges started to review funding commissions.

72. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 27–8.

73. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 27–8.

74. See Slater and Gordon, 'Slater and Gordon reaches $46.5 million settlement in G8 Education class action' (Media Release, 25 March 2024) <https://www.slatergordon.com.au/media/slater-and-gordon-reaches-46-5-million-settlement-in-g8-education-class-action>.

75. See, eg, *Lieberman v Crown Resorts Limited* [2022] VSC 787 where the GCO rate was 27.5% for each dollar of award or settlement sum that is recovered between $0 and $100m; 22% for each dollar of award or settlement sum that is recovered between $100,000,001 and $150m: and 16.5% for each dollar of award or settlement sum that is over $150m. For the purposes of the general rate in calculating the GCO average, the average of each three rates was used. See also *McCoy v Hino Motors Ltd* [2023] VSC 757.

76. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 23 (emphasis added).

77. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 20.

78. See, eg, *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173.

79. Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 15–8.

80. Authors calculations from the 16 GCOs included in Professor Vince Morabito's 2024 report (inclusive up to 31 December 2023), plus the three available GCO orders made from 1 January 2024 to mid-April 2024: See Vince Morabito, *Group Costs Orders and Funding Commissions* (Report, January 2024) 15–8. Even when the 40 per cent GCO awarded in 2022 (with a funder) in *Bogan v Smedley* [2022] VSC 201 is removed, the rate with funders is still higher at 25 per cent compared to 24 per cent.

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