KILMORE EAST KINGLAKE BUSHFIRE CLASS ACTION SETTLEMENT DISTRIBUTION SCHEME: FAIRNESS, COST AND DELAY POST-SETTLEMENT

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In class actions the twin evils of cost and delay that beset the civil justice system may persist past the formal litigation process and into the post-settlement phase where compensation is allocated to each group member. This article employs the experience with the Kilmore East Kinglake bushfire class action ('KEK') to explain why cost and delay are incurred in relation to the settlement distribution scheme ('SDS') that operated post-settlement and considers the steps that were taken to address these problems. The article takes the position that more can and should be done. The article proposes and critiques possible reforms to SDS procedures aimed at fostering fairness while reducing cost and delay, namely, interim distributions, a fast-track component of an SDS, a matrix SDS approach, allowing for competition in the appointment of the SDS administrator, including encouraging novel forms of charging, and technology.

I INTRODUCTION

'At 11:45 am on 7 February 2009, a section of power line known as the Valley Span conductor located at Kilmore East broke and, upon striking the ground, ignited a bushfire.'[1] The bushfire resulted in death, personal injury, economic loss and property damage. The Kilmore East Kinglake bushfire class action ('KEK') was commenced shortly afterwards to recover compensation. The class action settled for nearly half a billion dollars, including the payment of lawyers' fees and disbursements.[2] At that point almost six years had passed since the fire. However, the settlement fund then needed to be distributed to individual group members. The distribution of the settlement funds took a further 29 months and cost at least

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1 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014) [1] ('*Matthews SDS Approval*').

2 Ibid [10], [13], [346].

$30 million.[3] However, according to the Supreme Court of Victoria, KEK was not an outlier; rather, 'comparisons with other class action schemes in this State indicate that a delay of a couple of years between settlement and final distribution is relatively common'.[4] Courts administering other settlement distribution schemes have commented that settlement distribution scheme ('SDS') costs and disbursements are 'an important and sensitive issue'.[5]

Delay and cost are the twin evils of the civil justice system. However, in class actions the twin evils may persist past the formal litigation process and into the post-settlement phase where compensation is allocated to each group member. This article employs the experience with KEK to explain why cost and delay are incurred in relation to the SDS that operated post-settlement. The article then discusses the responses that were undertaken and possible reforms to SDS procedures to address cost and delay, while also recognising the need for continued concern regarding fairness.

II KILMORE EAST KINGLAKE CLASS ACTION

The proceeding was commenced on 16 February 2009 in the name of Mr Leo Keane, pursuant to the class action regime in Part 4A of the *Supreme Court Act 1986* (Vic).[6] The proceeding was put on hold pending the outcome of the Victorian Bushfires Royal Commission.[7] On 23 July 2010, the Court ordered that Mrs Carol Matthews be substituted for Mr Keane as plaintiff.[8]

The plaintiff brought the class action on her own behalf and on behalf of two classes of people: those 'who were either injured personally or suffered the death

3 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 Electricity Services Pty Ltd [Ruling No 46]* [2017] VSC 360 (22 June 2017) [6]–[15]. The administration costs are set out in a number of orders and reports including John David White, 'Special Referee's Report' (Kilmore East Costs Audit Report, Supreme Court of Victoria, 20 June 2016) 4–5 [13], 6–7 [15] <https://www.supremecourt.vic.gov.au/law-and-practice/class-actions/kilmore-east-kinglake-black-saturday-bushfire-class-action-4>, cited in *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 (15 July 2016) [32] ($18 226 657); John David White, 'Special Referee's Further Report' (Kilmore East Costs Audit Report, Supreme Court of Victoria, 21 November 2016) 3–4 [7] <https://www.supremecourt.vic.gov.au/law-and-practice/class-actions/kilmore-east-kinglake-black-saturday-bushfire-class-action-36>, adopted in Order of J Forrest J in *Matthews v AusNet Electricity Services Pty Ltd* (Supreme Court of Victoria, S CI 2009 04788, 30 November 2016) 2 [1] ($9 624 049); John David White, 'Special Referee's Third Report' (Kilmore East Costs Audit Report, Supreme Court of Victoria, 1 March 2017), adopted in Order of J Forrest J in *Matthews v AusNet Electricity Services Pty Ltd* (Supreme Court of Victoria, S CI 2009 04788, 30 March 2017) 2 [1] ($3 101 151).

4 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 (15 July 2016) [21].

5 *Stanford v DePuy International Ltd [No 7]* [2017] FCA 748 (28 June 2017) [9].

6 *Matthews v SPI Electricity Pty Ltd [Ruling No 1]* (2011) 34 VR 560, 560, 562 [1]–[2].

7 The Commission's terms of reference were issued on 16 February 2009. The Commission held 155 days of hearings. The Commission's report was released in July 2010. See Victoria, 2009 Victorian Bushfires Royal Commission, *Final Report: Summary* (2010).

8 *Matthews v SPI Electricity Pty Ltd [Ruling No 1]* (2011) 34 VR 560, 566 [32]. The proceedings were commenced without Mr Keane's authority: at 560, 564 [18]–[19], 565 [22]–[23].

of persons upon whom they were dependent' ('I-D claimants'), and those who 'suffered property damage or economic loss in consequence of the fire' ('ELPD claimants').[9]

The class action was 'brought against the owner and operator of the power line' (AusNet Electricity Services Pty Ltd, formerly SPI Electricity Pty Ltd), 'a maintenance contractor charged with carrying out a periodic inspection of the power line' (Utility Services Group Limited), and 'entities of the State of Victoria … charged with the management of forest lands, the fighting of fires, and the policing of emergencies' ('the State parties').[10]

Trial of the class action commenced on 4 March 2013 and included 208 sitting days before concluding on 18 June 2014. Before judgment, the class action was settled for $494 666 667, including the payment of $60 million for lawyers' fees and disbursements.[11] Class action settlements require approval of the court.[12] This includes seeking approval of the SDS, which is prepared by the lawyers acting for the plaintiff. Approval of the settlement and the SDS was obtained on 23 December 2014.[13] The settlement sum then needed to be distributed. As mentioned above, the distribution of the settlement funds took a further 29 months and cost $30 million.[14]

III KILMORE EAST KINGLAKE SETTLEMENT DISTRIBUTION SCHEME

A *Overview of SDS*

To comprehend why cost and delay arise, it is necessary to first understand the SDS process which is set out in the 40-page KEK SDS.[15] The SDS provides for the appointment of an administrator to carry out the functions and exercise the discretions specified in the SDS. The SDS also specifies the process for the distribution of the settlement sum.[16] The KEK SDS may be described as a global sum settlement with an individualised distribution scheme.[17] Osborn JA, in approving the settlement of the class action, explained that '[f]undamentally, the

9 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (23 December 2014) [8].

10 Ibid [9].

11 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [10], [13], [346].

12 *Supreme Court Act 1986* (Vic) s 33V.

13 Order of Osborn JA in *Matthews v AusNet Electricity Services Pty Ltd* (Supreme Court of Victoria, S CI 2009 04788, 23 December 2014).

14 See above n 3 and accompanying text.

15 *'Kilmore Bushfire Class Action': Settlement Distribution Scheme* (10 November 2014) Supreme Court of Victoria <https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/a5/aa2765adb/settlement%2Bdistribution%2Bscheme.pdf> ('*Settlement Distribution Scheme*').

16 Ibid 1.

17 Rebecca Gilsenan and Michael Legg, 'Australian Class Action Settlement Distribution Scheme Design' (Research Report No 1, IMF Bentham Class Action Research Initiative, The University of New South Wales, 1 June 2017) 18–19.

SDS is concerned with procedures for establishing a value for every claim of every claimant'.[18] The global sum is divided amongst group members by the scheme administrator and their staff. The division is achieved through assessing each group member's claim and paying them a proportion of their claim reduced to the same degree by which the global settlement sum is lower than the full recovery that might have been achieved at trial. The individual assessment requires the claimant to provide information about their injury and/or loss to which the scheme administrator, or someone appointed by the scheme administrator, then applies the relevant law. In KEK, the settlement sum was paid into two separate funds: one for I-D claims and the other for ELPD claims. Table 1 summarises the division of the settlement sum between the two funds, the number of claimants in each fund as at the date of settlement approval and the recovery claimants made compared to losses. Separate, and different, processes applied to I-D claims and ELPD claims as described below.

Table 1: Summary of Settlement Funds[19]

Personal Injury and Dependency Claims	Economic Loss and Property Damage Claims
• 3/8 of settlement fund • 1481 claimants • Each claimant's recovery capped at 80 per cent • Claimants expected to recover 65 per cent of total losses • Any excess funds transferred to ELPD	• 5/8 of settlement fund • 9174 ELPD claims registered comprised of: o 4138 claims made by approximately 3772 uninsured claimants; and o 5036 subrogated claims made by approximately 25 insurers • Approximately 3092 above insurance claimants and 25 insurers expected to receive payments • Claimants expected to recover 33 per cent of total losses

B *Personal Injury and Dependency Claims*

For I-D claims, information was collected from claimants, medical practitioners and insurers to prepare a claim book that was delivered to a barrister who specialised in personal injury. The barrister conferred with the claimant and evaluated the claim. The barrister then delivered a statement of reasons and an initial assessment of the value of the claim in accordance with the laws of

18 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [411].

19 Ibid [342], [388]; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 44]* [2016] VSC 732 (7 December 2016) [25]–[26]; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 45]* [2017] VSC 187 (11 April 2017) [7], [13]–[14].

Victoria.[20] The assessment involved determining the usual heads of damage 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).[21]

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.[22] The determination of significant injury is to be assessed by an approved medical practitioner or Medical Panel.[23] As a result, the SDS made provision for a medico-legal assessment to determine if the threshold for a significant injury was met.[24]

The claimant could seek a review if dissatisfied with their assessment, including challenging whether the threshold for recovery had been met.[25] The assessment, which may be modified by the review, would then determine the value of the claim.[26]

Claimants who received benefits from Centrelink, private health insurers or Medicare may be required to reimburse those bodies for some or all of the payments that they received.[27] Those reimbursements formed part of an I-D claimant's damages award. The Administrator devised arrangements for the exchange of information and payment to the third parties to whom reimbursements were owed.[28] Interactions between the SDS and statutory compensation schemes such as the Victorian WorkCover Authority, the Transport Accident Commission, or the Department of Veterans' Affairs that had made payments to group members also needed to be addressed.[29]

20 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [6]; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [8]–[11].

21 Michael Tilbury, *Civil Remedies: Remedies in Particular Contexts* (Butterworths, 1993) vol 2, 14; Katy Barnett and Sirko Harder, *Remedies in Australian Private Law* (Cambridge University Press, 2014) 167.

22 *Wrongs Act 1958* (Vic) ss 28LB (definition of 'threshold level'), 28LE; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (7 May 2015) [60].

23 *Wrongs Act 1958* (Vic) ss 28LF; *Deitrich v Pulse Pharmacy Northcote Pty Ltd* [2014] VSC 307 (7 August 2014) [34]. Similar requirements exist in relation to Division 8A of Part IV of the *Accident Compensation Act 1985* (Vic) or Division 1 of Part 6 of the *Transport Accident Act 1968* (Vic) which were provided for in the SDS.

24 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [17].

25 *Settlement Distribution Scheme*, above n 15, 17–18 [C5].

26 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [6]; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [12]–[13].

27 See, eg, *Health and Other Services (Compensation) Act 1995* (Cth) s 8 (Medicare); *Social Security Act 1991* (Cth) pt 3.14 (social security benefits); R P Balkin and J L R Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 388 [11.23].

28 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [19].

29 Ibid.

C Economic Loss and Property Damage Claims

For ELPD claimants, a claim book was prepared and delivered to an ELPD Assessor who then undertook two steps.[30] First, the claim was evaluated in accordance with ELPD Assessment Principles and otherwise in accordance with the law of the State of Victoria to determine Final Assessed Values. Second, the Final Assessed Values were multiplied by the ELPD Multipliers to determine the ELPD Distribution Values.[31]

The ELPD Assessment Principles were more than 40 discrete loss categories including homes, non-home buildings, fences, gardens and trees, home contents and chattels, livestock, and labour costs that were pursued in the proceedings. For each loss, item or category a narrative rule defined the basis on which the value of the loss was to be assessed.[32] The ELPD Assessment Principles were subject to orders making the rules confidential.[33] However, an indication of how the narrative rules operated may be gleaned from some of the other bushfire class actions which set out the values attached to the above loss categories.[34] For example, particular costs were assigned to garden/amenity trees, farm/utility trees and fences, while for other items such as lost or damaged buildings or machinery, the loss had to be established by the group member.[35] The ELPD Multipliers are further adjustments to reflect the risks or prospects of success applicable to certain types of claims that the loss would not be recovered if the relevant claim went to judgment.[36] They were also subject to confidentiality orders.[37]

The claimant was afforded an opportunity to correct any errors or omissions and then a notice and reasons were provided by the ELPD Assessor. The claimant could then seek a review if dissatisfied with the assessment and was entitled to provide written contentions in support of the review.[38] A final assessment was then produced, with the ELPD Review Assessor being able to seek further material and instruct a valuer as needed.[39]

The SDS was also structured so that the ELPD claims fund was distributed pro rata between uninsured claims and insurance recovery claims. This approach was adopted because of legal uncertainty as to the appropriate order of priority as between insurer and insured in the distribution of the settlement sum.[40]

30 *Settlement Distribution Scheme*, above n 15, 26 [E3.2]–[E3.3].

31 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [417].

32 Ibid [418]–[419].

33 Ibid [440] (the ELPD Assessment Principles were in sch A of the SDS).

34 *Thomas v Powercor Australia Ltd* [2011] VSC 614 (5 December 2011) [6]–[7]; *Perry v Powercor Australia Ltd* [2012] VSC 113 (29 March 2012) [6]–[7].

35 *Thomas v Powercor Australia Ltd* [2011] VSC 614 (5 December 2011) [6]–[7]; *Perry v Powercor Australia Ltd* [2012] VSC 113 (29 March 2012) [6]–[7].

36 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [421].

37 Ibid [440] (the ELPD Multipliers were in sch A of the SDS).

38 *Settlement Distribution Scheme*, above n 15, 26–7 [E4.2], 27–8 [E5.1], 28 [E5.3].

39 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [18]–[19]; *Settlement Distribution Scheme*, above n 15, 28–9 [E6.2].

40 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [395]–[398].

IV THE CAUSE OF COST AND DELAY

The administration of an SDS necessarily involves some cost and delay. This follows from the need to pay someone to allocate the settlement sum to all eligible group members using an approach to distribution that is just and reasonable. The approach to distribution is guided by the need to achieve substantive and procedural fairness; that is, compensation on the merits through a process that incorporates opportunities to make submissions, to seek review, and appropriate 'checks and balances'.[41]

A *Substantive Fairness*

Substantive fairness means that the group member recovers compensation consistent with the loss or harm they suffered.[42] Those who suffered greater harm or loss should be compensated more than those who suffered less.[43] The SDS should also seek to take account of the prospects of success, or risk that a claim would not be made out vis-a-vis other claims.[44] Weaker claims should not recover to the same degree as stronger claims.[45] The above approach also follows from a class action settlement needing to be 'fair and reasonable … as between the group members inter se' to be approved by the court.[46] However, substantive fairness does not equate with an outcome that mirrors a court adjudication. The class action has settled and the substantive law operates as a guide, not a straitjacket.[47]

In practice, the above judicial guidance means that it is rare that a settlement sum can simply be evenly divided amongst group members so that they all receive the same amount.[48] To redress the harm consistently with the loss suffered and the strength of the claim, the SDS needs to determine what loss or harm has

41 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [43]–[44].

42 Michael Legg, 'Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?' (2016) 16 *Macquarie Law Journal* 89, 96–7 <https://www.mq.edu.au/__data/assets/pdf_file/0004/213745/mlj_2016_legg.pdf>.

43 *A v Schulberg [No 2]* [2014] VSC 258 (5 June 2014) [12] ('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'); *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [40]; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (7 May 2015) [53]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec & mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 518 ('The concept of "fairness" of the settlement entails like being treated with like, but relevant differences to be reflected in different outcomes.').

44 *A v Schulberg [No 2]* [2014] VSC 258 (5 June 2014) [12]; *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [40]; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (7 May 2015) [53]; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec & mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 518; *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd [No 6]* [2013] FCA 447 (17 May 2013) [18].

45 *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, 344 [66].

46 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (rec & mgr apptd) (in liq) [No 3]* (2017) 343 ALR 476, 499. See also *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [5].

47 See, eg, *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, 341–2 [60].

48 *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (7 May 2015) [95].

been suffered and assess the prospects of recovery consistently with applicable law and then allocate the compensation sum in accordance with those findings. The greater the number of factors affecting the quantum or prospects of group members' claims, the more complex and lengthy the process to achieve a fair distribution. As explained in Part III above, to determine the applicable compensation for I-D claims, the KEK SDS required medical assessments of injured people while taking account of legislation that sets recovery thresholds, reimbursement of insurers and repayment of statutory benefits. For the ELPD claims, determining compensation required the valuation of property that fell into 40 discrete categories which then needed to be adjusted to take account of the prospects of success. Accuracy takes time and causes expense.

B *Procedural Fairness*

Procedural fairness in an SDS includes group members receiving a reasonable opportunity to lodge claims and to challenge assessments.[49] Osborn JA concluded that the procedures adopted in the KEK SDS were 'appropriate and [struck] a balance between the need on the one hand for expedition and certainty and the control of costs, and on the other hand the need for fair assessments'.[50] As explained in Part III above, the I-D claimants were required to submit documentation and could seek a review of their assessment. Similarly, ELPD claimants were given an opportunity to correct errors and then subsequently seek a review which included providing written contentions. Allowing time for claimants to submit documentation and seek reviews builds into the SDS delay and cost. For example, I-D claimants were given 28 days to request a review and ELPD claimants were given 42 days to request a review.[51] Where a review was sought, cost and delay ensued as an assessor then took the required steps to conduct the review.[52]

C *Individualised Assessments*

Implicit in the above analysis, but a matter that needs to be made explicit for later discussion, is that the KEK SDS (and most mass tort SDSs) adopted 'individual assessments of losses sustained by Group Members (whether injury, death or property)' in seeking to achieve substantive and procedural fairness.[53] Judged against an approach where assessments are more systematised such as through the use of a formula, the need to assess each individual's loss increases cost and delay.

49 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 (18 December 2015) [44].

50 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [410].

51 *Settlement Distribution Scheme*, above n 15, 17 [C5.1], 27 [E5.1].

52 The cost of reviews was offset to some degree through the administrator having the discretion to require the posting of a bond (not greater than $800 for I-D claimants and $1200 for ELPD claimants) and where reviews did not result in a material change, the payment of the administrator's costs ($3000 for I-D claimants and $5000 for ELPD claimants): ibid 17 [C5.4], 20 [C8.1], 28 [E5.2], 29 [E7.1]. However, further questions arise as to whether bonds and the prospects of costs may dissuade claimants from exercising the available procedural fairness protections.

53 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 (15 July 2016) [21].

By comparison, the SDS for a shareholder class action is usually less individualised in approach compared to a mass tort or product liability SDS. This is because shareholder claims are dealing with financial losses to the same securities that largely impact all group members in the same way. Consequently, the shareholder SDS is able to employ a formula which calculates losses using the relevant inputs that are applicable to all group members or large subsets within the whole group. In a shareholder SDS, this would be number of shares bought (and sold) in the relevant period and a calculation that compares the actual price paid with the price adjusted for price inflation. The group member only needs to provide their particular inputs, ie shares bought (and sold) in the relevant period.[54] By 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 or pain and suffering. The impact of the mass tort on each group member may vary in terms of not just applicable heads of loss, but in terms of severity or gradation of harm.

Further, the more claims there are, the longer it takes to apply the SDS provisions. In relation to the ELPD claims, Osborn JA said that 'the range of losses suffered, the number of individuals affected (approximately 5500) and the number of claims involved (approximately 9000) rendered the scale of the task of estimating such losses unprecedented in Australia'.[55] Similarly, the size of the task in relation to I-D claims, which numbered about 1500, may be understood through a comparison with the number of personal injury claims resolved by the Supreme Court of Victoria in a year — 464 in 2013–14 and 528 in 2014–15.[56] The size of the undertaking was borne out by the SDS having difficulty ensuring barristers returned their assessments of the value of I-D claims in a timely fashion.[57]

D *Fees Charged*

While some cost must be incurred to apply the SDS, the higher the fees charged for undertaking a task in the SDS, the greater the cost of the SDS. In the KEK SDS, as has usually been the case in Australia, the distribution process was undertaken by the law firm that had brought the class action. Further, the firm used a combination of lawyers and paralegals who charged the SDS at an hourly rate. The hourly rates to be charged for the work to be undertaken were provided to Osborn JA in a confidential affidavit which his Honour approved, stating that they were 'unexceptional commercial rates for legal work'.[58] The actual rates

54 Gilsenan and Legg, above n 17, 5–9.

55 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [55].

56 Supreme Court of Victoria, *Annual Report 2014–15* (Report, July 2016) 35 (the Personal Injury List) (but see Supreme Court of Victoria, *Annual Report 2015–16* (Report, August 2017) 37, which gives a figure of 509 for 2014–15). The Major Torts List also includes some personal injury cases, but also economic loss or property damage cases and defamation cases. The resolutions in that list were 100 in 2013–14 and 91 in 2014–15: Supreme Court of Victoria, *Annual Report 2014–15* (Report, July 2016) 36.

57 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [33].

58 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [403].

were not disclosed as they were ordered to be kept confidential by Osborn JA. Nonetheless, the hourly charge out rate for each level of lawyer or paralegal may be estimated using disclosures in subsequent reports to the court and similar SDSs as set out in Table 2.

Table 2: Estimated Hourly Rate for Lawyers and Paralegals Administering KEK[59]

Role	Estimated Hourly rate (excluding GST)
Principal or Partner	$790
Special Counsel	$720
Senior Associate	$610
Associate	$540
Lawyer	$440
Trainee Lawyer	$350
Paralegal	$320
Legal Assistant/Litigation Support	$230

The SDS also incurred other costs, namely the fees of barristers, medical practitioners and loss assessors. For example, the SDS paid $2000 for each I-D assessment conducted by Counsel; $3500 for each I-D review assessment conducted by Senior Counsel; $1650 for each comprehensive psychiatric assessment; $880 for each comprehensive psychological assessment; $650 for ELPD assessments of incurred only losses conducted by ELPD assessors in accordance with the SDS; $1800 for ELPD assessments of above-insurance claims (non-business); and $2400 for ELPD assessment of above-insurance business claims.[60]

In relation to the work undertaken by counsel, it was found necessary to increase the standard rate paid to assessors per assessment by $250, with a further incentive of $250 if the assessment was submitted within a two-week time frame so as to reduce delay in the process.[61] Similar financial incentives were offered to the ELPD assessors.[62]

59 Estimates drawn from White, 'Special Referee's Report' (20 June 2016), above n 3, 34–35 [76], 37 [86]; White, 'Special Referee's Third Report' (1 March 2017), above n 3, attachment C; *Settlement Scheme — ASR Class Action: Version 2* (17 June 2016) Maurice Blackburn, 27–8 [13.1] <https://www.mauriceblackburn.com.au/media/3172/amended-settlement-scheme.pdf>.

60 White, 'Special Referee's Report' (20 June 2016), above n 3, 38–9.

61 *Affidavit of Andrew John Watson* (17 June 2016) Supreme Court of Victoria, 7–8 <https://www.supremecourt.vic.gov.au/law-and-practice/class-actions/kilmore-east-kinglake-black-saturday-bushfire-class-action-32>. The $250 fee increases cost the SDS approximately $242 250: *Affidavit of Andrew John Watson* (29 November 2016) Supreme Court of Victoria, 12–13 <https://www.supremecourt.vic.gov.au/law-and-practice/class-actions/kilmore-east-kinglake-black-saturday-bushfire-class-action-1>.

62 *Affidavit of Andrew John Watson* (17 June 2016), above n 61, 24.

V THE PROBLEMS OF COST AND DELAY

The significance of cost and delay in the SDS for group members arises because the cost of administering the distribution reduces the quantum available for compensation (even if paid from interest earned on the settlement fund)[63] and delay in distributing the funds prolongs hardship and prevents finality.

SDS costs, like legal fees, disbursements and litigation funding fees in conducting a class action, are transaction costs.[64] The exchange at issue in much litigation, including class actions, is the seeking and obtaining of compensation which requires various steps such as lodging a claim, proving a claim or negotiating a payment.[65] In litigation, the transaction costs are legal fees and disbursements (eg court filing fees, expert witness fees), and in some situations, litigation funders' fees.[66] In the class action context, this has led to the observation: '[a]s both lawyers and funders seek to make a profit, the overall transaction costs increase and the net return to the class members decreases'.[67] However, unlike regular one on one litigation, in addition to securing the judgment or settlement, there is then a post-settlement phase where the compensation must be distributed among group members. The SDS process therefore gives rise to additional transaction costs. The greater the cost of the SDS, the less that can be paid to the claimant who is injured, the claimant who lost a person upon whom they were dependent, or the claimant who suffered property damage or economic loss. The SDS costs impact the value of the access to justice that the class action has facilitated. In the KEK SDS, that meant an additional $30 million in transaction costs.[68]

Finality is not just bringing the class action proceedings to an end, but also in bringing closure for group members and allowing them to resume their lives. Osborn JA in approving the settlement on 23 December 2014 observed:

> The experience of the fire and its consequences has been horrific for many group members. Moreover, the overwhelming probability is that the I-D claimants include persons who have suffered psychiatric injury or a significant psychological overlay in consequence of burn injuries.
>
> The settlement will materially reduce the stress and anxiety otherwise inherent in the continuation of the proceedings and the need to establish the extent of individual claims in an adversarial context.

63 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [28]; *Stanford v DePuy International Ltd [No 7]* [2017] FCA 748 (28 June 2017) [9].

64 Transaction costs are '[t]he cost incurred in undertaking an economic exchange': *A Dictionary of Economics* (4th ed, 2012) 'transaction costs'.

65 See Robert G Bone, *Civil Procedure: The Economics of Civil Procedure* (Foundation Press, 2003) 269–71.

66 Michael Legg, 'Securities Regulation in Australia: The Role of the Class Action' in Robin Hui Huang and Nicholas Calcina Howson (eds), *Enforcement of Corporate and Securities Law: China and the World* (Cambridge University Press, 2017) 312, 322–3.

67 Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, 'Justice for Profit: A Comparative Analysis of Australian, Canadian and US Third Party Litigation Funding' (2013) 61 *American Journal of Comparative Law* 93, 104. See also Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38 *Melbourne University Law Review* 590, 600.

68 See above n 3 and accompanying text.

> ...
>
> There is a substantial benefit conveyed by way of the settlement overall to the group in minimising the further personal stress, anxiety and trauma which would be inherent in continued litigation of individual personal injury claims.[69]

The distribution of the settlement funds pursuant to the KEK SDS added an additional 29 months to the six years that had passed since the date of the fire on 7 February 2009.[70]

As repeated above, a degree of cost and delay is necessary. However, can the civil justice system do better? The next section discusses responses and potential reforms to address the cost and delay associated with the SDS process.

VI RESPONSES

The SDS provided that 'the Court is to have ongoing supervision over the implementation of this Scheme'.[71] Oversight was aimed not just at monitoring cost and delay, but also at ensuring compliance with the SDS and the approach to substantive and procedural fairness that it embodied. However, cost and delay were at the forefront of concerns. In the judgment following the first case management conference after the approval of the settlement, J Forrest J stated:

> Given the unprecedented size of the settlement sum, and the vast number of claimants, it is important that the Court exercise the supervisory power granted by the Act, and required under the terms of the SDS, to ensure that the settlement distribution process is undertaken in a timely, efficient and cost-effective fashion.[72]

The SDS incorporated at least four interrelated forms of oversight. Oversight was achieved through the administrator being required to report to the court on the progress of the SDS and the costs incurred,[73] a court-appointed costs consultant being required to assess SDS costs,[74] an administrator-appointed auditor who ensured that data and calculations in the SDS were correct,[75] and a senior barrister from the independent Bar providing oversight of the I-D claims assessment process.[76]

69 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [321]–[322], [329].

70 See above n 3 and accompanying text.

71 Ibid [342]; *Settlement Distribution Scheme*, above n 15, 3. Power for the court to provide oversight of an SDS may be found in *Supreme Court Act 1986* (Vic) ss 33V(2), 33ZF.

72 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [14].

73 Ibid [11].

74 Ibid [28]–[29].

75 *Affidavit of Martin William Dougall* (20 October 2017) Supreme Court of Victoria <https://www.supremecourt.vic.gov.au/law-and-practice/class-actions/kilmore-east-kinglake-black-saturday-bushfire-class-action-41>, containing Martin Dougall, 'Maurice Blackburn Pty Ltd: Independent Expert Report — ID Claims' (Report, KPMG, 20 October 2017); Martin Dougall, 'Maurice Blackburn Pty Ltd: Independent Expert Report — ELPD Claims' (Report, KPMG, 20 October 2017).

76 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [29]–[32].

A *Administrator Reports*

The SDS provided for the costs of administering the scheme to be reported to the court for approval prior to payment.[77] Osborn JA, in approving the settlement, specifically referred to these requirements and observed that the administrator needed to provide the Court with sufficient material for it to be 'satisfied that the costs are being reasonably incurred'.[78] J Forrest J saw the court's supervisory role as also 'requiring [the administrator] to provide the Court with periodic updates as to the progress of the distribution process'.[79] Costs and progress were reported on through a series of affidavits sworn under oath from the administrator.

The administrator's reports undoubtedly provided a level of transparency rarely seen in the administration of a class action SDS. This transparency is important for two reasons. First, the reports are the reason that the cost and delay in the KEK SDS is publicly known and can be critiqued. The adherence to open justice, even in the post-settlement phase, has facilitated debate about the need for reform. Second, by providing such an accountability mechanism, the lawyers have an incentive to address cost and delay as their actions will be made public. However, as important as the information provided is, it is still just information. Effective oversight requires that the information be scrutinised.

B *Costs Consultant / Special Referee*

At the first case management conference after the approval of the settlement, J Forrest J determined that 'an external, high-level costs assessment' was appropriate, and appointed 'an independent costs consultant to conduct a high-level review of the ongoing costs of administration'.[80] The Court drew on the civil procedure rules for special referees and required the costs consultant to address specific questions and to report to the Court.[81] Procedurally this meant that the Court could then adopt or reject the report, but if adopted, the report became the opinion of the Court and judgment on the questions posed.[82] The costs consultant was to assist the Court in its oversight role.

77 *Settlement Distribution Scheme*, above n 15, 37 [I1.1].

78 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [405].

79 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [11].

80 Ibid [29]. Osborn JA may also have foreseen the need for a determination of whether costs were fair and reasonable: see *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [406].

81 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 50.04; Order of J Forrest J in *Matthews v AusNet Electricity Services Pty Ltd* (Supreme Court of Victoria, S CI 2009 04788, 5 November 2015), *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [26]. This procedure has subsequently been endorsed more generally for reviewing legal costs in class actions: see *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 (8 March 2018) [41]; *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527 (16 April 2018) [122]–[124]; *Botsman v Bolitho* [2018] VSCA 278 (1 November 2018) [225]. See also Victorian Law Reform Commission, *Access to Justice — Litigation Funding and Group Proceedings*, Report No 37 (2018) 126 (Recommendation 25).

82 See *Rowe v AusNet Electricity Services Pty Ltd [Ruling No 9]* [2016] VSC 731 (7 December 2016) [5].

The methodology adopted by the costs consultant was that endorsed by case law in respect of assessing a claim for gross sum costs on an *inter partes* basis in class actions.[83] This involved a sampling of the bill of costs with the work billed on every 20th page examined in detail. The review was of

> the nature of the work done … whether the work was reasonably done at the time … whether the work was done by the appropriate level of file operator given the nature of the task … whether the time claimed for the work was reasonable and … whether the correct hourly rate had been applied given the level of file operator doing the work.[84]

However, as the costs consultant recognised, '[t]he nature of the work done in administering the Scheme is inherently different to the nature of the work done in prosecuting a claim through the Court'.[85] The SDS is an administrative process guided by legal requirements. The review was not a taxation of costs by reference to what the Supreme Court of Victoria scale rates allowed. It did not use scale rates but instead the hourly rates approved by Osborn JA as part of settlement approval.[86] Nor did it disallow work done on tasks that could not be recovered on a taxation of solicitor-client costs, which may be summarised as administrative work. This was because the SDS either required this work to be undertaken or it was necessary 'to ensure the integrity and efficiency of the settlement distribution process'.[87]

The costs consultant provided three reports and in each found the administrator's costs and disbursements reasonable.[88] The review determined whether costs were charged in keeping with what the Court had approved in the SDS. It was a novel approach to the need to monitor cost and ensure a level of scrutiny that gave the Court, claimants and the public confidence that the SDS was being administered correctly. However, the difference in the work required to administer a settlement and to conduct litigation highlights the need to consider whether lawyers are the correct administrator and legal costs the appropriate measure for charging for the operation of an SDS. Both issues are discussed below.

83 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 44]* [2016] VSC 732 (7 December 2016) [15], citing ibid [10]–[27] (setting out the process in detail); White, 'Special Referee's Report' (20 June 2016), above n 3, 9–12 [27]–[37]. The case law referred to was *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [381]; *Courtney v Medtel Pty Ltd [No 5]* (2004) 212 ALR 311, 321 [56]; *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (21 June 2013).

84 White, 'Special Referee's Report' (20 June 2016), above n 3, 35–6 [79]–[81].

85 Ibid 11 [33], referring to *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [400]. See also *Stanford v DePuy International Ltd [No 7]* [2017] FCA 748 (28 June 2017) [26] ('There are … notable differences between assessing the reasonableness of costs incurred in a litigation setting, and assessing the reasonableness of costs involved in administering a complex scheme').

86 White, 'Special Referee's Report' (20 June 2016), above n 3, 11 [35]; see also *Rowe v AusNet Electricity Services Pty Ltd [Ruling No 9]* [2016] VSC 731 (7 December 2016) [22] (dealing with the same methodology by the same special referee as in Kilmore East).

87 White, 'Special Referee's Report' (20 June 2016), above n 3, 37 [82]; see also *Rowe v AusNet Electricity Services Pty Ltd [Ruling No 9]* [2016] VSC 731 (7 December 2016) [17] (dealing with the same methodology by the same special referee as in Kilmore East).

88 White, 'Special Referee's Report' (20 June 2016), above n 3, 47–8 [117]–[118]; White, 'Special Referee's Further Report' (21 November 2016), above n 3, 42 [85]–[86]; White, 'Special Referee's Third Report' (1 March 2017) 46 [123]–[124].

C *Senior Barrister and Auditor*

In addition to the administrator and costs consultant reports, a barrister and auditor were appointed to provide a check on the accuracy of the process. Neither roles are addressed in the written SDS. The barrister was a senior counsel tasked with supervising the assessment process for I-D claimants and coordinating the tasks of the assessors to ensure that there was a consistent approach.[89] The external auditor was appointed by the administrator to provide a report on the accuracy of the assessment data held by the administrator, including that assessment amounts reflected the data held by the administrator, and that reviews had been correctly recorded and deductions of administration costs were correct.[90]

The need for the auditor and senior barrister was endorsed by the Court.[91] While both appointments may have been necessary, they were focused more on fairness than cost or delay. The barrister ensured that I-D claims were being properly and consistently assessed. The auditor sought to identify and remedy any errors in the record keeping to ensure that 'the distributions are consistent with the provisions of the SDS'.[92]

VII POTENTIAL REFORMS

While the Court and the lawyers administering the settlement took steps to address cost, delay and fairness, the outcome of the KEK SDS (29 months in time and $30 million in fees) suggests that further reform aimed at reducing cost and delay should be considered. This article examines options for interim payments, fast-tracks, matrix or grid schemes, alternative administrators, alternative forms of charging, and technology.[93]

A *Interim Distributions*

The KEK SDS was designed so that, although assessments of individual claims might be completed on an ongoing basis, payments would not be made until the assessment processes for all claimants were completed.[94] However, the KEK SDS provided that once the assessment process for 30 per cent (by number) of

89 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [31]–[32].

90 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 43]* [2016] VSC 583 (29 September 2016) [41]. See also *Rowe v AusNet Electricity Services Pty Ltd [Ruling No 8]* [2016] VSC 586 (29 September 2016) [11]–[12].

91 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [30]; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 43]* [2016] VSC 583 (29 September 2016) [42].

92 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 43]* [2016] VSC 583 (29 September 2016) [42].

93 See Victorian Law Reform Commission, above n 81, 88.

94 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [9].

I-D Claims or 40 per cent (by number) of ELPD claims had been finalised, the administrator could, in his discretion, 'commence to make interim distributions from the respective funds to claimants whose claims had been completed'.[95]

In KEK, J Forrest J raised the use of interim payments as a way to address the delay experienced in the SDS process.[96] However, the issue was not pursued due to increased progress in the assessment of claims.[97] The administrator also raised concerns about the diversion of resources that would be needed for an interim distribution due to the need to ensure data was correct to communicate and pay an interim amount to claimants. In addition, this may prompt further inquiries, including from claimants whose claims had not advanced sufficiently for them to receive an interim distribution.[98]

An alternative form of interim payment is to link payment to need or financial hardship. The KEK SDS gave the administrator discretion to make a payment where satisfied that compared to the typical circumstances of other claimants, a 'particular claimant is in a position of extraordinary need' and 'payment is appropriate on special compassionate grounds'.[99] Media reports suggest that this type of interim payment was made, but that the administrator was concerned that such payments could encourage further requests that would 'slow the process'.[100]

The use of an interim payment may also be problematic if the quantum of the interim distribution is too high compared to the value of the later claims yet to be assessed. In such a case, the funds available for later payment may be diminished so that a pro-rata allocation to all group members is not possible unless there is an attempt to claw back earlier payments.[101] The extent of this problem will vary depending on the knowledge about the value of the yet-to-be-assessed claims and the size of the interim payment. The KEK SDS recognised this issue and stated that the administrator shall determine the quantum of the interim payment

95 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [5]. Similar provisions have been included in other SDSs. See *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 (7 May 2015) annex A cl 12 where the Bonsoy class action SDS provided that once 30 per cent of claims were finally assessed the scheme administrator had discretion to make interim distributions to participants with completed assessments either progressively or in tranches and up to 60 per cent of the value of the assessment.

96 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 41]* [2016] VSC 171 (19 April 2016) [38]–[41].

97 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 (15 July 2016) [24].

98 Ibid [26]–[27].

99 *Settlement Distribution Scheme*, above n 15, 22 [D1.4], 31 [F1.4]. Similar provisions have been included in other SDSs. See Casey v DePuy International Limited and Johnson & Johnson Medical Pty Ltd*: Federal Court of Australia, Proceeding ACD 10 of 2010 — Compensation Protocol* (29 August 2012) Maurice Blackburn, 10 [7] <https://www.mauriceblackburn.com.au/media/1270/knee-implants-compensation-protocol.pdf>: the LCS ® Duofix ™ Femoral Components class action provided for a claimant to be able to receive $15 000 by way of advance payment if they were suffering financial hardship. The settlement is explained in *Casey v DePuy International Ltd [No 2]* [2012] FCA 1370 (4 December 2012).

100 Tessa Akerman, 'Black Saturday Bushfires: Lawyers' Money from Misery "Obscene"', *The Australian* (online), 11 April 2016 <https://www.theaustralian.com.au/news/nation/black-saturday-bushfires-lawyers-money-from-misery-obscene/news-story/0c6f0c8c8aefcc8b5d168c809491d2fe>.

101 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 (15 July 2016) [9].

through taking into account 'the imperative' to retain sufficient funds for later payments.[102]

The determination of the quantum of interim payments may be assisted by using group member surveys of injuries/losses and actuarial assessments. A survey and actuarial assessment were employed in the DePuy ASR Implants (hips) class action.[103] As the settlement sum was fixed but the number and size of claims was uncertain, these steps were needed to be able to demonstrate at the settlement approval hearing that the settlement was reasonable.[104] Presumably they also informed settlement negotiations. The survey gave rise to a profile of claimants that became an input into the actuarial assessment of compensation amounts.[105] Uncertainty is not completely removed as an actuarial assessment is based on assumptions which may differ from what later occurs.[106] Nonetheless, surveys and actuarial assessments undertaken as part of the litigation process can be carried over to the post-settlement phase.[107] They then provide an informed estimate as to the claims and compensation that will need to be paid in the future, which can guide the quantum of interim payments. These steps take time and involve cost. But, if they are needed for settlement approval and can be repurposed for settlement distribution, then this would be an efficient way to proceed.

The above concerns raised by the KEK administrator suggest that interim payments can alleviate delay for eligible claimants, but, it would seem, only by imposing greater delay on other claimants. Further, there is no reduction in cost; indeed the interim distribution may incur additional costs if calculations need to occur twice (on an interim and final basis), or to ascertain the quantum of an interim payment, and resources are needed to address group member inquiries. Interim distributions can be a useful tool, especially where there is financial hardship, but a better solution would be to increase the speed of resolution for all claims.

B *Fast-Track*

In the DePuy ASR Implants (hips) class action, eligible group members were given the option of electing to accept a 'fast track resolution' of their claim, which entitled them to a single $55 000 lump sum payment per hip.[108] Alternatively,

102 *Settlement Distribution Scheme*, above n 15, 22 [D1.3], 31 [F1.3].

103 *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [76]–[77]. See also Julian Schimmel, 'Product Liability Class Actions in Australia — 25 Years On' (Paper presented at Current Issues after 25 Years of Pt IVA *Federal Court of Australia Act*, Sydney, 23 March 2017) 15.

104 *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [144]–[148].

105 Ibid [76]–[77].

106 Ibid [144].

107 See, eg, *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2011] FCA 671 (15 June 2011) [40]–[52] where an expert economist's report on loss for trial was subsequently used to construct the SDS.

108 *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [64]; *Amended Settlement Scheme — ASR Class Action: Version 3* (14 June 2017) Maurice Blackburn, [6.2] <https://www.mauriceblackburn.com.au/media/3759/amended-settlement-scheme-approved-by-the-court-on-14-june-2016.pdf>.

group members could undergo a conventional form of individual assessment similar to that in the KEK SDS. Wigney J explained that the fast-track 'avoids the necessity of any assessment process and will result in a prompt payment of a fixed amount'.[109] The DePuy hips SDS also provided that if there were funds left over once all claimants had their losses assessed, then all claimants' payments would be proportionately increased. Alternatively, if there were insufficient funds to pay the losses assessed conventionally for claimants, then payments to conventional claimants would be proportionately reduced. Fast-track payments were exempt from such reduction.[110]

The fast-track was thought to be most attractive to group members who had not suffered significant loss or damage, or who wanted an expeditious payment of their entitlements. Indeed the calculation was based on there being no inclusion for economic loss.[111] Group members elected to proceed under the fast-track to a much greater degree than expected.[112] This is in a context where the average compensation payment was previously estimated to be $101 477 per hip.[113] Additionally, at the settlement hearing some group members expressed concern at the adequacy of the $55 000 amount, which was dealt with by the Court observing that the fast-track was 'entirely optional'.[114]

A fast-track option undoubtedly results in quicker payment for those who choose it. It is a simpler approach than an individualised assessment, thus making it less costly to administer. It may therefore be an effective way to streamline part of the SDS process with the result that cost and delay are reduced.

Before adopting a fast-track similar to the DePuy hips SDS, two concerns must be considered. First, as with the KEK SDS, the lawyers for the group members became the administrators and were forbidden from acting for group members in the SDS process.[115] Consequently, group members lost access to the legal representation that was intimately engaged with the issues in the case. For a group member to make an informed decision about the value of their claim and whether they should elect to pursue the fast-track, they must incur further legal costs to have new lawyers consider and advise upon their case. The fast-track option may shift costs from the SDS to the individual claimant. Alternatively, the

109 *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [141].

110 *Amended Settlement Scheme*, above n 108, [10.7].

111 Ibid [6.2].

112 *Stanford v DePuy International Ltd [No 7]* [2017] FCA 748 (28 June 2017) [22]; Julian Klaus Schimmel, *Affidavit* (8 June 2017) Class Action: DePuy ASR Hip Implants, 7–9 [23] <https://www.depuyclassaction.com.au/sites/default/files/2018-08/affidavit-of-julian-schimmel-dated-8-june-2017.pdf>. (As at 2 June 2017, 1722 group members registered claims, but only 920 had their claim reviewed and found eligible. 651 of the 920 eligible group members chose the fast-track.) Julian Klaus Schimmel, *Affidavit* (20 June 2018) 6–9 [19] <https://www.depuyclassaction.com.au/sites/default/files/2018-08/18-06-20-affidavit-of-julian-klaus-schimmel-sealed.pdf>. (As at 18 June 2018, of the 1548 eligible group members 1259 (81.3 per cent) elected the fast-track, 277 (17.9 per cent) elected individual assessment and 12 (0.7 per cent) had not yet made an election.)

113 *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [105].

114 Ibid [110].

115 *Amended Settlement Scheme*, above n 108, [2.1(b)] ('the law firms cease to act for any individual Group Members who had retained [the law firms] before the Approval Order was made').

claimant, being unable or unwilling to incur further legal costs, and having had their recovery already reduced by the lawyer's fees as part of the settlement that they are bound by, simply makes a less than fully informed election.

The second problem with a fast-track approach is that claimants may choose it not because they have suffered minor harm, but rather delay (and further expected delay) has taken such a significant toll that they want to bring the experience to an end. This critique should not be seen as directed only at the delay caused by an SDS process. It is the accumulated delay of the litigation process.[116]

The above concerns suggest that a fast-track may privilege reducing cost and delay over fairness. Consequently, a fast-track approach needs to ensure informed decision-making by claimants so as to guard against unfairness. Further research into claimant decision-making would be useful here so that there is greater understanding as to why a fast-track approach was preferred so as to guide the operation of future SDS.

C *Matrix Settlement Distribution Scheme*

The concern with cost and delay raises for consideration whether a mass tort SDS such as KEK could adopt a less individualised approach. In the US, mass torts have created significant challenges for the conventional tort system due to the complexity and sheer size of those actions. As a result, not only was settlement promoted by the courts, but efficient mechanisms for distributing settlements were needed. Individual damage determinations were often not practical.[117] Accordingly, the US turned to the matrix, or grid, SDS, drawing on those used in workers' compensation and car accidents.[118]

US mass tort SDSs typically divide the claims of the class into several distinct categories that correspond to the medical conditions thought to result from the tort/product in question. Other factors may also be included such as age and/or degree of disability. Compensation amounts are then assigned to each category.[119] There may also be deductions due to factors that may weaken a case or reduce the compensation that could be awarded, such as smoking or obesity.[120] For example, in the National Football League concussion class action, monetary compensation was assigned based on factors such as type of disease and age at diagnosis. There were also deductions where the number of NFL seasons played was below five

116 In both KEK and the DePuy ASR Implants (hips) class action, delay was exacerbated as the settlement occurred only after proceedings were conducted through to the completion of trial.

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

118 Samuel Issacharoff and John Fabian Witt, 'The Inevitability of Aggregated Settlement: An Institutional Account of American Tort Law' (2004) 57 *Vanderbilt Law Review* 1571, 1625–6. The first use of a matrix was *Cimino v Raymark Industries Inc*, 751 F Supp 649 (ED Tex, 1990).

119 Richard A Nagareda, 'Turning from Tort to Administration' (1996) 94 *Michigan Law Review* 899, 921–2.

120 Paul D Rheingold, 'Mass Torts — Maturation of Law and Practice' (2017) 37 *Pace Law Review* 617, 632.

seasons or there was a medically diagnosed stroke or traumatic brain injury occurring prior to a qualifying diagnosis.[121] In the Deepwater Horizon medical benefits class action, upon proof of specified physical conditions, an award was determined by a matrix that factored in class member status (either a 'clean-up worker' or a resident), their residential location, whether their condition was acute or chronic, and any enhancing elements such as condition-related hospitalisation.[122] In the Vioxx multi-district litigation settlement, the claimant needed to satisfy three criteria: (1) qualifying injury, (2) duration of Vioxx use, and (3) proximity of injury to usage, and then compensation was calculated based on 'points' that were awarded by reference to injury, age, duration and consistency of use, general health and medical history.[123] In Australia, matrix or grid settlements have rarely been utilised in mass tort class actions.[124]

The advantage of the matrix is that it can be administered more quickly and at less cost once created. The matrix is also more certain to the extent that the compensation attributed to a particular injury/harm and any deductions are clearly spelt out at the time a settlement is brought to the court for approval.[125]

However, it seems unlikely that a matrix is a panacea to the problems of cost and delay. This mainly arises because the creation of the matrix itself takes time and cost. The categories and amounts need to be determined, which either draws on past experience from other cases or from discovery, expert evidence, and in some situations, trials, in the current case, or through voluntarily generating medical and actuarial data with the help of experts. There is also a need to specify what evidence needs to be presented for a claim to be allocated to a cell in the matrix. The claimant under a matrix SDS will then need to provide that evidence to demonstrate that they meet the criteria for payment.[126]

Determining whether to use a matrix may turn on a comparison between the creation cost and the allocation/administration cost in any particular class action SDS. The greater the number of claims to be processed, the more likely that incurring the creation cost will reduce the allocation costs and the use of the

121 *In re National Football League Players' Concussion Injury Litigation*, 307 FRD 351, 366–8 (ED Pa, 2015). The operation of the SDS is explained in more detail in Michael Legg, 'National Football League Players' Concussion Injury Class Action Settlement' (2015) 10 *Australian and New Zealand Sports Law Journal* 47.

122 *In re Oil Spill by Oil Rig "Deepwater Horizon"*, 295 FRD 112, 119–22 (ED La, 2013).

123 *In re Vioxx Products Liability Litigation* (ED La, No MDL 1657, 7 August 2008) slip op 5–6.

124 Two examples where a matrix was used are *Amom v New South Wales* [2016] NSWSC 1900 (23 December 2016) (class action based on false imprisonment of young people; the matrix allocated compensation based on the group member being subject to various occurrences such as false imprisonment, strip search, a degree of humiliation, a degree of discomfort, age); *Casey v DePuy International Ltd [No 2]* [2012] FCA 1370 (4 December 2012) (LCS ® Duofix ™ Femoral Components class action where a matrix was used to allocate compensation based on the number of surgical procedures or revisions linked to the implant up until a specified limit, where compensation was then individually determined).

125 Howard M Erichson, 'A Typology of Aggregate Settlements' (2005) 80 *Notre Dame Law Review* 1769, 1789; Dana A Remus and Adam S Zimmerman, 'The Corporate Settlement Mill' (2015) 101 *Virginia Law Review* 129, 151–3; *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [108].

126 Nagareda, above n 119, 922–3; Issacharoff and Witt, above n 118, 1627–30; Rheingold, above n 120, 632.

matrix will save cost overall. In the US, use of the matrix approach makes sense because the number of claims can be very large. For example, the Vioxx MDL involved 32 000 cases,[127] the NFL concussion class action included 20 000 class members,[128] and the World Trade Center consolidated recovery workers case involved 10 000 suits.[129] Whether Australian class actions are sufficiently large to warrant the up-front expenditure would need to be carefully considered.

A remaining concern is that the matrix is less able to take account of individual issues.[130] In the mass tort context the lack of precision may have grave consequences because there is greater variation in claims. Nonetheless, when the quantum to be awarded is low then individual refinements may consume a large portion of the recovery and a more economical approach needs to be adopted.[131] In such a settlement, or in a settlement that is composed of some low value claims, a matrix for the low value claims may be warranted. Nonetheless, it is important to be clear that there is a trade-off between accuracy and cost which impacts civil justice objectives, such as corrective justice, the compensation principle and individualised justice.

D *Choice of Administrator*

There may be less expensive ways to administer an SDS. Possible options would be to choose lawyers other than the lawyer who acted for the plaintiff in the class action, or a non-lawyer administrator.[132] Typically, the court has appointed the lawyer for the plaintiff in the class action as administrator.[133] In KEK, J Forrest J considered an argument for the appointment of an administrator other than the lawyer for the plaintiff, but dismissed it because:

> this would have meant reinventing the wheel in terms of communications with Group Members and knowledge of the facts of the case and the circumstances of thousands of Group Members. It would have significantly delayed the processing of the claims and provided no discernible benefit.[134]

127 *In re Vioxx Products Liability Litigation* (ED La, No MDL 1657, 3 January 2014) slip op 2.

128 *In re National Football League Players' Concussion Injury Litigation*, 301 FRD 191, 195–6 (ED Pa, 2014).

129 *In re World Trade Center Disaster Site Litigation*, 754 F 3d 114, 117 (2nd Cir, 2014).

130 *Stanford v DePuy International Ltd [No 6]* [2016] FCA 1452 (1 December 2016) [108].

131 *Johnston v Endeavour Energy* [2016] NSWSC 1132 (18 August 2016) [36].

132 See *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 (8 March 2018) [52]–[54]; *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527 (16 April 2018) [157].

133 See *Kamasaee v Commonwealth* [2017] VSC 537 (6 September 2017) [36] ('*Kamasaee Approval of Settlement*') ('as has featured in other schemes previously approved by courts for distribution of settlement sums in group proceedings, a senior lawyer with the plaintiff's law firm is appointed as Administrator of the SDS'); Victorian Law Reform Commission, above n 81, 89.

134 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 42]* [2016] VSC 394 (15 July 2016) [20]. It should be noted that the argument was raised after Osborn JA had already dealt with the appointment of the SDS administrator as part of settlement approval. See also *Earglow Pty Ltd v Newcrest Mining Ltd* [2016] FCA 1433 (28 November 2016) [84]–[86] (appointment of the solicitor for the plaintiff was supported because '[i]t is optimal that the Administrator has familiarity with the subject matter of the proceeding so that the claims can be finalised as quickly as possible and so that there is consistency across the assessments'); *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527 (16 April 2018) [158]; *Wotton v Queensland [No 10]* [2018] FCA 915 (15 June 2018) [50].

However, whether 'reinventing the wheel' is efficient depends on the rates to be used and the method of charging by the incumbent lawyer and potential alternatives.

1 *Other Lawyers*

In the US, the claims administration process is frequently conducted by a neutral third person who is a lawyer, such as a special master.[135] The reason for this is to avoid the lawyer for the plaintiff and group members being placed in a position of conflict where as administrator they may make decisions that advantage some clients and disadvantage others.[136] In the KEK SDS, the administrator sought to avoid such conflicts of interest through the SDS providing that he and his staff did not act for claimants once appointed as the administrator, and instead were required to administer the SDS fairly.[137] Nonetheless, for current purposes the important point is that it is common in the US for another lawyer to undertake the administration.

Seeking out other lawyers to be administrators would only be worthwhile if they were prepared to charge lower rates than the lawyer for the plaintiff. In the Bellamy's Australia Ltd shareholder class actions, Beach J compared the rates charged by lawyers and paralegals in competing class actions, the McKay proceedings and the Basil proceedings, and commented as follows:[138]

> Now I accept that the rates and the litigation budget for the McKay proceedings are both lower than those in the Basil proceedings. The lawyers' rates are higher in the Basil proceedings than in the McKay proceedings across all categories of personnel who might be involved. The differences range from 12% for a principal lawyer/consultant/special counsel, to 45% for a paralegal. The average difference between the rates proposed to be charged for equivalent legal staff is 27% higher in the Basil proceedings. Further, the litigation budget in the Basil proceedings is higher than that in the McKay proceedings.

This suggests that there are other lawyers that may be willing to undertake the administration of an SDS at a lower cost. In relation to KEK, that means an hourly rate less than that set out in Table 2. However, his Honour went on to raise a number of problems with comparing rates and budgets, including that lawyers charging higher rates may be more efficient, or put another way, a lawyer charging lower rates may spend more time on a matter.[139] To address this concern, the above responses such as administrator reports and review of costs would

135 Nagareda, above n 119, 921; Nancy J Moore, 'Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule' (2013) 81 *Fordham Law Review* 3233, 3263.

136 Lynn A Baker, 'Aggregate Settlements and Attorney Liability: The Evolving Landscape' (2015) 44 *Hofstra Law Review* 291, 317; Morris A Ratner, 'Class Conflicts' (2017) 92 *Washington Law Review* 785, 793–4.

137 *Settlement Distribution Scheme*, above n 15, 8–9 [A3]–[A5]; *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [5]. This article does not take a position on whether the approach is effective.

138 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 (18 August 2017) [90].

139 Ibid [92].

continue. Alternatively, other forms of charging that incentivise efficiency could be adopted, as discussed below.

2 *Non-Lawyers*

An SDS involves both administrative work and legal work, although 'the greater bulk of work done is almost entirely in respect of administrative processes rather than a legal process'.[140] The concern with cost and delay then raises for discussion whether the administrative work could be efficiently conducted by non-lawyers who charge less. For example, could accountants or loss adjusters administer the SDS and obtain legal input from lawyers where needed? There are examples of non-lawyers administering class action settlements. In the US, specialist claims administrators design and implement complex mass claims processes.[141] The administrator employs lawyers, analysts, project managers, software programmers and claims reviewers. In an Australian consumer class action, a forensic accounting/expert services firm was appointed to receive, review and accept or reject claims for payment by group members.[142] The division between administrative and legal work may vary depending on the type of class action.

Both lawyers and non-lawyers have roles to play in an SDS. The SDS needs to be structured and administered so that the appropriate expertise is deployed. Over-reliance on lawyers or paralegals can unnecessarily increase costs. Where lower cost non-lawyer personnel can undertake a role effectively, that should be pursued.[143]

3 *Methods of Charging*

In the KEK SDS, the administrator and his employees charged on an hourly basis. The hourly rates were 'unexceptional commercial rates for legal work'.[144] In the Murrindindi bushfire SDS, the expert costs consultant opined that the rates were reasonable when compared to Supreme Court scale rates with an appropriate complexity allowance, ie costs charged in litigation on a solicitor-client basis.[145] The costs consultant added that 'he could not see how the costing of the work

140 White, 'Special Referee's Report' (20 June 2016), above n 3, 37 [82]. See also *Rowe v AusNet Electricity Services Pty Ltd [Ruling No 9]* [2016] VSC 731 (7 December 2016) [23].

141 See, eg, BrownGreer PLC, who administered the Deepwater Horizon Settlement, NFL Concussion Settlement and the ASR Hip Settlement: BrownGreer, *Featured BrownGreer Settlement Programs* <https://www.browngreer.com/featured-programs.html>; JND Legal Administration, who administered Visa/Mastercard Antitrust Litigation, Bank of America Securities Litigation and Worldcom Securities Litigation: JND Legal Administration Co, *Class Action Administration Cases* <http://www.jndla.com/class-action-administration>.

142 *Hardy v Reckitt Benckiser (Australia) Pty Ltd [No 3]* [2017] FCA 1165 (20 September 2017) [17].

143 In the KEK, SDS paralegals were used to undertake large parts of the work. See, eg, White, 'Special Referee's Report' (20 June 2016), above n 3, 37 [86]. Although not qualified as lawyers, they may still have high charge out rates. In the KEK, SDS paralegals are estimated to have been charged out at $320 per hour: see above tbl 2. Utilising non-lawyers but charging for their time at such rates does not assist with reducing cost.

144 *Matthews SDS Approval* [2014] VSC 663 (23 December 2014) [403].

145 *Rowe v AusNet Electricity Services Pty Ltd [Ruling No 9]* [2016] VSC 731 (7 December 2016) [23].

performed in the administration of the scheme could be tackled in any way other than by time costing'.[146]

Both the use of time-based billing and choosing litigation rates as the reference point for the administration of an SDS need to be questioned.[147] Time-based billing has been subject to criticism because it rewards the lawyer for undertaking more work, rather than operating efficiently.[148] The rise of alternative fee arrangements ('AFAs') in commercial law is frequently linked to corporate dissatisfaction with the high legal costs associated with time-based billing.[149] AFAs also offer an alternative approach to remunerating the administration of an SDS that could create incentives designed to reduce cost and delay.

AFAs are not just different forms of billing. They are also a different mindset because they shift the focus from the lawyer's input into the process, being their time, to the lawyer's output or achievement.[150] In an SDS, the administrator should be rewarded not for taking more time, but instead for the efficient and accurate distribution of the funds in accordance with the terms of the SDS.

For example, the administration of an SDS could be undertaken using hourly rates but with a cap on the maximum amount that can be charged or a fixed amount which would implicitly incentivise the administrator to undertake the SDS as efficiently as possible so as to maximise profit.[151] The SDS fee could also include overt incentives. For example, if the administrator distributes the funds successfully and economically by an agreed date, there is a bonus. Equally, a sliding scale of fee awards could apply. The amount paid could decline by a set amount or percentage for each month the distribution occurs past a specified date.[152] Additionally, or alternatively, an administrator's fee may only be payable

146 Ibid.

147 Justice Jack Forrest, 'Issues in Case Management of Class Actions and Administration of Settlements — Kilmore East/Kinglake Bushfire Trial' in Damian Grave and Helen Mould (eds), *25 Years of Class Actions in Australia: 1992–2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 71, 94.

148 See, eg, Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 286–8; Future Committee, The Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (2017) 19.

149 See, eg, Catherine Ho, 'Law Firms Look for Alternatives to the Billable Hour', *The Washington Post* (online), 15 April 2012 <https://www.washingtonpost.com/business/economy/law-firms-look-for-alternatives-to-the-billable-hour/2012/04/15/gIQAeyW9JT_story.html>; Leigh McMullan Abramson, 'Is the Billable Hour Obsolete?', *The Atlantic* (online), 15 October 2015 <https://www.theatlantic.com/business/archive/2015/10/billable-hours/410611/>.

150 Michael Legg, Testimony to The Law Society of New South Wales, *Future of Law and Innovation in the Profession Commission of Inquiry*, 7 July 2016, available at The Law Society of NSW, 'Michael Legg — News Ways of Working' (YouTube, 21 July 2016) 00:02:40–00:02:50, 00:14:58–00:16:49 <https://youtu.be/ECQUTkt31JM>.

151 See, eg, *Vodanovich v BOH Brothers Construction Co LLC* (ED La, Civ No 05-4191, 19 March 2013) 3–5, where legal fees were capped in response to concern from the appeals court in *In re Katrina Canal Breaches Litigation*, 628 F 3d 185, 196 (5th Cir, 2010) that costs would 'cannibalize' the settlement.

152 For example, if the distribution is estimated to take 12 months the fee could be calculated so that the administrator is paid $\$X$ if the distribution is accurately completed within 12 months. For every two months after that the fee reduces by 5 per cent.

once the SDS is completed.[153] This puts them in the same position as the claimants and creates an incentive to efficiently distribute the funds.

Less creative solutions would be that a firm's standard commercial hourly fee is simply discounted to reflect the existence of a guaranteed stream of work and economies of scale. This is equivalent to the fee that could be expected if the administrator was dealing with an informed client who has the choice of multiple service providers to undertake repetitive work.[154]

4 *Administrator Appointment Process*

To facilitate lower cost administrators coming forward and to foster alternative approaches to the traditional billable hour, the courts need to promote some form of competition between potential SDS administrators. This could include some form of auction or tender process. Auctions have been used in the US by courts to select the lawyer that will represent the group members in a class action.[155] The Australian courts have preferred to speak of tenders to the extent they have considered the concept.[156]

The mechanics of a tender process would need to be addressed. A straightforward approach would be to have the solicitor that seeks settlement approval to continue to put forward an SDS. The court would review the SDS and approve it as currently occurs. The approved SDS would then be put out to tender. A variation on this process would be to allow a tenderer to also put forward an alternative SDS. The tender process may also require that participating group member information, and possibly legal analysis of their claims, be provided to tenderers. This would necessitate steps to protect confidentiality, privacy and legal professional privilege.

A registrar/associate judge, court-appointed expert or referee would review the tenders and provide a report and recommendation to the judge who would

153 See Judith Resnik, 'Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships among Litigants, Courts, and the Public in Class and Other Aggregate Litigation' (2017) 92 *New York University Law Review* 1017, 1058, citing Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, HR 985, 115th Congress § 103(a) (2017); Rick Maese, 'Ten Months after NFL Concussion Settlement, Most Players Haven't Seen a Dime', *The Washington Post* (online), 10 November 2017 <https://www.washingtonpost.com/sports/ten-months-after-nfl-concussion-settlement-most-players-havent-seen-a-dime/2017/11/10/9df64c28-c56b-11e7-afe9-4f60b5a6c4a0_story.html>.

154 Robert E Litan and Steven C Salop, 'Reforming the Lawyer-Client Relationship through Alternative Billing Methods' (1994) 77 *Judicature* 191, 194–5.

155 See, eg, Jill E Fisch, 'Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction' (2002) 102 *Columbia Law Review* 650; *Kirby v Centro Properties Ltd* (2008) 253 ALR 65, 73 [34] (citing examples). Auctions in class actions have also been put forward as a method to compensate group members or finance class actions: Jonathan R Macey and Geoffrey P Miller, 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform' (1991) 58 *University of Chicago Law Review* 1, 106–16; Randall S Thomas and Robert G Hansen, 'Auctioning Class Action and Derivative Lawsuits: A Critical Analysis' (1993) 87 *Northwestern University Law Review* 423; Tyler W Hill, 'Financing the Class: Strengthening the Class Action through Third-Party Investment' (2015) 125 *Yale Law Journal* 484.

156 *Lifeplan Australia Friendly Society Ltd v S&P Global Inc* [2018] FCA 379 (8 March 2018) [36]; *Caason Investments Pty Ltd v Cao [No 2]* [2018] FCA 527 (16 April 2018) [158].

have responsibility for making the final selection. The auction process in the US teaches that evaluating the qualitative aspects of a bid, such as the people and processes, can be difficult.[157] Beach J's comments in the Bellamy's class action above reflect this concern, ie that low cost may mean low quality.[158] However, it needs to be recalled that the high quality legal representation that may have been needed to litigate the case is not the skill set needed to distribute the settlement funds. The second observation is that bids based on different forms of charging may be difficult to compare.[159] For example, how does a court choose between an hourly rate, a fixed fee or some other form of AFA when it will have incomplete information, such as how long the process will take? There is no escaping this dilemma but courts have undertaken this analysis in the context of comparing the funding arrangements in competing class actions.[160] The court has a clear goal: to minimise the cost to group members for a timely and accurate (ie in accordance with the SDS) distribution of compensation.

It must also be recognised that not every SDS will involve sufficient time and expense that a tender process is worthwhile, because the tender itself will cost money and take time.[161] Indeed the spectre of a tender process may see costs fall.

E *Technology*

Technology has been adopted in class actions to communicate with group members (eg through email, webpages and social media)[162] and to record and manage group member data (eg through databases).[163] The cost and delay experienced with the KEK SDS raise for consideration whether technology can go further, and not just collect and record information, but process the information through a program or algorithm to determine the payment due to a group member. More specifically, could technology be used to automate the determination of a 'significant injury', or to assess the heads of damage for personal injury, including pain and suffering, for economic loss and for property damage? In the past, such questions would not have arisen because technology was incapable of such tasks. Today such

157 Michael Legg, 'Entrepreneurs and Figureheads — Addressing Multiple Class Actions and Conflicts of Interest' (2009) 32 *University of New South Wales Law Journal* 909, 922.

158 See above n 138 and accompanying text.

159 Ibid.

160 See, eg, *Perera v Getswift Ltd* (2018) 357 ALR 586; *Impiombato v BHP Billiton Ltd [No 2]* (2018) 132 ACSR 428.

161 See, eg, *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2018) 358 ALR 382, 414–15 [149] deciding against a tender where the SDS costs in the shareholder class action was $250 000.

162 See, eg, Alex Boxsell, 'Business Beware: Class Actions Go Viral', *The Australian Financial Review* (online), 24 September 2010 <https://www.afr.com/business/business-beware-class-actions-go-viral-20100924-iuto6>; *Matthews v SPI Electricity Pty Ltd [Ruling No 13]* (2013) 39 VR 255, 280 [100] (utilising a webpage, Facebook page and Twitter); *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [6] (electronic survey and questionnaire).

163 See, eg, *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [17]; Victorian Law Reform Commission, above n 81, 148 referring to software solutions offered by Epiq, Analytics Consulting LLC and JND Legal Administration.

a possibility must be considered due to the increasing capabilities of artificial intelligence.[164]

Two issues require consideration. First, is technology sufficiently developed to undertake such steps, and second, are there sufficient economic incentives for someone to make the investment to create such technology?

Technology is able to process large quantities of data to extract the necessary information to answer legal and medical questions.[165] As a result, pre-existing medical records or insurance claims could be fed into an SDS process. In the KEK SDS, the administrator was able to obtain information from Centrelink, private health insurers and Medicare to process reimbursements.[166] However, in a mass tort SDS, some of the necessary information may not pre-exist. Focusing on I-D claims, data may need to first be created through a physical or psychological examination. Technology is being developed to undertake medical diagnosis that is more accurate, more efficient and faster than a healthcare provider.[167] For example, IBM's Watson and Google's DeepMind combine big data and machine learning to undertake diagnosis of cancer, macular degeneration and kidney injury.[168] Technology for diagnosis could be converted to technology for assessing injury. Indeed, while accurate disease diagnosis is crucial as errors may result in fatalities, in an SDS the outcome is not life-threatening, and accuracy has already been traded-off with cost and delay. However, in many cases a face-to face interview or physical examination will still be needed.[169] Indeed, group

164 See, eg, Amir Husain, *The Sentient Machine: The Coming Age of Artificial Intelligence* (Scribner, 2017); Kevin D Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press, 2017) ch 1. However, it is prudent to recall 'Amara's Law' — the adage coined by Roy Amara to the effect that '[w]e tend to overestimate the effect of a technology in the short run and underestimate the effect in the long run': Rodney Brooks, 'The Seven Deadly Sins of AI Predictions', *MIT Technology Review* (online), 6 October 2017 <https://www.technologyreview.com/s/609048/the-seven-deadly-sins-of-ai-predictions/>.

165 See, eg, Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (Mariner Books, 2014); Eric Siegel, *Predictive Analytics: The Power to Predict Who Will Click, Buy, Lie, or Die* (Wiley, 2016).

166 *Matthews v AusNet Electricity Services Pty Ltd [Ruling No 40]* [2015] VSC 131 (4 May 2015) [19].

167 Kori M Klustaitis, 'Dr Watson Will See You Now: How the Use of IBM's Newest Supercomputer Is Changing the Field of Medical Diagnostics and Potential Implications for Medical Malpractice' (2012) 5 *Biotechnology and Pharmaceutical Law Review* 88, 97; Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press, 2015) 166; Laura Yan, 'Chinese AI Beats Doctors in Diagnosing Brain Tumors', *Popular Mechanics* (online), 15 July 2018 <https://www.popularmechanics.com/technology/robots/a22148464/chinese-ai-diagnosed-brain-tumors-more-accurately-physicians/>.

168 Susskind and Susskind, above n 167, 48; Stephen Armstrong, 'The Computer Will Assess You Now' (2016) 355 *British Medical Journal* <https://dx.doi.org/10.1136/bmj.i5680>; Giorgio Quer et al, 'Augmenting Diagnostic Vision with AI' (2017) 390 *Lancet* 221. However, progress has been hampered due to data quality problems in the training data sets: R B Altman, 'Artificial Intelligence (AI) Systems for Interpreting Complex Medical Datasets' (2017) 101 *Clinical Pharmacology & Therapeutics* 585; David H Freedman, 'A Reality Check for IBM's AI Ambitions', *MIT Technology Review* (online), 27 June 2017 <https://www.technologyreview.com/s/607965/a-reality-check-for-ibms-ai-ambitions/>.

169 See White, 'Special Referee's Report' (20 June 2016), above n 3, 34 (referring to the file operators (generally paralegals) who interviewed claimants as needing 'tact, skill and compassion' for obtaining details about loss of life and treasured possessions). However, robots that interact with humans are being developed: M Nazmul Huda, Hongnian Yu and Shuang Cang, 'Robots for Minimally Invasive Diagnosis and Intervention' (2016) 41 *Robotics and Computer-Integrated Manufacturing* 127.

members may desire it.[170] The information on injury could then be combined with other data (such as earnings and medical expenses) to be evaluated in accordance with the substantive law for compensation as expressed in the SDS to determine an amount of compensation.[171] Technology should be introduced into the process where it can best save time and money without adverse impacts on other concerns such as fairness.

However, the investment needed to develop the required technological capabilities is not incentivised by the current system where the lawyer from the class action automatically becomes the administrator and charges their usual hourly fee. Outsiders have no incentive to create an automated SDS process. Moreover, a more efficient SDS process would result in a lower fee to the incumbent lawyer. The above suggestion that courts need to promote some form of competition between potential SDS administrators applies equally to the development of technological solutions. If the court is prepared to employ a tender process, then this provides an opportunity for the innovative provider of SDS services to come forward and it also motivates the incumbent lawyer to reduce cost and delay.

VIII CONCLUSION

The administration of an SDS necessarily involves some cost and delay, primarily to ensure fairness. However, the aim should be to minimise cost and delay as both harm the group members that the class action was meant to assist. The cost of administering the SDS reduces the quantum available for compensation. Delay in distributing the funds prolongs hardship and prevents finality.

This article has chronicled the operation of the KEK SDS to demonstrate why cost and delay occur in the pursuit of fairness. It also explains the steps that were taken to try and minimise cost and delay while assuring fairness. This article also suggests that more can and should be done.

The above discussion suggests there are four ways forward. The first is to employ interim distributions which result in some compensation being distributed more quickly. However, this approach may increase costs and delay final payment.

Second, a fast-track component to an SDS or matrix SDS could reduce cost and delay. However, for the matrix SDS, costs are front-loaded and much would turn on the particular size and complexity of the claims in the class action. Further,

170 See, eg, Carrie Menkel-Meadow, 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road' (1995) 80 *Cornell Law Review* 1159, 1216 ('some claimants will want personal contact with [a] third party … who can demonstrate some human empathy for what has happened as well as award appropriate damages').

171 'New Device Predicts Personal Injury Outcomes', *New Law Journal* (online), 7 November 2014 <https://www.newlawjournal.co.uk/content/new-device-predicts-personal-injury-outcomes>; Michael Williams, 'Lawyers, Technology and Dispute Resolution' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis Butterworths, 2016) 339, 347–8; Brenna Hughes Neghaiwi and John O'Donnell, 'Zurich Insurance Starts Using Robots to Decide Personal Injury Claims', *Reuters* (online), 19 May 2017 <https://www.reuters.com/article/zurich-ins-group-claims/zurich-insurance-starts-using-robots-to-decide-personal-injury-claims-idUSL2N1IK268>.

how much design work would need to be specifically undertaken for the SDS, compared to repurposing discovery and expert evidence that had been incurred as part of the litigation, would be important. Both would require consideration of to what degree a reduction in precision in the calculation of compensation may occur compared to an individualised SDS and its associated cost and delay.

The third approach is to seek to reduce costs by being prepared to reject the current status quo of the class action lawyers becoming the administrator and employing time-based billing. Courts need to adopt an approach that permits other lawyers or non-lawyers to contest the role of administrator. Courts also need to be receptive to, or even better, proponents of new ways of charging such as alternative fee arrangements.

The final reform looks further into the future and seeks to encourage the use of technology to reduce cost and delay. When such technology would become available is unclear. However, the courts need to ensure that innovation is not being discouraged by existing practices.

The SDS process, although occurring post-settlement, must, like civil justice generally, balance fairness, cost and delay. Achieving that balance is critical to the access to justice that the class action process delivers to group members.