

The Executive Director
The Australian Law Reform Commission
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26 June 2018

Submission to Inquiry into Class Action Proceedings and Third Party Litigation Funders: from Vicki Jane Ruhr, Kilmore East – Kinglake Bushfire Class Action Group Member and Advocate

Dear Executive Director,

I welcome the Australian Law Reform Commission's Inquiry into Class Action Proceedings and Third Party Litigation Funders; and for the opportunity to put a Submission which I hope shall ably assist the Commission when considering what changes should be made to Commonwealth legislation to implement its recommendations.

My Submission intends to be evidence and example-based and shall largely talk to the following Terms of Reference topics, from the perspective of a directly-involved and participatory Class Action Group Member, of what is now widely recognised as one of Australia's largest and most significant Class Actions on record*¹, the **"Black Saturday"** Kilmore East – Kinglake Bushfires Class Action*²:-

- **the increased prevalence of class action proceedings in courts throughout Australia, and the important role they play in securing access to justice;**
- **the importance of ensuring that the costs of such proceedings are appropriate and proportionate;**
- **the importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards;**
- **any other matters related to these Terms of Reference**

*¹ Below are the three largest class actions in Australia's history to date.

SP AusNet/Utility Services Group -This class action lawsuit was filed on behalf of the 10,000 survivors of Victoria's 2009 bushfires and the 119 people who died. SP AusNet and Utility Services Group were found responsible for a faulty electricity cable which caused the start of the fire. In 2014 AU\$500 million was paid to those effected.

Australian Banks – There have been 10 class actions against Australian banks in relation to the fees they charged their customers. These banks included Commonwealth Bank, ANZ, Westpac and NAB. They were accused for syphoning AU\$400 million from customers. In 2015, ANZ won leave to appeal the decision that their late fees were too high to the High Court of Australia. This is an ongoing class action.

Sigma Pharmaceuticals– Sigma was accused of engaging in deceptive conduct by 600 shareholders. In 2012 the settlement was approved for AU\$57.5 million.

<https://www.shine.com.au/blog/class-actions/3-largest-class-action-lawsuits-in-australia/>

*²"The Victorian Supreme Court has begun hearing a class action in which about 10,500 people are seeking damages for losses in the Kilmore East-Kinglake fire. This particular fire storm claimed the lives of 119 people and destroyed more than 1200 homes and properties... That this case can be heard at all is a measure of the maturity of Australia's class-action regime, which in the past 15 years has generated substantial financial settlements for people and companies affected by negligence, misleading claims or the failure of company officers to properly carry out their duties." Editorial, The Age (Melbourne), 5 March 2013.

Please find my Submission as follows.

Summary

Class Action Group Members are at the root of a Class Action.

If persons did not opt-in or join-up there would be no bottom line, and no Class Actions.

The widely-acknowledged and increased prevalence of class action proceedings in courts throughout Australia brings to light the vital importance of ensuring Australia's Class Action regime, and role, is carefully examined on an intermittent basis in order and in turn to, uphold and safeguard the rights and interests of Class Members.

Aside from the increasing Class Action prevalence, it would be fair to surmise that the general public in Australia is not at all well-versed, &/or particularly knowledgeable about legal process and systems, let alone Class Actions and Litigation Funders; and this conjecture would translate for persons who opt to join a Class Action, with little if any, real awareness of the array of legal intricacies to follow.

It would be expected by those entering in to a Class Action foray that members of the law profession would abide by and follow ethical guidelines to ensure the interest of Class Members, before the court and not before the court, are protected.

It would also be imagined that due to the numerous claims that need to be resolved, and the likelihood of associated misunderstandings, errors, disagreements and potentially, conflict occurring, that contingencies would be developed ahead and adopted if and when required.

However, and regrettably, in my experience as a Class Member, what is professed and publicly espoused to be occurring is not always so accurately reflected in real life.

Clear and accurate information communication pathways and regular, easy-to-understand communication with Class Members can support a Class Action to run efficiently and dispel/circumvent inevitable myths and erroneous information potentially arising.

I became aware of Class Members of the Kilmore East – Kinglake Bushfires Class Action, living in my community that began to ventilate increasing concerns about the Class Action.

The concerns predominantly appeared to stem from a general lack of understanding and mistruths that were circulating surrounding the Class Action process; and I sought to help with addressing this circumstance by proposing the following to the Class Action Lawyers:

- a. that Community Information Sessions be held in the bushfire-affected communities to assist with dissemination of accurate information and provide an opportunity for questions and answers – with a view to also providing a more private area at the session venues for Class Members to discuss individual claims and any concerns; and*
- b. that a simple Frequently Asked Questions (FAQ) document be crafted and urgently issued to all Class Members*

The Lawyers indicated that they did not see a need for holding Community Information Sessions and this proposal was not discussed further

A helpful FAQ sheet was ultimately issued to all Class Members. I provided the Lawyers with a compilation of related topics/questions that were appearing on local community social media sites to help inform the FAQ document. This information was enthusiastically accepted by the Lawyers and utilised in the compilation of questions.

Lawyers need to provide clear and timely information to better assist Class Members to understand relevant legal issues and to make informed choices about action to be taken during the course of the Class Action a matter, consistent with the terms of the engagement.

In a significant Class Action, talking vast numbers of claimants, and subsequent gamut of work relating to assessments and distribution of settlements etc., it is inevitable that a great amount of information, processes/tasks and procedures will be involved and entail costs. Along with ensuring measures are taken to make certain that the costs of such Class Action proceedings are appropriate and proportionate, it is essential and needs to be made certain that the interests of Class Members are protected throughout the duration of a Class Action.

As per the general community, Class Members in general, cannot be presumed to have a sound legal awareness &/or the general wherewithal to navigate their way around the vast complexities of a Class Action. Sufferers of a catastrophe, such as a disaster or traumatic event, are likely experiencing resultant physical &/or psychological levels of impairment, PTSD, socio-economic constraints and vulnerability. Their position is often an invidious one, being less than capable of competently interpreting/completing onerous, associated legal paperwork and they are in need of extraordinary help to be able to understand or follow legal proceedings, as a direct result of their related suffering, damage and losses. Class Members require utmost protection, along with an appropriate level of support to ensure they have a proper understanding of the legal process involved; and proper and due access to justice.

Currently, there is nil support system in place.

Class Members that pose relevant and valid questions and/or seek clarification about any Class Action related processes must be heard and be treated with courtesy, at all times.

Currently Class Members are exposed and vulnerable.

In my experience, there is little if any real 'protection' for Class Members' interests, once a Trial has concluded.

The importance of ensuring that the interests of plaintiffs and class members are protected, in particular in the distribution of settlements and damages awards:

Unsurprisingly, given the complicated and multifarious nature of Class Actions, topics will undoubtedly arise from time to time that stimulate discussion. Issues arising from such topics will require clarification and resolving. Concerns and interests need to be duly acknowledged and this is particularly imperative once a Trial reaches conclusion and Members are no longer represented, legally.

Class Members cognisant of related topics of concern surrounding a Class Action will naturally be looking for answers and clarity in order to better understand the complex legal process and steps involved. Common issues must predominate over individual issues.

Once a Trial has concluded, the Class Members look to the Court and the representative Lead Plaintiff, with the expectation that related concerns are duly received and communicated to the relevant parties, and dealt with fairly and expeditiously.

The Court plays a supervisory role and oversees the Settlement and the Lead Plaintiff is assumed to have the ability to represent and protect Class Members' interests with diligence and constancy. It is the duty of the Lead Plaintiff to represent the interests of the Class and not just his or her own interests.

However, aside from loose guidelines there is an apparent lack of any legislation surrounding the role/function of a Class Action Lead Plaintiff in Australia, which means there is nil real assurance that Class Members' interests will be appropriately protected.

The plaintiff must also satisfy the Court, that as the representative party, she/he/it is able to bring the proceedings based on their:

1. ability to provide adequate representation
2. retaining sufficiently skilled and efficient legal representation
3. obtaining cost-effective financing sufficient to conduct the proceedings.

The aim is that the key requirements for a group proceeding to be successfully undertaken are now the subject of upfront judicial verification.

Adequacy of representation

Adequate representation would need to be defined. Adequate representation embodies the ideals of loyalty and common – not conflicting – interests. The Supreme Court of the United States has explained the meaning of adequacy of representation as follows:

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The adequacy inquiry under r 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent ... "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members".

Adequacy of representation also guards against "The self-proclaimed carrier of a litigious banner [who] may prove to be an indolent or incompetent champion of the common cause in the courtroom" as described by Brennan J in *Carnie v Esanda Finance Corporation Ltd.*

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A suggested definition is that it means the ability to represent and protect group members' interests with diligence and loyalty.

Alternatively, rather than referring to loyalty, reference could be made to an alignment of interests so that no conflict of interest arises. <https://www.austlii.edu.au/au/journals/UNSWLRS/2017/57.pdf>

An example of an unfavourable and injurious set of circumstances that directly resulted due to Class Members' interests not being protected is provided in the illustration as follows:-

It became evident during the course of the Black Saturday Class Action(s), there were measures afoot being exercised to try to discredit concerned Class Members that began to exhibit worries about the Settlement Scheme process – [REDACTED]

When Class Members began to learn, inadvertently, that the Settlement Scheme was apparently encountering difficulties regarding management of the Assessment process, which was creating a "delay" in the distribution of compensation payments, a group of concerned Class Members made a direct approach to the Scheme Administrator and respectfully requested a meeting to discuss the concerns about the Scheme and the apparent delay. After receiving a less than satisfactory response to relevant concerns put during the meeting;

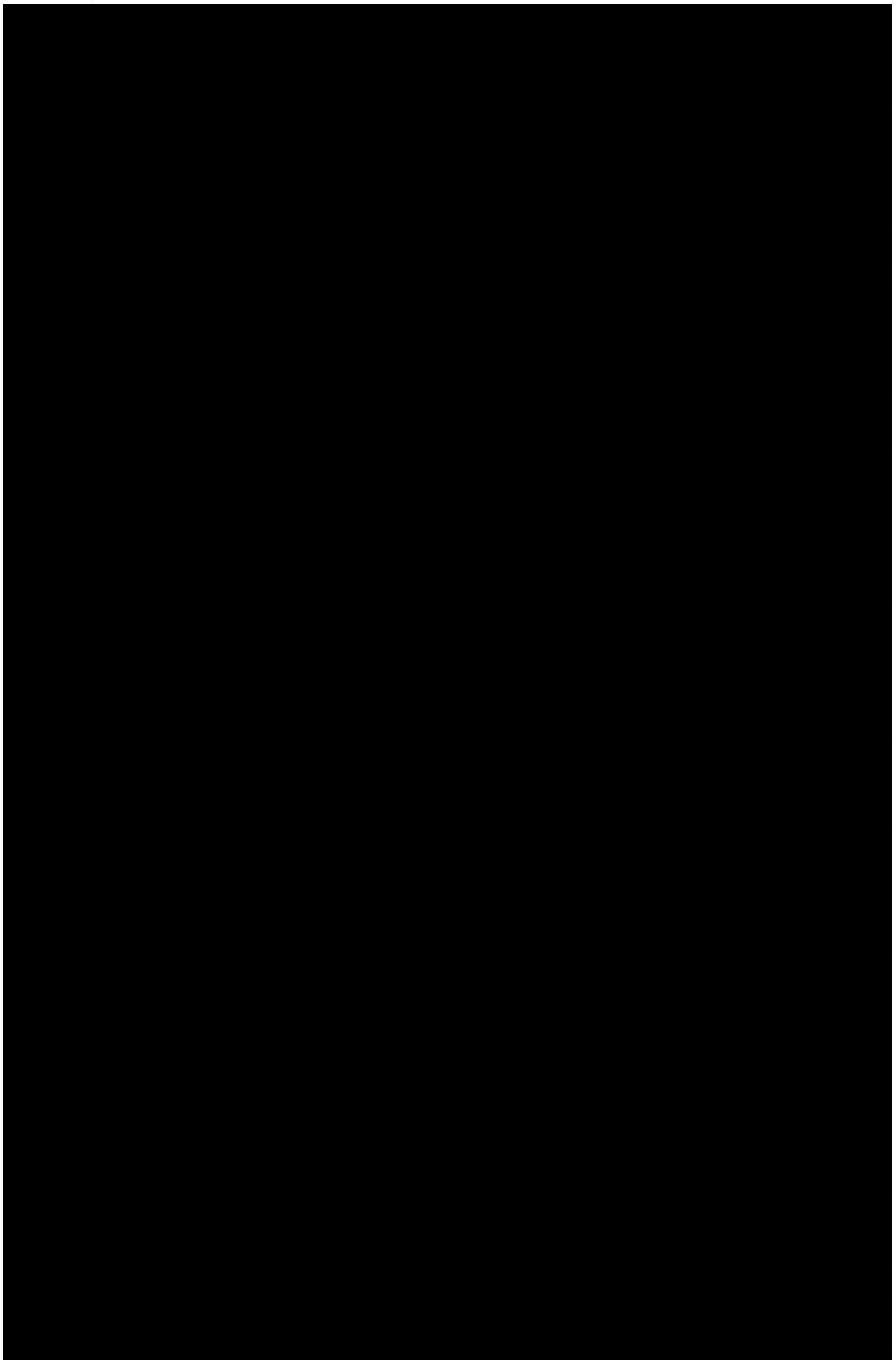
[REDACTED], they were left with nil other avenue or option than to approach the Court for assistance with resolving their concerns. Anxious Class Members that were highly reliant upon receiving their compensation to address the long-outstanding, unanticipated and increasing financial burden the Black Saturday Disaster had caused began to approach the media after 'discovering' payments were going to be delayed.

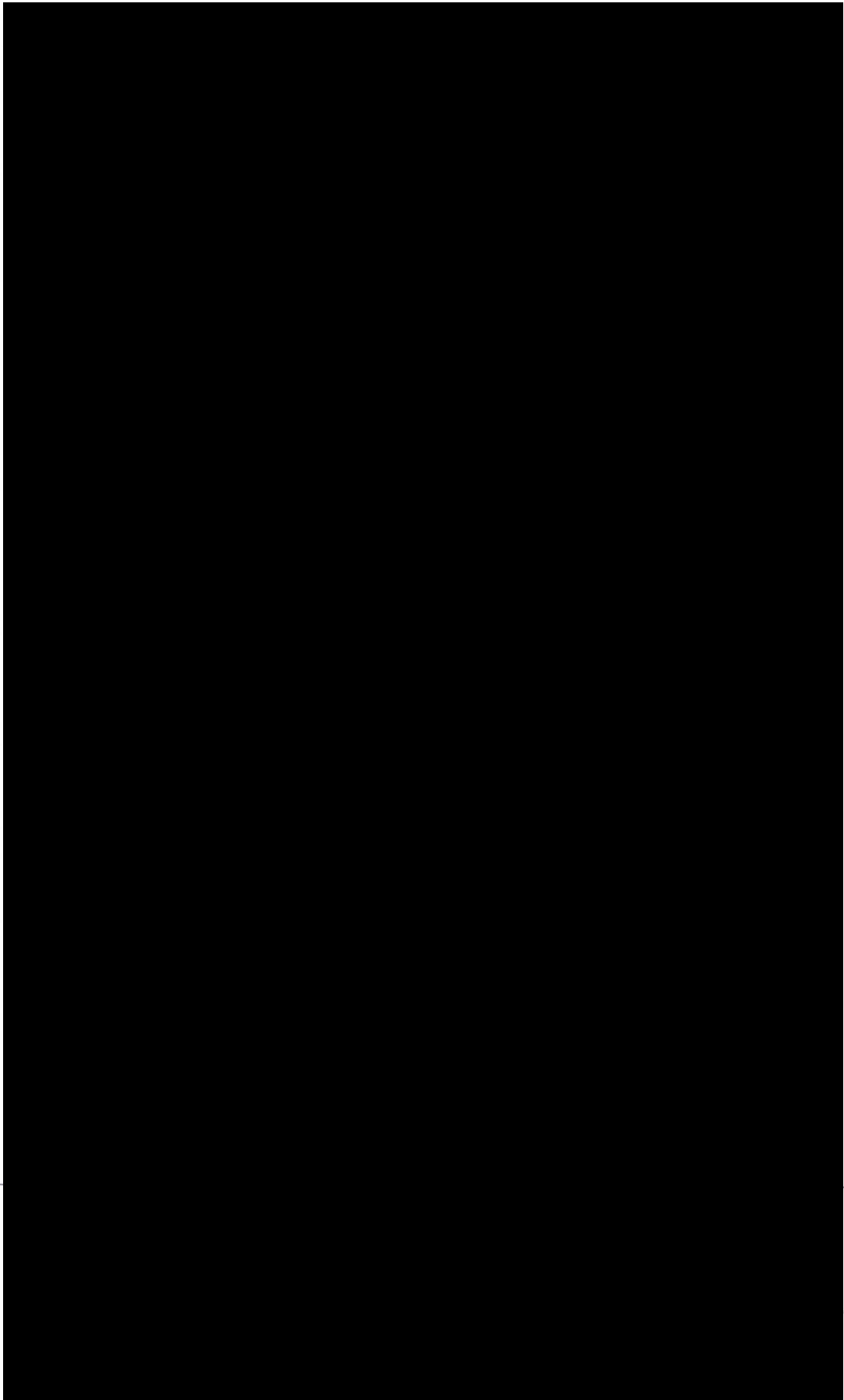
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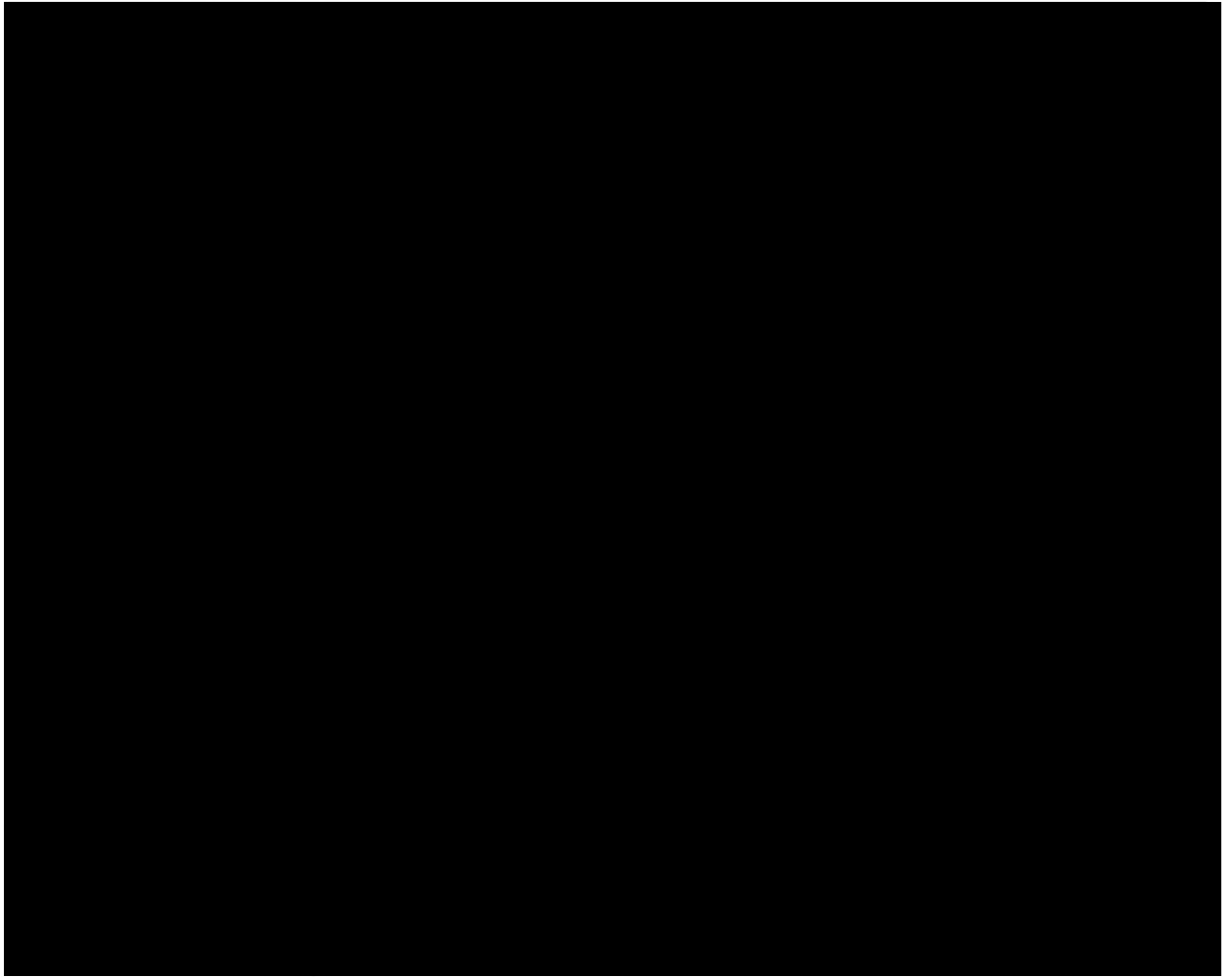
[REDACTED]

[REDACTED]

[REDACTED]







The importance of ensuring that the costs of such proceedings are appropriate and proportionate:

...in Victoria there is a gap in the disclosure obligations with which lawyers must comply, and in the court's express powers to order disclosure to plaintiffs about costs in funded proceedings, and particularly class actions. Lawyers are not expressly required to disclose information to the plaintiff about the funding fee and associated costs at the commencement of funded proceedings. <http://www.lawreform.vic.gov.au/content/4-disclosure-plaintiffs>

THE AUSTRALIAN

PIA AKERMAN THE AUSTRALIAN 12:00AM November 30, 2016

Schism splits Black Saturday class action members

Tensions are mounting among Black Saturday victims who joined landmark class actions, as some members face criticism for raising questions about the costs charged by Maurice Blackburn and a multi-million-dollar tax bill that may reduce payouts.

Two Victorian Supreme Court judges will today question a costs assessor who has approved the legal firm's bills for administering the \$794 million Murrindindi and Kilmore East settlement schemes, with disgruntled victims given the opportunity to probe the auditor as they seek court orders for a fresh review.

More than two years after the Kilmore East case settled for an Australian record figure of \$494m, class action members still await compensation although Maurice Blackburn has received more than \$100m in costs and administration fees.

At least 20 people have sent letters to Maurice Blackburn raising concerns about the conduct of the settlement administration and an unexpected tax liability that the firm said this month could be as high as \$20m.

The firm and the cases' lead plaintiffs — Carol Matthews for the Kilmore East action and Katherine Rowe in the Murrindindi case — have responded by warning that extra and "superfluous" processes to scrutinise the settlements' handling could potentially delay payments more.

"The mechanisms for financial scrutiny, spot checks and double checks are all in place," Ms Matthews wrote in a letter to all claimants. "When will all this secondguessing and double-handling stop?"

Class action member Denis Spooner, who has challenged Maurice Blackburn's administration, responded in a letter to the court. "Throughout this entire process, all we have done is to ask questions and seek clarifications with regard to the scheme administration processes and to reassure ourselves all actions taken have been in the best interests of all class action members," Mr Spooner wrote, with his partner, Suzi Kerr.

"This is something we are well within our rights to do. We are all the more surprised at and disappointed by the scheme administrator's defensive, reactionary and inflammatory responses to our endeavours to have a few questions answered and his seeming attempts to shut us down."

Maurice Blackburn class action head Andrew Watson, who acts as the settlement scheme administrator, has repeatedly described concerns raised by Mr Spooner and fellow litigants Vicki Ruhr and Norman Archibald as based on incorrect information.

The area of Class Action “costs” is highly involved and difficult enough for the average person to get their head around, let alone a Class Member who is likely struggling with the entire Class Action process.

Why is much of the Class Action Settlement Distribution Scheme work, being predominantly administrative, task-based and accountancy-focused, exclusively being performed by Law Firms, including Senior Counsel, Principals and Associates, which is costly and also poses the potential and real risk of incurring a range of extra charges to the Scheme’s Settlement Fund?

Wouldn’t it be prudent to appoint professional firms that provide a full range of services and have the necessary resources and expertise surrounding compliance, auditing and reporting and maintaining good relationships with the tax authorities?

Surely, engaging a reputable professional firm that was ably-equipped would ensure a Settlement Distribution Scheme would be run more efficiently and effectively altogether – with reduced likelihood of extra-charges/expenditure that impacts upon the Scheme’s fund, and risks reducing the compensation outcome for Class Members.

An example of what can cost risk can occur when a Settlement Distribution Scheme is conducted by Law Firms that appear to lack the related resources to properly perform the job is as follows:-

- Maurice Blackburn Lawyers charged substantial costs to both the Kilmore East – Kinglake and Murrindindi Bushfire Class Actions Settlement Distribution Scheme for the *purchase of new software and programming and the provision of related training*. The software was for what was described by the Maurice Blackburn Scheme Administrator as “bespoke systems that have been developed exclusively for the Kilmore and Murrindindi Settlement Distribution Scheme”, and “Without this software and systems we would not have been able to conduct the settlement administration efficiently or cost effectively.”

These were not systems or software that Maurice Blackburn Lawyers had previously set up or required.

Indubitably, this newly acquired ‘asset’, being the systems and software, along with the programming and related training that was charged to and paid for out of one distinct Settlement Fund is conveniently set up and available for all subsequent Class Action Settlement Distribution Schemes, with nil cost-encumbrance to the Law Firm..

I ask is this type of situation at all fair, appropriate or acceptable?

Although a Cost Assessor can be appointed by the Court, reservations may be held by Class Members surrounding the independence, objectivity and competence of a Cost Assessor.

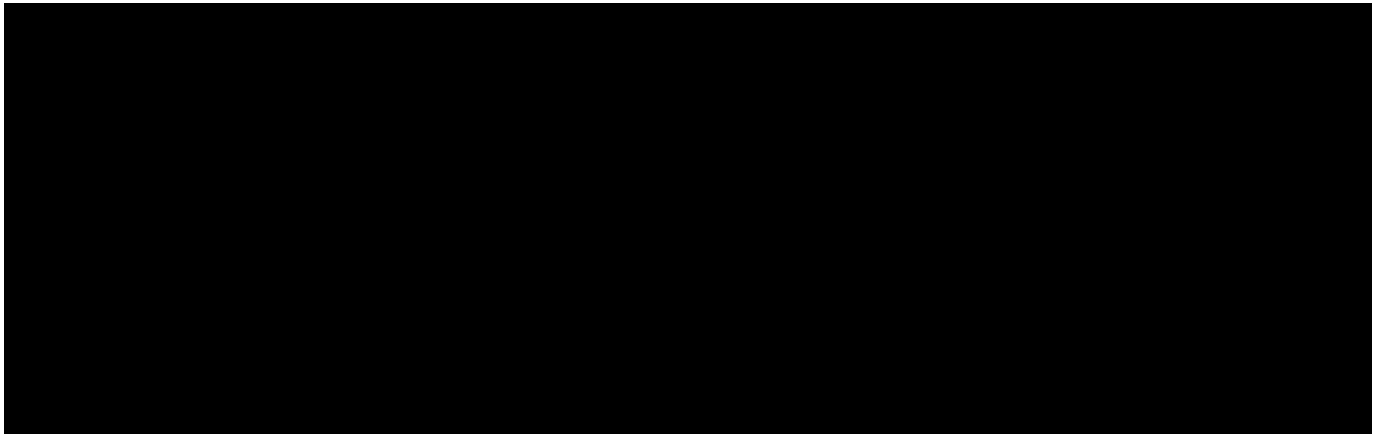
This arrangement may be fitting for anyone with any expertise and knowledge regarding scale of costs, scale rates, billing, fees, time etc., however, Class Members that do not have this proficiency are at a clear disadvantage to really know what is appropriate and proportionate in relation to costs.

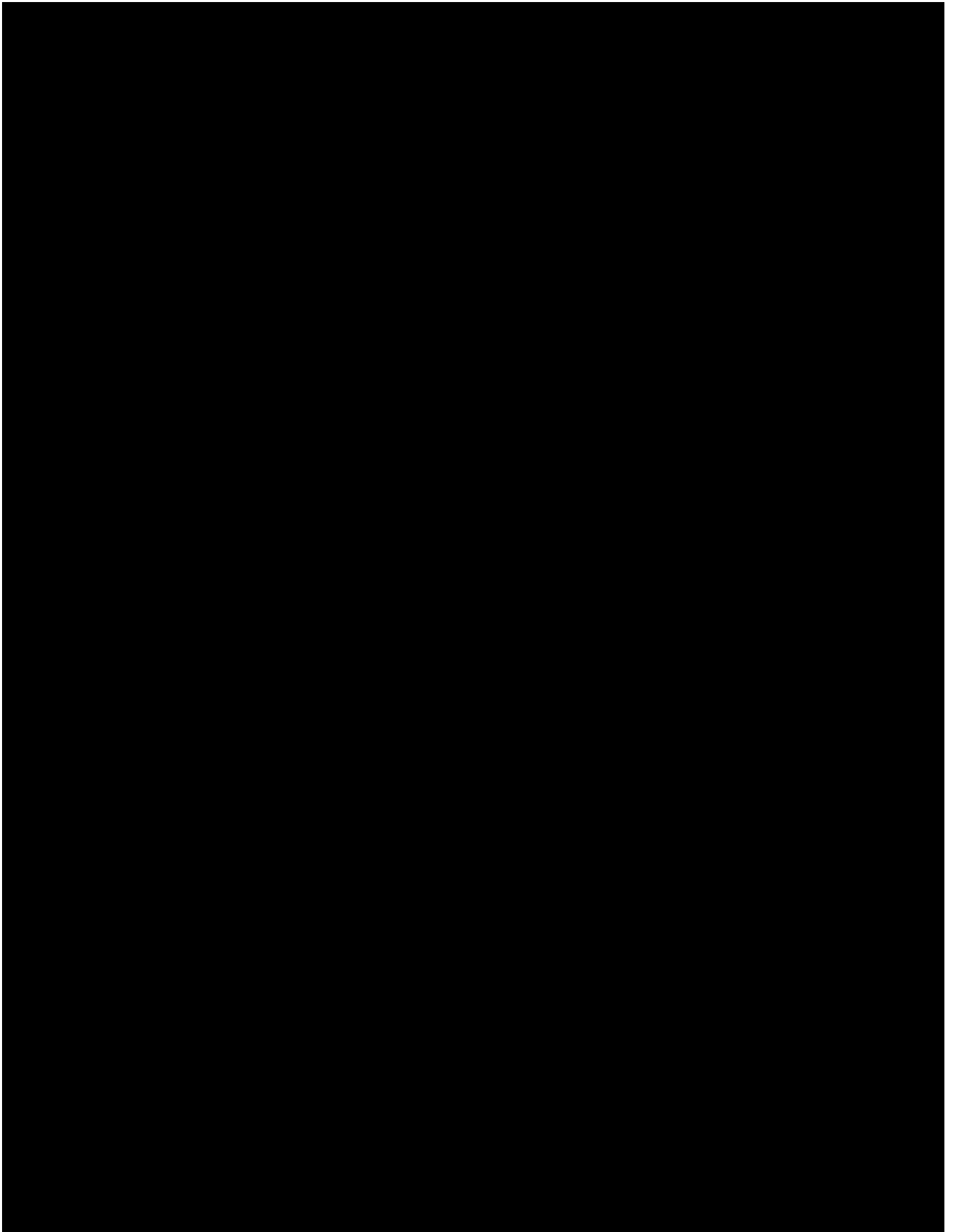
A Cost Assessor was appointed for the Black Saturday Bushfire Class Actions (Kilmore East – Kinglake & Murrindindi) subsequent to inquiries arising about the Scheme costs. The Cost Assessor was promptly *quarantined* from Class Members. Any interaction &/or discussion with Class Members outside the Court was disallowed - yet the Cost Assessor was free to engage and liaise with Class Action Lawyers, and presumably the Lead Plaintiffs.

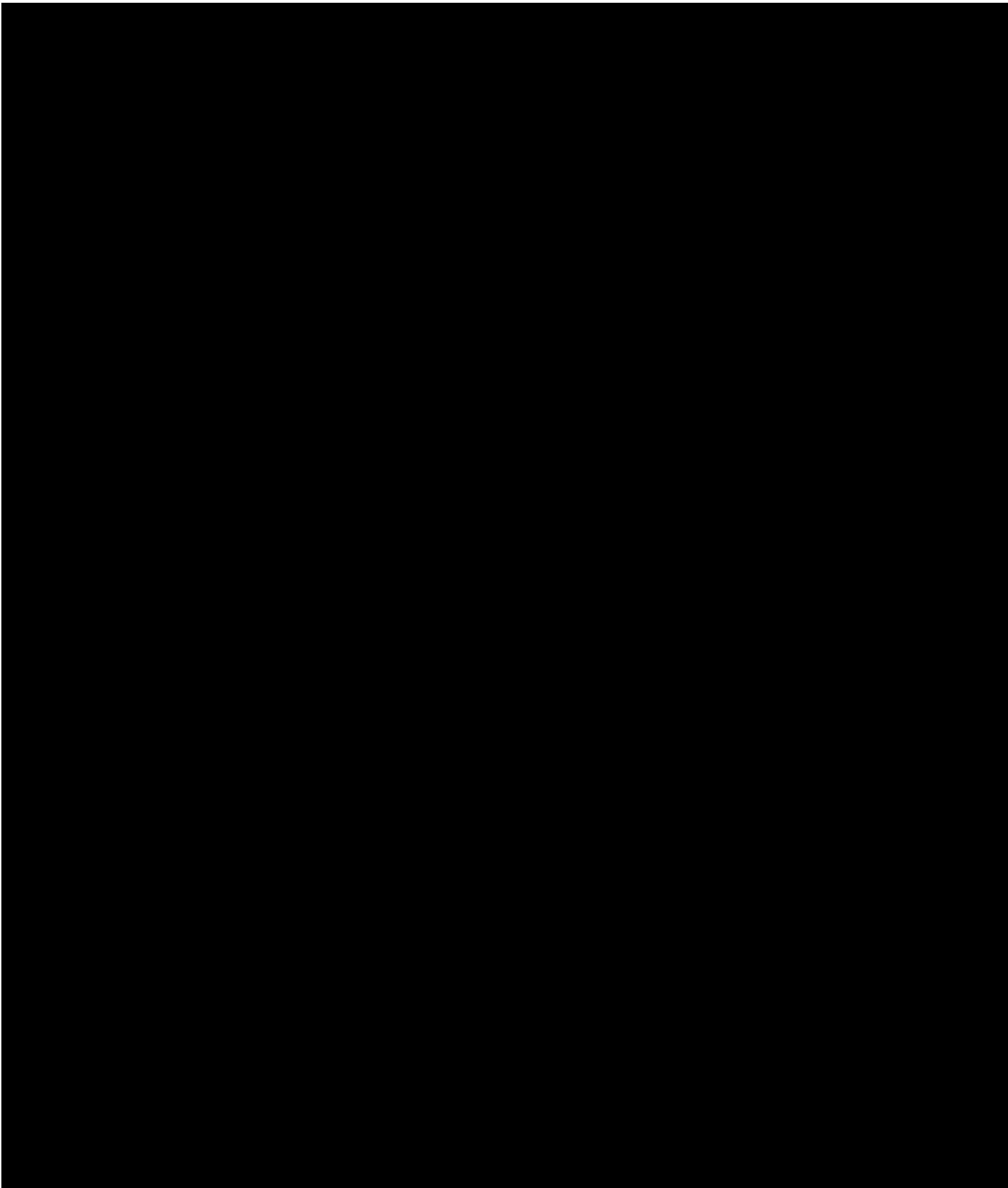
Cost Audit Reports were made available to Class Members upon request. However, Class Members, in the main were unaware of such Reports and to the best of my knowledge, didn't seek to request them or appear to be at all interested.

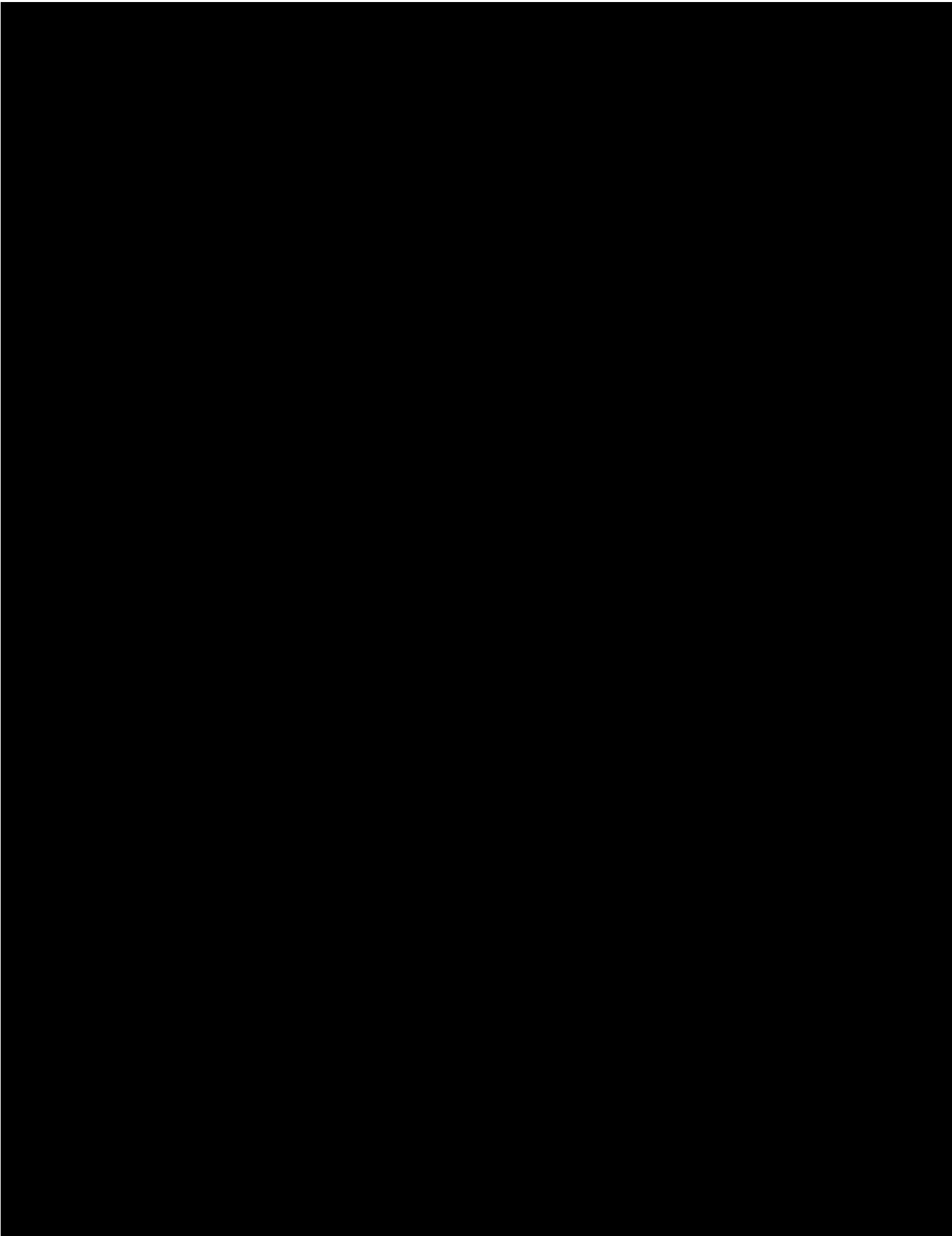
The Cost Assessor would be allotted time at the Bushfire Class Action CMC's to talk to the Reports, and questions could be put to the Cost Assessor following.

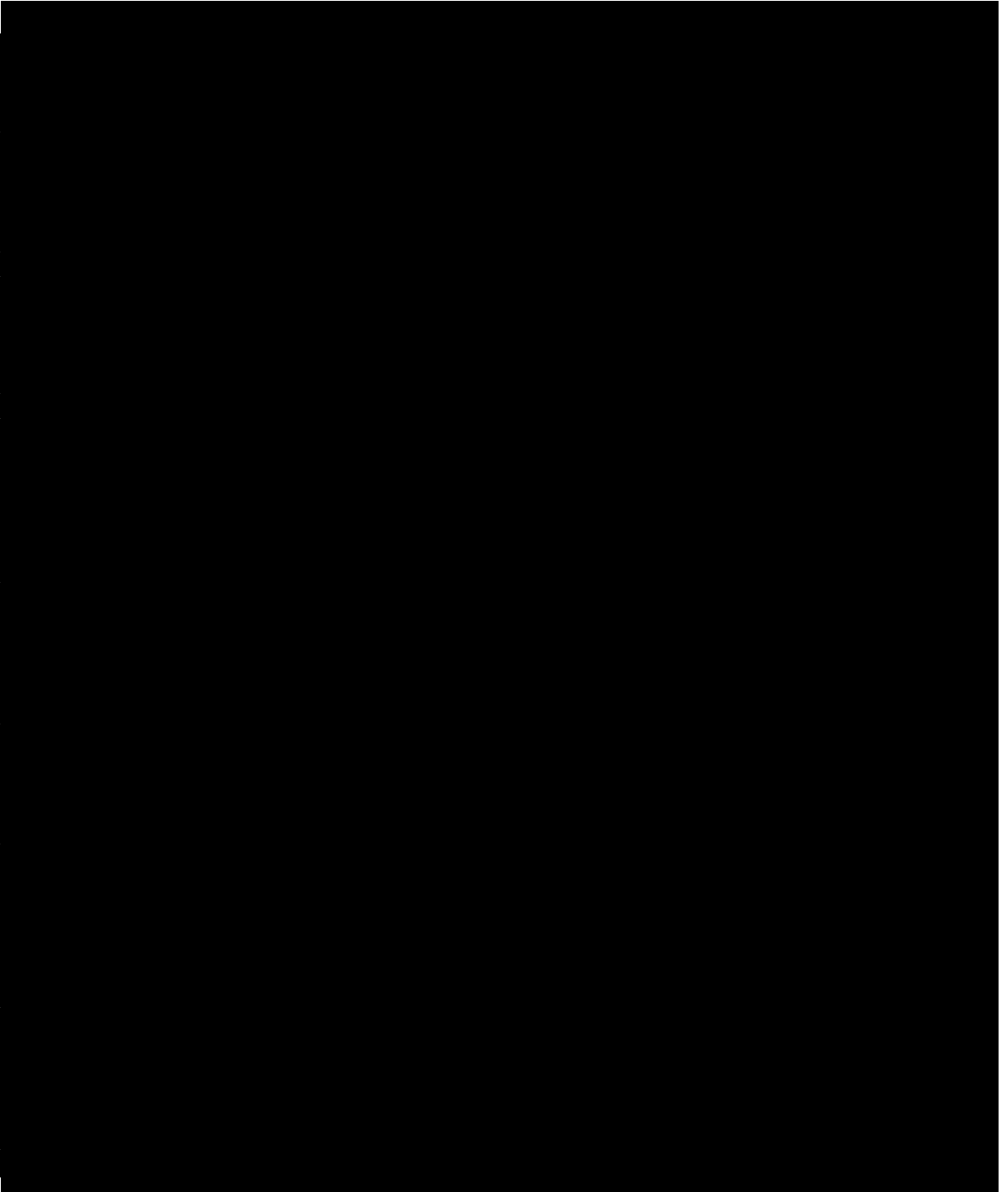
During an opening summation the Cost Assessor revealed to the Court that he was not the best with computers – accordingly, Class Members were not left with good deal of confidence upon learning this.

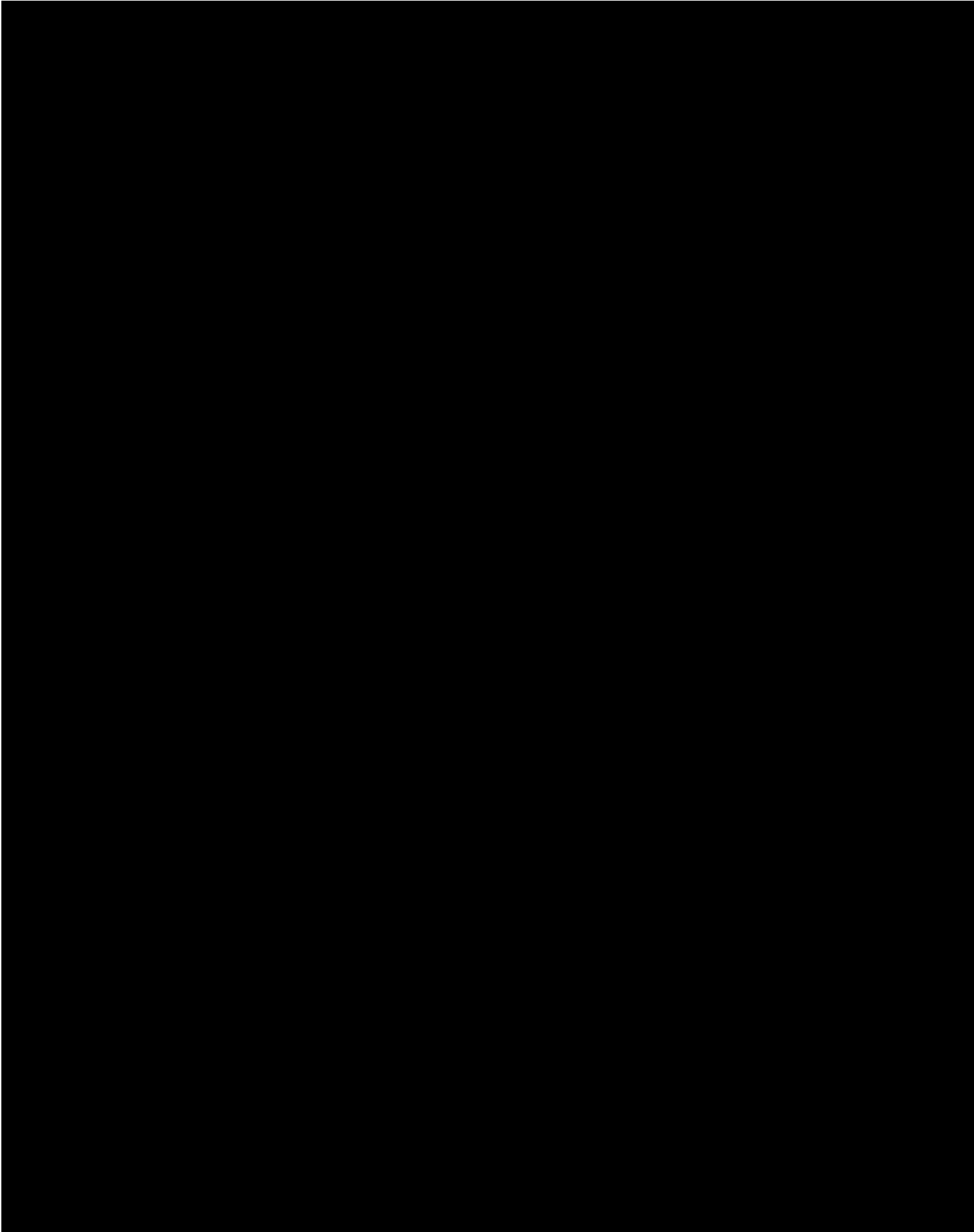


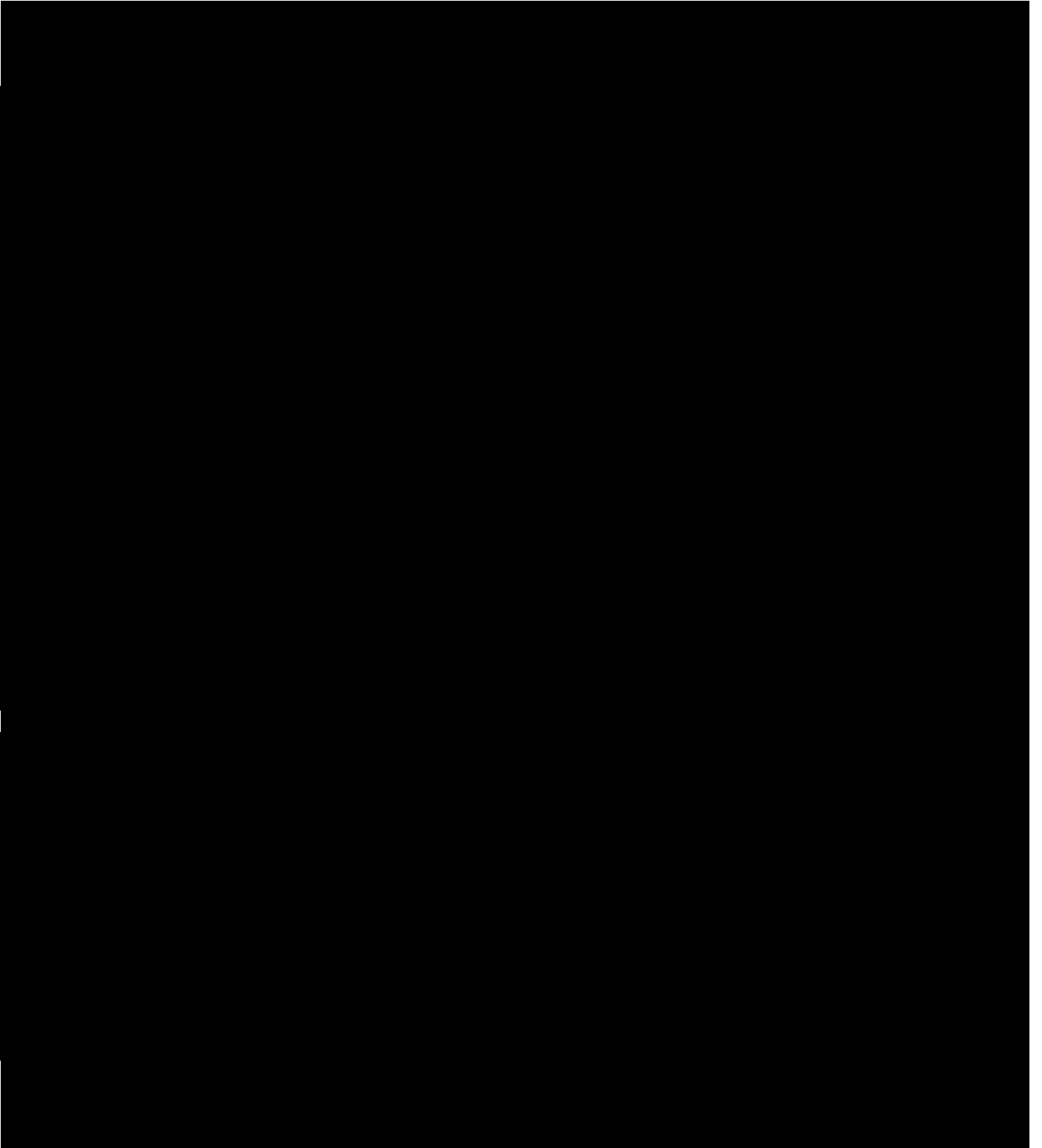


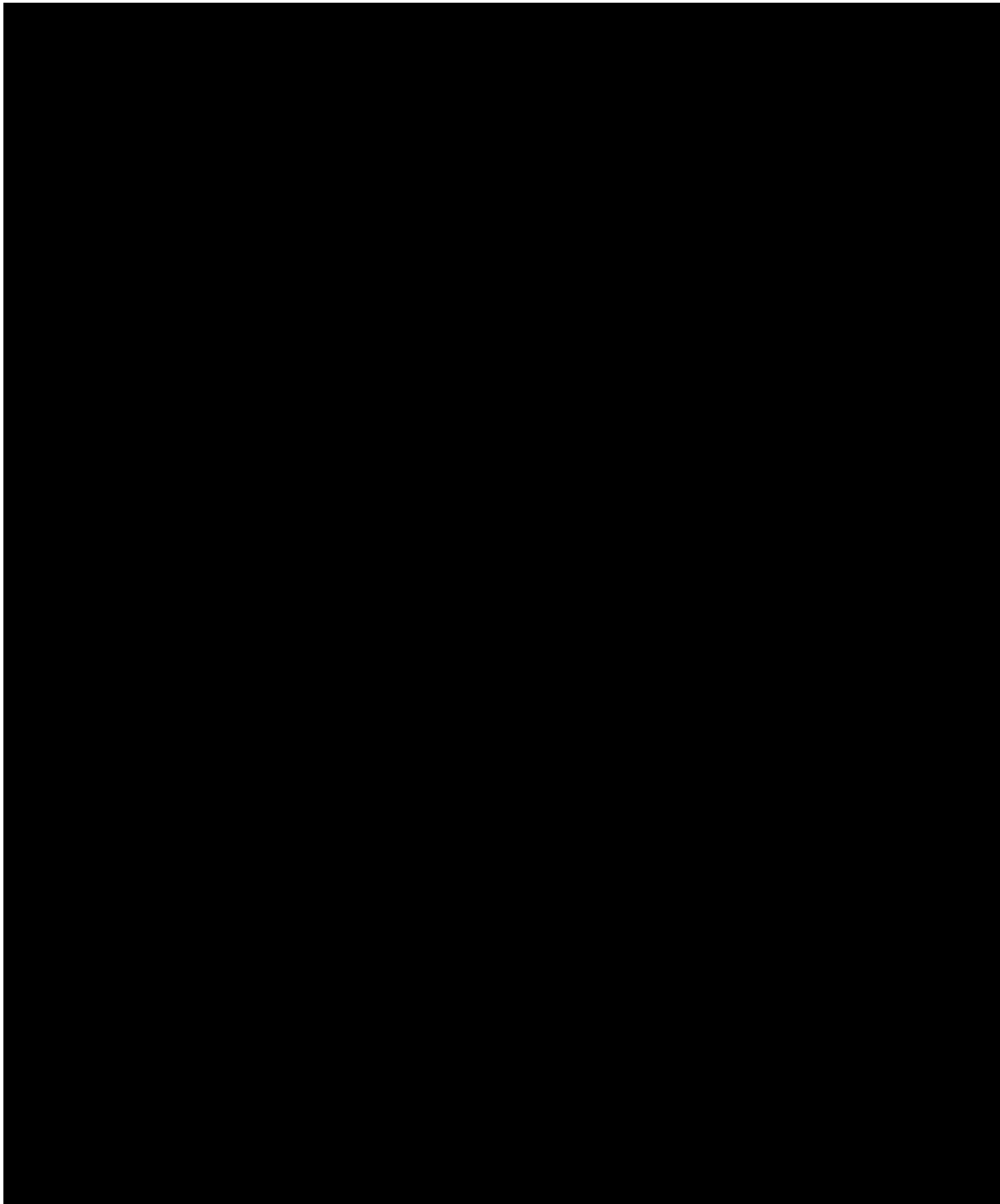


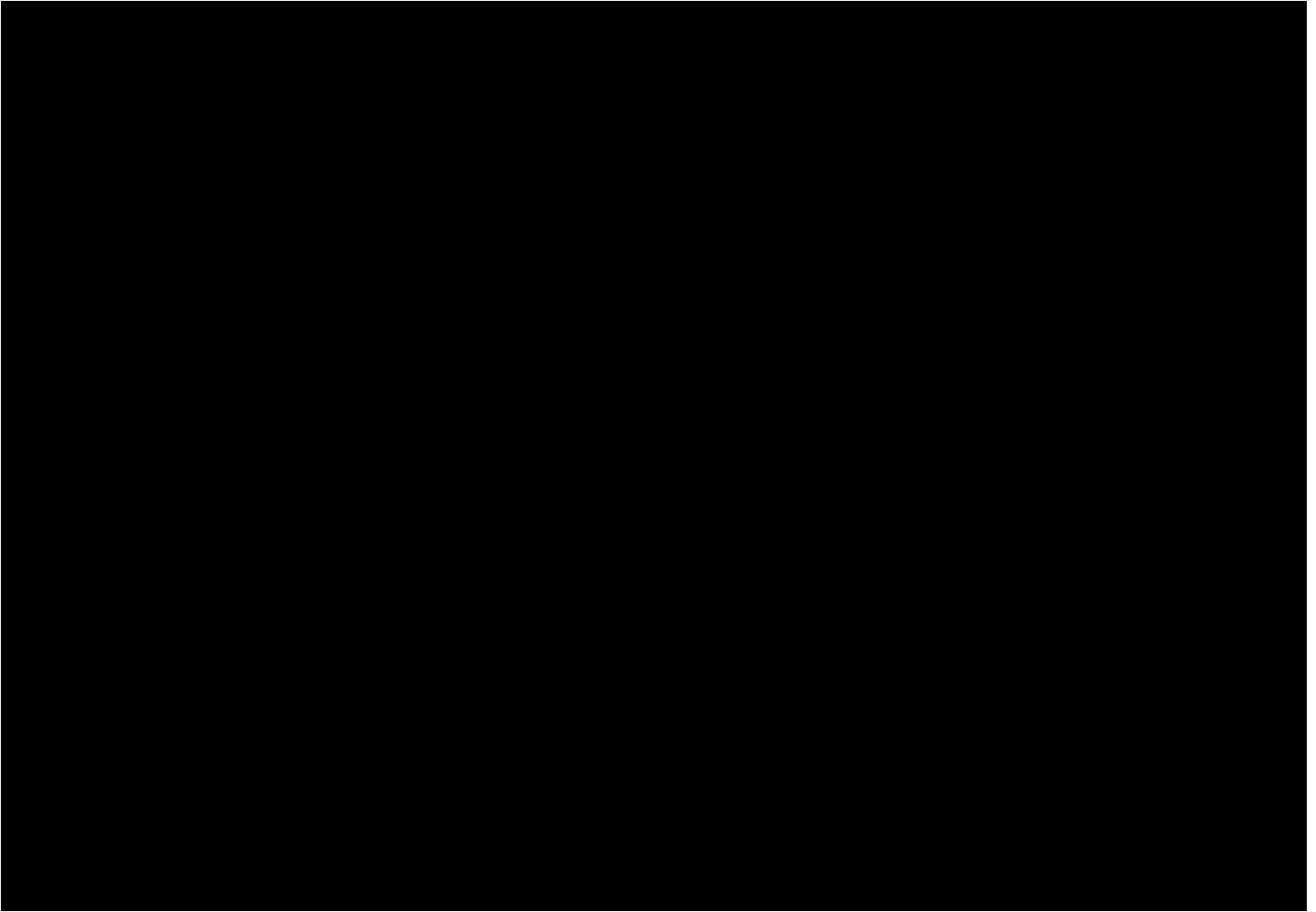


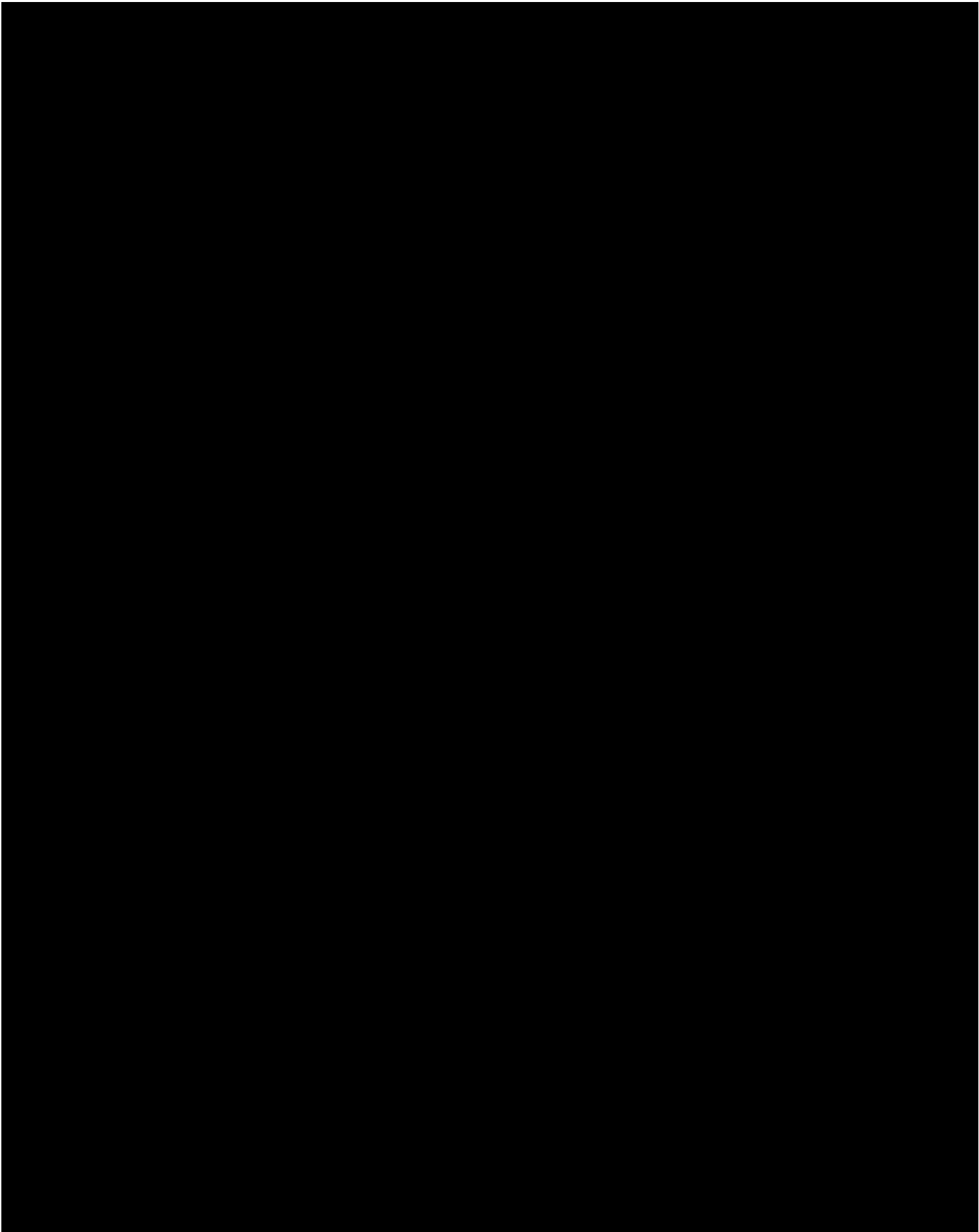


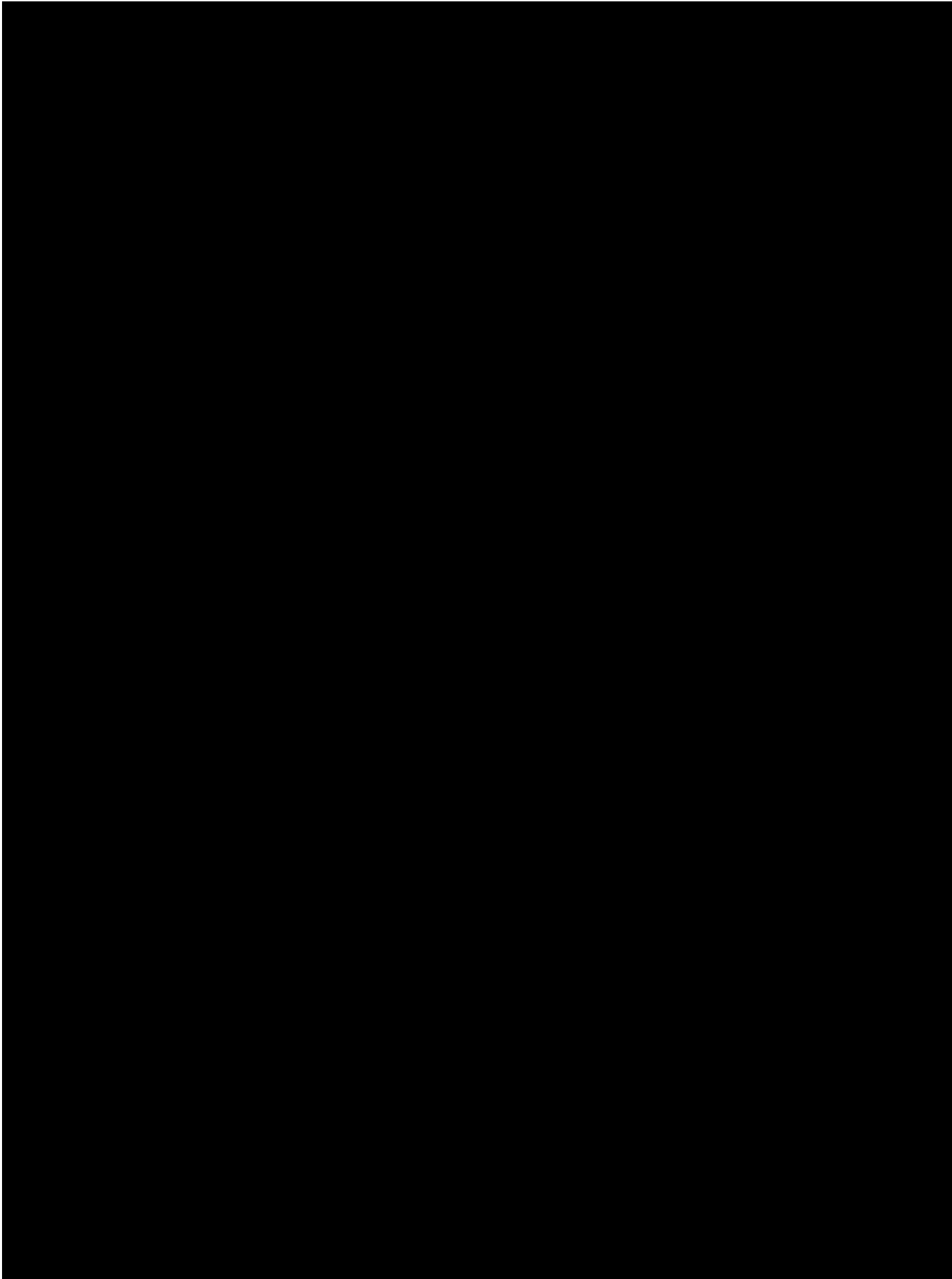












.....**end of document: Letter to Prime Minister and Senator Brandis**.....

Related material re 'costs' copied below for reference

Additional oversight of solicitors' costs

Proposal 7-1 Part 15 of the Federal Court of Australia's Class Action

Practice Note (GPN-CA) should include a clause that the Court may appoint a referee to assess the reasonableness of costs charged in a class action prior to settlement approval and that the referee is to explicitly examine whether the work completed was done in the most efficient manner.

7.19 It is common for the Court to be asked to approve the plaintiff's legal costs to be paid out of the settlement sum prior to any distribution on the basis that such costs are 'fair and reasonable'. It is common practice for the plaintiff's solicitors to rely on an affidavit prepared by a costs consultant which purports to set out a commercial and reasonable methodology consistent with the terms of any retainer.

7.20 Concern is often expressed as to whether such costs consultants are truly independent or whether they are likely to suffer from bias.²⁵ Competing expert reports increase the overall costs, which in turn reduces the ultimate return to the class members. The independence of experts must be assured. Thus, this Proposal would establish a panel of competent and reputable independent costs consultants from which the Court can select a referee. The Proposal seeks to reduce:

- conscious or unconscious bias in the preparation of reports as to the reasonableness of the costs charged;²⁶
- the costs incurred in relation to applications for Court approval of settlement by obviating the need for competing expert reports and/or the appointment of a contradictor; and
- reduce costs overall through enhanced scrutiny of costs incurred in class actions.

7.21 The use of referees in appropriate cases is consistent with the requirement that the Court apply any civil practice and procedure provision in a way that promotes the

24 Legg, 'Class Actions, Litigation Funding and Access to Justice', above n 6, 16.

25 *Caason Investments Pty Limited v Cao* (No 2) [2018] FCA 527 [113]–[116]; The Hon Justice GL Davies,

'The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System' (20th AIJA Annual Conference, 12 July 2002); NSW Law Reform Commission, Expert Witnesses, Report 109 (2005) [5.14].

26 *Caason Investments Pty Limited v Cao* (No 2) [2018] FCA 527 [123].

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quick, inexpensive and efficient resolution of proceedings in the Court consistent with the overarching purpose in s 37M of the FCA Act.

7.22 It is acknowledged that the appointment of a referee will not always be appropriate.²⁷ Additional costs, which ultimately come out of the settlement fund, may be incurred unnecessarily if the Court routinely appoints a referee without appropriate regard to the circumstances of the case. The appointment of a referee should remain a discretionary power.

The possibility of expert witness bias is amplified when an independent costs expert provides an opinion in a settlement approval application because: (a) the expert is engaged by a firm of solicitors which is, in reality, acting for itself in seeking that its costs be approved; (b) there is no opposing expert's report; and (c) there is usually no contradictor in the application.³⁰

30 Caason Investments Pty Limited v Cao (No 2) [2018] FCA 527 [116]

Other related matters

Settlement Objections

Whilst it is appreciated that there needs to be a clear and readily-accessible process in place in regards to putting a/any Class Action Settlement Objection regarding the final Settlement Orders/Decision, a review needs to urgently occur surrounding this process.

Specifically, an evaluation of the existing process appears long-due; and consideration of what is a suitably ample time-frame to provide for lodging an Objection; and in regards to what is the most efficacious way to ably ensure the Announcement & Instructions for lodging an Objection reaches all involved - Class Action Group Members do not all have access to, and/or read newspapers.

There needs to be increased recognition of the fact that Class Action Group Members, in the main, may simply not have the required wherewithal to fully comprehend the meaning and significance of what an Objection to a Settlement actually is; and how to go about lodging one, if desired.

Therefore, it is an important reality that assumptions have the known potential to misrepresent and mislead, and should be avoided at all costs by all parties involved in Class Actions.

Silence should not be assumed as, or taken for acceptance – refer below.

385 Notably since the notice of settlement was published, there has been no objection filed in respect of the proposed payment for costs and disbursements. Whilst, as I have said, the group members are not in possession of the detailed information that would allow them to assess in detail the costs sought, they are aware of the unprecedented scale of the proceeding and settlement sum, and the silence that has followed the notice of settlement is a significant factor. This is particularly so when one considers that a number of the group members have subrogated rights to insurers, who are sophisticated litigants, with experience of the reasonable costs of large scale litigation.

[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2014/663.html?stem=0&synonyms=0&query=title\(Matthews%20and%20AusNet%20\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2014/663.html?stem=0&synonyms=0&query=title(Matthews%20and%20AusNet%20))

It is important to note that several Members of the Class Action I have been involved with, have shared a number of relevant concerns and wanted to ask questions surrounding the Settlement; however, many disclosed that they were afraid to ask questions for fear of doing so, explaining that they were fearful that their individual Settlement may be adversely looked upon, or that the amount of their compensation would be potentially threatened.

It was also indicated by Members that they wouldn't have the first idea about how to write a letter, and/or that due to their circumstances, in a fraught and burdened post-disaster environment, they simply had no time and energy to do so.

This is particularly relevant when we are talking Class Members that have experienced a traumatic event and are suffering the effects of Personal Injury and likely PTSD, who are invariably experiencing resultant, ongoing levels of impairment &/or decline in their functioning and overall capacity.

Anecdotal accounts from Kilmore East – Kinglake Bushfire & Murrindindi Class Members attested to the invidious circumstance they found themselves in – similar sentiments were being expressed, such as “It’s just all legal gobbledygook” / “I cannot get my head around it” / “I’m not in a good place and can’t cope with all the information” / “I wouldn’t know how to even write, or where to write to with my questions” / “I cannot open or read any more ‘stuff’ about the Class Action” / “I’m done with it all, it’s all too much paperwork, I wish I’d never joined up” / “I have a panic attack whenever a legal letter comes in the mail”.

Also, when a Settlement is approved and subsequently announced soon after a Class Action Trial has concluded, a Class Action Group Member is in no position to anticipate or predict any potential “matters of concern” which may arise/unfold down track, during the Settlement Administration &/or Distribution; and which warrants putting an Objection.

CLASS ACTION SETTLEMENT DISTRIBUTION IN AUSTRALIA: COMPENSATION ON THE MERITS OR ROUGH JUSTICE?

MICHAEL LEGG*

However, in Australian class actions, the settlement distribution regime may only be decided after the time to opt out has passed.⁸² As a result, group members may only learn that they are being unfairly treated once their right to exit has expired.⁸³ This may mean that group members will make their decision to opt out based on the reputation of the class action, rather than the actual settlement distribution regime that is employed.

⁸² In some class actions that settle early the opt out and settlement notices may occur at the same time: *Inabu Pty Ltd v Leighton Holdings Limited* [2014] FCA 622.

⁸³ See *Kelly v Willmott Forests Ltd (in liquidation)* [No 4] [2016] FCA 323, [6] where the detrimental effect of a settlement term was not known at the time of the right to opt out. Murphy J raised for consideration the need to allow for a second right to opt out for group members where the first opt out opportunity occurred prior to the terms of a proposed settlement being made available to group members: [136][140].

<http://www.austlii.edu.au/au/journals/MqLawJl/2016/6.pdf>

Legg, Michael --- "Class Action Settlements in Australia - The Need for Greater Scrutiny" [2014] MelbULawRw 23; (2014) 38(2) Melbourne University Law Review 590

B Objections by Group Members

One obvious source of information is the reaction of the group members to the settlement. The lack of objections by group members has been seen as a sign that a settlement is not opposed and is a factor in favour of the settlement being fair and reasonable.^[30] However, ‘[w]here some group members object to a settlement or compromise and state their reasons for doing so, it is appropriate for the

Court to have regard to those reasons as a point of reference by which to determine matters of fairness and reasonableness'.^[31]

Reliance on a lack of objections has been identified as problematic because silence may not equate to acquiescence but rather reflect the high cost of objecting compared to the benefit to be obtained, or result from group members being unaware of the settlement, having insufficient information or miscomprehending the settlement notice.^[32]

Some Federal Court judges have refined the understanding of a lack of objections. In *P Dawson Nominees Pty Ltd v Brookfield Multiplex Ltd [No 4]* ('*Multiplex Shareholder Settlement*'), Finkelstein J observed that it is dangerous to assume that silence by group members equals assent but, in the instant case, the lack of objections could be given more weight than usual as most group members were institutional investors who had in-house legal departments, were experienced investors and were better placed than the ordinary investor to assess the benefits of the settlement.^[33] In *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* ('*Corrugated Cardboard Cartel Settlement*'), although it was acknowledged that 'some Group Members may have only a small stake in the action', comfort was obtained from all group members being 'business owners who should be able to assess the benefits (or disadvantages) of the settlement'.^[34]

While better resourced and more informed group members are better placed to object if they wish, the collective action problem persists in that the objector incurs costs alone in aid of a benefit that accrues to all group members. The costs for institutional investors may be greater than for individuals as they must give up the relative anonymity provided to group members and take centre stage in a settlement hearing. Institutional investors such as banks and insurance companies may not wish to be seen as litigating against other corporations with whom they may have a current or future relationship, there may be concerns at being identified as having made an unsuccessful investment, or more general reputational concerns such as being associated with class action litigation.^[35]

When objections are made they usually occur without legal assistance and are expressed to be against the amount of the settlement, the amount of legal fees or due to some idiosyncratic feature of the group member's claim.^[36] These objections almost never result in a settlement being rejected.^[37] Often this is because the objection involves a misunderstanding or is put forward without any evidence, compared to the affidavits on prospects of success, fairness of settlement and reasonableness of fees.^[38]

A reliance on a lack of objections and the poor quality of the objections that are made suggests group members need assistance.

<http://www.austlii.edu.au/au/journals/MelbULawRw/2014/23.html>

Use of a Case Managers and Implementation of Guardian or Contradictor

Case Management is a means for Class Action Group Member's interests are protected.

In situations where a Class Action has a vast number of Group Members, and where complex topics, questions, concerns and issues are expected to arise, Case Management could appropriately manage issues, efficiently provide clarification, and effectively achieve outcomes.

Case Managers could ably advocate for Group Members, optimise communication and address Group Member's needs through providing a support system, in an open and collaborative manner.

Refer to related material for reference below:-

CLASS ACTION SETTLEMENTS IN AUSTRALIA — THE NEED FOR GREATER SCRUTINY

MICHAEL LEGG* B Guardian for Group Members' Interests

The responsibility for the approval of a settlement, including protecting group members' interests, is an onerous and important role for the presiding judge. A potential reform to aid the judge is the use of a guardian for group members.⁹⁷ This reform deserves to be reiterated because it allows for the Court to create an adversary contest⁹⁸ which would otherwise be lacking, for representation of the interests of absent group members, monitoring of the parties, and assistance to the Court in understanding the mechanics and ramifications of the settlement.⁹⁹ These are issues which continue to present themselves in the class action context because of the complexities explained at the outset of this article.

In Australia in both *King v AG Australia Holdings Ltd* ('GIO Shareholder Settlement')¹⁰⁰ and the *Aristocrat Shareholder Settlement*,¹⁰¹ a 'contradictor' was appointed to represent the putative group members who sought to be included in the settlement but had failed to return a necessary form by the specified date.¹⁰² The contradictor was thought necessary because the lawyers for the applicant and group members were arguing against inclusion. The contradictor was a senior barrister who was paid by the lawyers for the applicants.¹⁰³ In the *Storm Financial Settlement* a settlement was challenged successfully on appeal by the Australian Securities and Investments Commission ('ASIC'), which intervened in the proceedings to object to the payment of a 35 per cent uplift to group members who had made a contribution to legal costs.¹⁰⁴ Although 28 notices of objection to the settlement were filed by group members¹⁰⁵ it was only ASIC that appeared at the hearing and made submissions explaining the objections to the settlement. Without ASIC's intervention a 'substantial wrong' would not have been identified.¹⁰⁶ It has been accepted that in the analogous area of court approval of a pecuniary penalty agreed between a regulator and a respondent that a contradictor may be beneficial. In *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd*, the Federal Court was asked to approve an agreed penalty following breaches of the *Petroleum Retail Marketing Sites Act*

1980 (Cth).¹⁰⁷ At first instance, Gyles J referred a question to the Full Federal Court regarding whether his Honour was bound by the decision in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission*.

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In the course of giving its reasons, the Full Federal Court observed that if the absence of a contradictor inhibits the Court in the performance of its duties, it may seek the assistance of an *amicus curiae* or of an individual or body prepared to act as an intervener.¹⁰⁹

A guardian or contradictor could be usefully employed in Australian class actions on a more extensive basis. This follows due to the limitations on the adversarial process through lack of participation by respondents in critiquing the fairness and reasonableness of settlements, including the quantum of legal fees and litigation funding fees, while reliance on objectors (if there are any) is problematic and absent group members are vulnerable to decisions by the parties. A guardian that is given access to the necessary information and required to act in the interests of the group members can provide a valuable

critique or outright objection to a settlement that may otherwise be unavailable.

However, the employment of a guardian must consider a number of practical questions such as who pays the guardian, who instructs the guardian and how confidential information is made available to the guardian. These issues would need to be addressed by the Court at the time of the appointment.

The use of a guardian does incur additional costs that would need to be monitored to ensure the benefits of a guardian did not come at too high a price. The cost of the guardian could be paid for by one or more of the parties where the settlement is not approved, or deducted from the settlement if it is approved. As with costs generally, the costs of the guardian would be in the Court's discretion.¹¹⁰ As the guardian is needed where group members are unable to protect their own interests, the Court may need to specify the issues or questions for the guardian to address in a manner similar to the referral of questions to a referee.¹¹¹ Alternatively, the Court may request assistance from a relevant body, such as a regulator, or consumer or shareholder's association, which could proceed as an *amicus curiae* or intervener.¹¹² The guardian may need access to some or all of pleadings, evidence, funding agreements, settlement agreements and settlement distribution formulae. Some of these documents may be confidential, which would necessitate confidentiality agreements or undertakings to the Court. The role of a guardian or contradictor should remain flexible so that it can be adapted to protect group members' interests and assist the Court as needed.

⁹⁷ See Sylvia R Lazos, 'Abuse in Plaintiff Class Action Settlements: The Need for a Guardian during Pretrial Settlement Negotiations' (1985) 84 *Michigan Law Review* 308; Vince Morabito, 'Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs' (1995) 21 *Monash University Law Review* 231, 249; Edward H Cooper, 'The (Cloudy) Future of Class Actions' (1998) 40 *Arizona Law Review* 923, 950; Edward Brunet, 'Class Action Objectors: Extortionist Free Riders or Fairness Guarantors' (2003) *University of Chicago Legal Forum* 403, 464–71; Federal Judicial Center, *Manual for Complex Litigation*, Fourth (2004) § 21.644; Vince Morabito, 'An Australian Perspective on Class Action Settlements' (2006) 69 *Modern Law Review* 347, 380; American Law Institute, *Principles of the Law: Aggregate Litigation* (2010) § 3.09.

⁹⁸ See Judith Resnik, 'Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation' (2000) 148 *University of Pennsylvania Law Review* 2119, 2161.

99 Brunet, above n 97, 466–7.
 100 [2003] FCA 1420 (5 December 2003).
 101 (2008) 67 ACSR 569.
 102 GIO Shareholder Settlement [2003] FCA 1420 (5 December 2003) [15] (Moore J); Aristocrat Shareholder Settlement (2008) 67 ACSR 569, 574 [11] (Stone J).
 103 GIO Shareholder Settlement [2003] FCA 1420 (5 December 2003) [15] (Moore J); Aristocrat Shareholder Settlement (2008) 67 ACSR 569, 574 [11] (Stone J).
 104 ASIC v Richards [2013] FCAFC 89 (12 August 2013). ASIC has power pursuant to s 1330(1) of the Corporations Act 2001 (Cth) to ‘intervene in any proceeding relating to a matter arising under this Act’. See also Georgia Wilkins, ‘ASIC Weighs In on Great Southern Row’, The Sydney Morning Herald (Sydney), 28 October 2014, 21, reporting that ASIC sought and was granted leave by the Victorian Supreme Court to intervene in the settlement approval hearing for the Great Southern class action.
 105 ASIC v Richards [2013] FCAFC 89 (12 August 2013) [38] (Jacobson, Middleton and Gordon JJ).
 106 Ibid [58].
 107 (2003) 134 FCR 370.
 108 (1996) 71 FCR 285.
 109 Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] ATPR ¶41-993, 48 628 [58], 48 630–1 [72] (Branson, Sackville and Gyles JJ). The Victorian Court of Appeal in ASIC v Ingleby (2013) 275 FLR 171, 180 [29] (Weinberg JA), 194 [99] (Harper JA), 194 [101] (Hargrave AJA), took issue with the Federal Court’s approach to approving pecuniary penalties. The Court did not, however, take issue with the concept of seeking further information: at 181 [33] (Weinberg JA), 194 [101] (Hargrave AJA).
 110 See FCA Act s 43(2). Courts have been given specific power to deal with the costs of third parties who assist in the proceedings in a number of circumstances: see, eg, FCA Rules rr 9.12, 28.11(d), 28.61 (dealing with interveners, arbitrators and referees respectively); Civil Procedure Act 2005 (NSW) s 28(a) (dealing with mediators).
 111 See FCA Act s 54A; FCA Rules div 28.6.
 112 See FCA Rules r 9.12(3) (the Court in appointing an intervener may specify the form of assistance to be given and the matters that may be raised); United States Tobacco Co v Minister for Consumer Affairs (1988) 20 FCR 520, 534–5 (Davies, Wilcox and Gummow JJ) (the role the amicus plays is a matter entirely within the discretion of the Court).
https://law.unimelb.edu.au/_data/assets/pdf_file/0005/1586993/382Legg2.pdf

Appointment & Role of Lead / Representative Plaintiff

The role or function of the Lead Plaintiff in a Class Action does not appear to be clearly regulated in Australia.

Although there appears to be agreed-upon-principles surrounding the appointment and function of the Lead Plaintiff, due to the lack of any formal regulatory statutes, there is potential for adverse and unforeseen circumstances to arise that do not correspond with these principles.



Conclusion

Class Actions present a significant personal risk to Class members and a significant business opportunity for law firms and litigation funders.

Being a party to a Class Action can be a long and fraught process.

Class actions are high stakes litigation, and often incredibly complex and difficult for Class Members to process and understand.

Class Members make a large investment in time and energy when choosing to *opt-in*, yet are easily disregarded in the full and complex scheme of things; and especially if they are unrepresented, absent, impassive or uninvolved with the process.

Controversy surrounding class actions arises in relation to amounts recovered by Class members at settlement, when compared to the amounts received by lawyers and litigation funders.

Criticism inevitably arises during the course of a Class Action, and in my experience has occurred about the way the Settlement Scheme has been performed, particularly surrounding the lack of regular communication, the use of terminology that is difficult to understand, the way that assessments were conducted, the way the amount has been distributed, and particularly regarding the timeframe for distributing it; and how the Tax Dispute has come about, that has impacted upon the final and due compensation amounts.

Ensuring the Court upholds a strong role in supervising Settlements is vital.

Ensuring Class Members' vulnerability, exposure to risk and reputation is protected at all times will only occur if significant measures and essential changes to improve safeguards for unprotected and unrepresented Class Members are urgently made.

I respectfully look to the ALRC to accept my Submission in earnest support of, and on behalf of what is often the silent majority in Class Actions in Australia - the Class Members.

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