MALLESONS

The Review

Class Actions in Australia 2025/2026

The rise of the court-appointed contradictor

Alex Morris

Partner

Sydney

Emma Costello

Partner

Brisbane

Isabel Waters

Special Counsel

Melbourne

The review period has underscored the willingness of Australian courts to appoint contradictors to kick the tyres on settlement distribution schemes and costs-related issues on behalf of group members.

During the review period:

- 30% of all class action settlements involved a contradictor, representing a noticeable increase from previous years.[66]
- While courts had regard to the contradictor's position when assessing what was fair and reasonable, the fact that the contradictor did not take issue with a particular aspect did not constrain the Court from adopting a different position to the parties.
- Courts repeatedly affirmed the value provided by contradictors, even in cases where the contradictor's arguments or approach were not ultimately accepted.[67]

WHAT IS THE ROLE OF A CONTRADICTOR?

Contradictors are appointed by the Court to represent the interests of group members.

The precise role that a contradictor is required to play is determined by the scope of their appointment, as ordered by the Court. The appointment can be framed broadly (for example, assisting the Court at large to perform its judicial function in relation to a settlement approval application)[68] or limited to addressing particular matters (such as making submissions in relation to a proposal to vary a GCO).[69]

In representing the interests of group members who would not otherwise be represented, contradictors have the potential to fill an adversarial void. It has been said that the contradictor's role *'should be fundamentally understood as ensuring there is a real contest between conflicting interests where the outcome will be a res judicata'*.[70]

66 In FY26, a contradictor was appointed in 6 out of 20 class action settlements: *Excel Texel Pty Ltd v Wilson (No 2)* [2026] FCA 154 (**Excel Texel**); *Janssen v OnePath Custodians Pty Ltd (No 2)* [2026] FCA 291 (**Janssen**); *Mallia v Colonial First State Investments Ltd* [2026] FCA 463 (**Mallia**); *Challenor v QSuper Board* [2026] FCA 617 (**Challenor**); *Prygodicz v Commonwealth of Australia (Robodebt settlement)* [2026] FCA 102 (**Prygodicz**); and *McCoy v Hino Motors Ltd* [2025] VSC 447 (**McCoy**) (in McCoy, the Court determined to appoint a contradictor at the time of settlement in relation to a GCO amendment application, which was heard after settlement approval). Between FY21 and FY25, there was an average of 2 settlement approval applications per year which involved a contradictor.

67 *McCoy; McCoy v Hino Motors Ltd (No 2)* [2025] VSC 553 (**McCoy (No 2)**); *Janssen; Challenor; Byrnes v Origin Energy Ltd (No 2)* [2026] VSC 97 (**Byrnes**).

68 *Janssen* at [9].

69 *McCoy (No 2)* at [7] and *Byrnes* at [6].

70 *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291; [2019] VSC 653 at [110], cited with approval in *Laricchia v WiseTech Global Ltd* [2025] VSC 482 at [19] (**Laricchia**).

An essential by-product of appointing a contradictor is the assistance a contradictor may provide to the Court in exercising its supervisory and protective function. For that reason, contradictors are commonly appointed in relation to settlement approval applications where the Court's central task is to determine whether the proposed settlement is fair and reasonable and in the interests of group members as a whole, including as between group members *inter se*.

HOW DOES A CONTRADICTOR ASSIST THE COURT?

First, a contradictor may assist the Court merely by providing an independent evaluation and perspective, bringing to bear *'the normal and proper forensic judgements of counsel in determining what submissions ought be made in the interests of Group Members'*.[71] The value of the contradictor lies in ensuring the issues are properly tested, not in the outcome being advocated or in taking every arguable point that might be thought to be in the group members' interests.

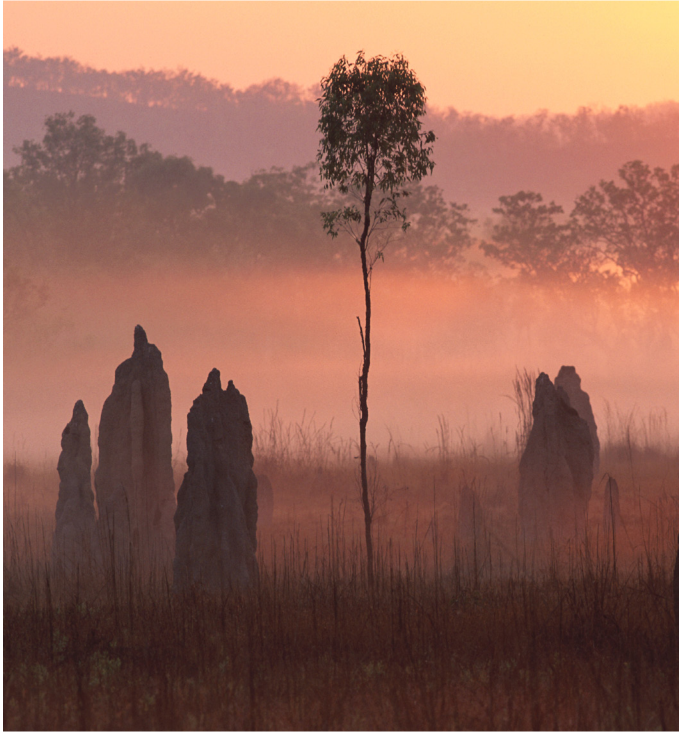
Second, a contradictor ensures the possibility of a 'real conflict' in settlement approval applications. As the respondent often supports the settlement, there will be no effective opposition or contest unless objectors to the settlement are represented or a contradictor is appointed. In *Challenor*, the Court observed that the applicant was contractually obliged to support the deductions sought by the funder and therefore the applicant was *'effectively gagged... [which] makes the appointment of a contradictor all but inevitable in many cases'*.[72]

Third, appointment of a contradictor has been looked on favourably by some judges as a means of sharpening the applicant's focus on whether a proposed settlement distribution is fair as between certain group members. For example, in *Janssen*, Button J found that the applicants' willingness to revise the settlement distribution scheme in response to the contradictor's submissions demonstrated the utility of appointing a contradictor:

> *'The preparedness of the Applicants to give consideration to the Contradictor's submissions and change course — rather than sticking doggedly to their guns — presents an example of the value of the role of Contradictor. It is somewhat regrettable that the Applicants previously strenuously resisted the appointment of a Contradictor.'*[73]

On the more nuanced question of whether the courts actually find contradictors to be helpful, the answer emerging from recent cases appears to be yes, and perhaps decidedly so. In *McCoy (No 2)*, the Court stated that the contradictors' submissions *'helpfully identify and systematically consider the evidence'*[74] relevant to the application to vary a GCO. Even where a contradictor ultimately supports the settlement and proposed distribution, rather than opposing it, courts have treated the appointment as valuable.[75]

It is evident that courts will temper any assistance expected to be obtained from a contradictor against the costs and delays a contradictor may add, which are often borne by the group members. In *Laricchia*, for example, the Court was satisfied that the appointment of a contradictor *'would not significantly assist, or at all, the decision of this Court'* in circumstances where the application for a GCO did not concern any novel interpretation of provisions, the available material addressed the relevant counterfactuals, and the Court was mindful of not unnecessarily delaying the progress of the proceedings and ensuring a timely and efficient outcome for the group members.[76]



71 *Janssen* at [9] and [87].
72 *Challenor* at [70].
73 *Janssen* at [92].
74 *McCoy (No 2)* at [69].
75 *Janssen* at [87]; *Excel Texel* at [38] and [137].
76 *Laricchia* at [47]-[50].
77 See *Byrnes; McCoy (No 2)* and *McCoy v Hino Motors Ltd (No 3)* [2026] VSC 195.

HEADLINE TRENDS FROM THE REVIEW PERIOD

Settlement approval applications remain the primary context in which contradictors are appointed, with applications to vary a GCO coming in second. In the review period, the courts appointed a contradictor in 6 class action proceedings at the settlement approval stage and when hearing applications to vary a GCO.[77]

Settlement approval applications

Contradictors continue to assist the Court in assessing whether a funder's remuneration and after-the-event (**ATE**) insurance costs are fair and reasonable at the time of settlement approval.

Some recent decisions of note are set out below.

Judgment	Assistance provided by a contradictor
Prygodicz v Commonwealth of Australia (Robodebt settlement) [2026] FCA 102	The contradictors urged the Court to adopt a return-on-investment methodology rather than the funder's preferred percentage-of-settlement approach to arrive at a commission of approximately $22m, compared to the funder's claim for $71.25m and the Commonwealth's proposed range of $5.9m to $35.3m. The Court agreed with the contradictors that a straight percentage approach was inappropriate and largely accepted their risk analysis based on the funding agreements' staged structure, but ultimately allowed a higher commission of $35m.[78]
Challenor v QSuper Board [2026] FCA 617	The Court accepted the contradictor's submission that it was appropriate to assess the reasonableness of the funder's remuneration in a 'holistic' way, and considered that the contradictor had *'exposed that there are in fact significant flaws and inconsistencies in the Funder's evidence'*.[79] The Court brought the funder's total recovery (for commission, ATE insurance, managed investment scheme costs, deeds of indemnity, and legal costs) to approximately $23m or 34.34% of the settlement sum. This was higher than the payments of approximately $21m (31.5%) that the contradictor submitted would be reasonable.
Mallia v Colonial First State Investments Ltd [2026] FCA 463	The Court agreed with the contradictor that awarding ATE insurance premiums on top of a 27.5% commission (equating to 30.7% of the total settlement sum) was *'disproportionate to the risks incurred by the Funder in the context of this specific proceeding'*.[80] It was not to the point that the ATE insurance costs represented a small proportion of the overall settlement sum of $140m. Consistent with the contradictor's position, the Court decided not to allow the ATE insurance costs and fees for the deeds of indemnity.
Janssen v OnePath Custodians Pty Ltd (No 2) [2026] FCA 291	The contradictor did not object to the $1.76m ATE insurance deduction sought by Slater and Gordon. The Court, however, found that allowing the ATE deduction in addition to legal costs (including a 25% uplift) would amount to impermissible 'double-dipping' given the law firm's hedging between a common fund order and a 'no win, no fee' model, and incomplete disclosure to group members about the ATE arrangement. Her Honour decided to allow only half the deduction sought for the ATE insurance.
Excel Texel Pty Ltd v Wilson (No 2) [2026] FCA 154	The contradictor submitted that the settlement was fair and reasonable but that a funding commission of 30% was too high. The Court agreed the funding amount was excessive and disproportionate to the sum available for distribution to the group members, ultimately allowing a commission of approximately 25%.

78 *Prygodicz* at [213].
79 *Challenor* at [88].
80 *Mallia* at [78].

GCO amendment applications

During the review period, contradictors were also appointed by the Victorian Supreme Court in the context of applications to vary GCOs. Following the enactment of s33ZDA of the *Supreme Court Act 1986* (Vic) in 2020, contradictors were appointed in the first 4 GCO applications made under that provision.[81]

Since then, over 20 GCO applications have been heard (not including variation applications), with a contradictor appointed in only 1 of those applications.[82]

See further discussion of GCOs in the Funding Developments chapter of The Review.

Some recent decisions of note are set out below.

Judgment	Assistance provided by a contradictor
Byrnes v Origin Energy Ltd (No 2) [2026] VSC 97	This was the first time an applicant had applied to vary an initial GCO during a proceeding (as distinct from at the time of settlement).[83] The Court made orders appointing a contradictor in relation to the GCO variation application. The contradictor identified 11 factors bearing on the Court's discretion under s33ZDA(3), and submitted that 7 factors weighed in favour of the variation, 1 against and 3 were neutral. Not only did Waller J embrace the contradictor's approach as *'a useful and disciplined framework for working through the material considerations'*,[84] but having considered the contradictor's detailed analysis of the relevant factors, his Honour observed that he was *'fortified'* in his conclusion that the initial GCO should be varied.
McCoy v Hino Motors Ltd (No 2) [2025] VSC 553	Following settlement approval, the Court considered whether the initial GCO should be varied in light of an early settlement. The Court made orders specifying that the contradictors' role was limited to *'making any submissions which the Contradictors consider might assist the Court'* in determining whether there should be a variation. While the contradictors submitted that the GCO rate should not be reduced, Delany J disagreed (despite having *'been very much assisted by their detailed and systematic analysis of the evidence'*). His Honour reduced the effective GCO rate from 24.66% to 17.392% to ensure the costs payable to the plaintiff law practice remained proportionate.
McCoy v Hino Motors Ltd (No 3) [2026] VSC 195	At a subsequent hearing following the identification of an error in the modelling relied upon when varying the GCO, the Court was again assisted by the contradictors' submissions (and again disagreed on the GCO percentage, determining that a percentage below the range advocated for by the contradictors was appropriate).[85]

LOOKING AHEAD

In the past year, court-appointed contradictors have assisted the courts in exercising a supervisory jurisdiction to protect the interests of group members. Parties should expect more contradictors to be appointed in the future, particularly in cases involving significant settlement amounts, large classes, or complex costs or funding issues. And if other jurisdictions were to replicate Victoria's GCO model, or similar, there could well be a rush to appoint contradictors.

81 See *Laricchia* at [23].
82 *DA Lynch v Star Entertainment Group* [2023] VSC 561. This application also required resolution of a complex multiplicity dispute.
83 The applicant sought to increase the initial GCO, which was calculated at 30%, to a tiered rate of 35% on the first $42.5m and 25% above that.
84 *Byrnes* at [83].
85 Justice Delany determined that a GCO percentage of 13.253% was appropriate and was satisfied that it would not serve as a disincentive to engaging in early settlement discussions (in contrast to the contradictors who proposed a higher percentage range with that consideration in mind).

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