

THE ROLE OF CONTRADICTION IN CLASS ACTION LITIGATION

A. INTRODUCTION

1. This paper addresses the significant role of contradictors in class action litigation, including the development of that role over time and possibilities for its future evolution.
2. It is divided into the following sections:

(a) *Contradictors: applicable principles*

This section summarises the role of contradictors in commercial litigation as reflected in the authorities, including by way of comparison with the roles of amici curiae and interveners.

(b) *Contradictors in class action litigation*

This section addresses the different scenarios in which contradictors have been appointed in class action litigation, with a focus on settlement approval applications, and considers possible further roles.

(c) *Practical and procedural considerations*

This section considers procedural issues that may arise in class action litigation involving contradictors, including who bears responsibility for the contradictor's costs and the rights of contradictors to take certain procedural steps, including with respect to appeals.

B. CONTRADICTION: APPLICABLE PRINCIPLES

B.1 Role of contradictors

3. The authorities disclose that contradictors have two inseparable functions: (1) to seek to represent the interests of particular parties whose interests would not otherwise be represented; and (2) to do so in a manner that assists the Court.¹
4. In *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291 (**Banksia No 6**), John Dixon J summarised the contradictor's role as follows:²

1 See, for example, *Bolitho v Banksia Securities Ltd (No 6)* (2019) 63 VR 291 (**Banksia (No 6)**) at [73(c)] (John Dixon J).

2 *Banksia (No 6)* at [96] and [110].

The contradictor is ‘the person with whom the applicant for relief is in dispute’. He or she ‘has a true interest to oppose the declaration sought’.

...

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*.

5. While a contradictor takes an active role in the proceeding, and often adopts an adversarial position, they do not represent a hypothetical belligerent client. The contradictor need not necessarily oppose the application in question. As Beaumont, Dowsett and Lee JJ observed in *Merit Protection Commissioner v Nonnenmacher* (1999) 86 FCR 112:³

The term “contradictor” describes the person with whom the applicant for relief is in dispute. That person must be joined in the proceedings as a party thereto, but it is not necessary that he or she attend to resist the application. If he or she does not do so, a binding order may still be made. The requirement for a “contradictor” is not designed to secure actual opposition.

6. Having regard to the above principles, the precise role that a contradictor is required to play in a proceeding ought to be determined by reference to the context of their appointment by the Court.⁴ The orders appointing a contradictor ordinarily define the scope of the role to be undertaken. For example, in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 11)* [2022] FCA 331 (**7-Eleven (No 11)**), O’Callaghan J described the contradictor’s role as follows:⁵

The terms and scope of Mr Redwood’s appointment as contradictor require him to advance all reasonably arguable competing positions on behalf of group members (or a subset of group members) on material points of law and fact going to the relevant issues and to ensure the court receives evidence and submissions on those matters he considers important to its deliberations in the exercise of its protective jurisdiction.

7. Importantly, the Court may “expand and empower the role” of a contradictor as necessary.⁶

B.2 The distinct roles of amici curiae, interveners and contradictors

8. The role of a contradictor needs to be distinguished from that of an *amicus curiae* or intervener. The more clearly delineated roles of *amici curiae* and interveners provide useful

3 *Merit Protection Commissioner v Nonnenmacher* (1999) 86 FCR 112 (citations omitted).

4 *Banksia (No 6)* at [49].

5 *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 11)* [2022] FCA 331 (**7-Eleven (No 11)**) at [22] (O’Callaghan J).

6 *Banksia (No 6)* at [79] and [111].

points of comparison in understanding what the role of a contradictor involves. Broadly speaking, the role of a contradictor is wider than the former and narrower than the latter.

Amici curiae

9. The role of an amicus curiae is “to provide assistance – on a matter of law or fact – which the court would not otherwise receive”.⁷ An amicus curiae is typically a neutral and independent participant in the proceeding.⁸ The essence of an amicus curiae is that they are disinterested in a way that a party is not.
10. Whether to hear from an amicus curiae is entirely in the Court’s discretion.⁹ Where it is in the interests of justice to do so, the Court may hear an amicus curiae by allowing them to make oral submissions or file written submissions, or to do both. However, the role of an amicus curiae is otherwise tightly constrained. In *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, the Full Court of the Federal Court stated:¹⁰

... it will be a rare case in which a person admitted as an amicus will be admitted to fulfil a role which is other than a strictly limited, clearly defined role.
11. It has been held that only in an exceptional case will an amicus curiae be permitted to adduce evidence or raise a new issue or defence.¹¹ An amicus curiae is not a party to the proceeding, and hence has neither the rights nor the obligations of a party, such as the right to appeal or the obligation to pay costs.¹²
12. As to the distinction between the role of an amicus curiae and that of a contradictor, in *Banksia (No 6)*, John Dixon J observed:¹³

Whilst amici curiae are appointed to assist the court (usually impartially) and are very limited in the role they are permitted to play in proceedings, contradictors are generally appointed to ensure that there is a ‘real conflict’ in proceedings.
13. His Honour also explained: “[u]nlike amici curiae ... a contradictor’s role is to maintain the adversarial nature of the court’s processes.”¹⁴

7 *Priest v West* (2011) 35 VR 225 (**Priest**) at [29], [35] (Maxwell P, Harper JA and Kyrou AJA); *Banksia (No 6)* at [107].

8 *Priest* at [29].

9 *Levy v State of Victoria* (1997) 189 CLR 579 (**Levy**) at 604-605 (Brennan CJ); *Bropho v Tickner* (1993) FCR 165 at 172 (Wilcox J) citing *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520 (**United States Tobacco**) at 534-535 (Davies, Wilcox and Gummow JJ).

10 *United States Tobacco* at 539.

11 *Priest* at [31]. See also *Re Baby D (No 2)* [2011] 258 FLR 290 at [241] (Young J).

12 *Priest* at [29].

13 *Banksia (No 6)* at [78].

14 *Banksia (No 6)* at [96]; see also at [110].

Interveners

14. It has recently been stated that the role of a contradictor “bears closer relationship” with the position of an intervener than that of an amicus curiae.¹⁵ Unlike an amicus curiae or a contradictor, who are appointed by the Court, a person seeking leave to intervene as a party must demonstrate that their interests may be affected by the outcome of the proceeding.¹⁶
15. If leave to intervene is granted, the intervener becomes a party to the proceeding.¹⁷
16. The role of an intervener was described in *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 in the following terms:¹⁸

A person accepted as an intervener becomes a party to the proceedings with all the privileges of a party. Thus he can appeal, tender evidence and participate fully in all aspects of the argument. His position is quite different from that of an amicus curiae.

17. As to the distinction between the role of amici curiae and contradictors, in *Priest v West* (2011) 35 VR 225, the Court of Appeal stated:¹⁹

Where a person is given leave to appear as a friend of the court, he or she does not become a party to a proceeding and hence has neither the rights nor the obligations of a party, such as the right to appeal and the obligation to pay costs. By contrast, a person who is given leave to intervene as a party enjoys all the benefits, and bears all the burdens, of a party to the proceeding.

18. Thus, the functions of a contradictor are fundamentally broader than those of an amicus curiae, in that their purpose is to represent the interests of an affected party, as opposed to providing neutral assistance to the Court.

C. CONTRADICTION IN CLASS ACTION LITIGATION

19. Contradictors have regularly been appointed to perform various functions in class action litigation. In particular, contradictors are often utilised in the context of settlement approval applications.²⁰

15 *Banksia (No 6)* at [78].

16 *Priest* at [29]. Cf *Federal Court Rules 2011* (Cth), r 9.12.

17 *United States Tobacco* at 534-535.

18 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 396 (Hutley JA).

19 *Priest* at [30].

20 See, for example, *7-Eleven (No 11)* at [22] (O’Callaghan J); *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed)* (No 4) [2021] NSWSC 121 (**SurfStitch (No 4)**) at [17].

C.1 Approving class action settlements

20. The Court has a supervisory and protective role in relation to class action settlements.²¹ In performing this role, the Court must consider: (1) whether the proposed settlement is fair and reasonable as between the parties having regard to the claims of the group members; and (2) whether the proposed settlement is in the interest of group members as a whole.²² This includes consideration of whether claimed amounts of commission and legal costs and disbursements are reasonable. This role of the Court in approving class action settlements has been described as “important and onerous”²³ and as involving a “heavy burden”.²⁴
21. It has been recognised that group members who are to share liability for costs and disbursements may be “limited in their capacity to act as contradictors of the claim for costs because the information available to them is limited”.²⁵ There may also be different categories of group members (who may stand to benefit from, or be affected by, the proposed settlement in different ways), some of whom are not represented before the Court.
22. It is for this reason that contradictors are often appointed to assist the Court in determining settlement approval applications (i.e., principally to represent the interests of group members in circumstances where the representative plaintiff(s) and defendant(s) have reached the proposed settlement and thus seek that it be approved by the Court).²⁶ The presence of a contradictor may facilitate the ventilation of key issues arising on the settlement approval application and enable the Court to be satisfied of all relevant matters. The contradictor is well placed to actively test the proposed settlement, including by carefully reviewing the evidence supporting claims to costs and commission proposed to be deducted from the settlement sum.
23. Earlier this year, in *7-Eleven (No 11)*, a case where a contradictor was appointed to represent group members interests and assist the Court, O’Callaghan J observed:²⁷

The role of the contradictor also involves, or can involve, sharpening the focus on the question of the fairness and reasonableness of the settlement sum and the distribution of it,

21 See for example, *Federal Court Act 1976* (Cth), s 33V; *SurfStitch (No 4)* at [52]; *Prygodicz v Commonwealth (No 2)* 173 ALD 277 at [85] (Murphy J).

22 *Banksia (No 6)* [2019] VSC 653 at [62] (John Dixon J) citing *Downey v Spiral Foods Pty Ltd & Ors* [2015] VSC 190 at [45] (J Dixon J).

23 *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [7]. See also *Prygodicz v Commonwealth (No 2)* 173 ALD 277 at [85] (Murphy J).

24 *Banksia (No 6)* at [70] (John Dixon J).

25 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 at [349] (Osborn JA).

26 *Banksia (No 6)* at [114] (John Dixon J).

27 *7-Eleven (No 11)* at [22].

and encouraging parties to provide adequate justification for the key features of the sum and its distribution, where otherwise it may be lacking or insufficient.

24. As noted in an article by Jeremy Kirk SC (now Kirk J) referred to in *Banksia (No 6)*:²⁸

On occasions, moreover, it may be appropriate for an aspect of a proposed settlement to be challenged by evidence ... Judges may request such evidence, but they rely on the parties to gather it. A contradictor is not so limited.

25. Contradictors may also perform an important role in overcoming any potential conflicts of interest between applicants and group members and their legal representatives and litigation funders. In *Botsman v Bolitho* (2019) 57 VR 68, the Court of Appeal observed (emphasis added):²⁹

It is the nature of group proceedings that are funded by third parties on a commercial basis that a potential conflict may arise between the funder and group members in relation to the size of any commission that is payable to the funder.

In circumstances where a common fund order is sought, the plaintiff may have an interest in obtaining a common fund order on the basis that it might reduce the liability that the plaintiff had under a funding agreement. The funder will often play a critical role in negotiations and, understandably, may seek to maximise its return on its investment. The position of the funder is more acute in circumstances where the funder is the source of instructions about how the case is to be run and on what terms it may settle. On the other hand, group members have an interest in minimising any common fund order.

...

The funder has an obvious interest in maximising its return and recovering its legal costs. The defendant may have little interest in how any settlement sum is distributed other than to the extent that the distribution may imperil court approval. Group members may not have access to all the relevant information and may not be well placed to ensure that any settlement is fair and reasonable.

26. The fundamental role of a contradictor in settlement approval applications is to represent the interests (or certain of the interests) of the group members. This can be seen in the descriptions of the role of the contradictor in several recent decisions.

28 *Banksia (No 6)* at [115] quoting Kirk, ‘The Case for Contradictors in Approving Class Action Settlements’ (2018) 92 *Australian Law Journal* 716 at 720.

29 *Botsman v Bolitho* (2019) 57 VR 68 at 135 [330]-[331], [335].

27. In *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689, Murphy J explained that the role of the contradictor was: “to represent class members’ interests in relation to the reasonableness of the costs charged”.³⁰
28. Similarly, in *Banksia (No 6)*, the contradictor was required to represent the interest of debenture holders who were not parties to the proceeding,³¹ including by challenging the case being mounted by the litigation funder for recovery of legal costs and disbursements and the determination of a fair and reasonable commission.³² Justice John Dixon described the role of the contradictor in that case as follows:³³
- The role of the Contradictor is to *represent the interests of debenture holders in order to assist the court*, in the exercise of a protective jurisdiction in which the debenture holders are beneficiaries whose rights are thereby determined, *in seeking to satisfy itself of the fairness and reasonableness of the settlement*, having regard to the claims being made against the settlement sum.
29. In *Prygodicz v Commonwealth (No 2)* (2021) 173 ALD 277 (the “Robodebt” class action), Murphy J appointed a contradictor to represent the interests of group members.³⁴ The orders in that case provided that the role of the contradictor was:
- ... to represent Group Members’ interests and to assist the Court to perform its judicial function in relation to the settlement approval application, including as to whether the proposed settlement is fair and reasonable having regard to the interests of Group Members who will be bound by the settlement and in relation to legal costs.
30. Within the scope of the role as set out in orders of the Court, the contradictor may determine the approach they take to their task, unburdened by instructions from an intransigent client. The contradictor should consider their role and approach in the context of the interests they have been appointed to represent.
31. As suggested above, it is not necessary that the contradictor oppose a proposed settlement in its entirety. It may be more appropriate to identify any issues with the proposed settlement and propose defensible alternatives so as to improve potential outcomes for those parties whose interests will be affected. This approach applies equally to any other step or matter which the contradictor is called to consider. The contradictor plays the ordinary role of

30 *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689 at [4] (Murphy J).

31 *Banksia (No 6)* at [73(c)].

32 *Banksia (No 6)* at [74].

33 *Banksia (No 6)* at [73(c)] (emphasis added).

34 *Prygodicz v Commonwealth (No 2)* 173 ALD 277 at [17], [26], [81], [339] and [358(a)] (Murphy J).

counsel, and should not take every conceivable point, but rather exercise forensic judgment in deciding which steps and matters are objectionable and should be tested. It would be legitimate for a contradictor to decide not to contradict a given proposal, although in such situations the contradictor ought inform the Court as to why they have taken such a position.

32. For example, in *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (administrators appointed) (No 4)* [2021] NSWSC 121 (**SurfStitch (No 4)**), the contradictor did not oppose the settlement or dispute the appropriateness of a proposed fund equalisation order, but contended that the plaintiffs’ costs were unreasonably high and the funder’s overall entitlements ought to be reduced by reason of certain disentitling conduct.³⁵ The Court accepted the contradictor’s submissions in part, approving the settlement on the condition that the funder’s overall entitlement to costs and commission be capped.³⁶
33. Similarly, in the Robodebt class action, the contradictor submitted that the proposed settlement should not be approved because it was not, according to the contradictor’s submission, a settlement that was fair and reasonable *inter se* (i.e., as between the different categories of group members); in the alternative, the contradictor proposed a middle ground whereby certain group members who objected to the proposed settlement would be provided with another opportunity to opt out of the proceeding.³⁷
34. In *Banksia (No 6)*, non-parties to the proceeding submitted that the contradictor’s role should be confined to addressing “the reasonableness of the legal costs and disbursements and the funder’s commission” and that it was no part of the contradictor’s role to make submissions as to certain disentitling conduct of the legal practitioners, including breach of fiduciary duty and dishonesty.³⁸ John Dixon J considered there was a sufficient nexus between the alleged disentitling conduct and the reasonableness of the claimed commission and costs, such that it was appropriate for the contradictor to make submissions about those matters.³⁹

C.2 Other roles for contradictors in class action litigation

35. The significant contribution of contradictors in settlement approval applications augurs well for their involvement in other aspects of class action litigation.

35 *SurfStitch (No 4)* at [18], [42], [63], [113], [286] and [325].

36 *SurfStitch (No 4)* at [19]-[20].

37 *Prygodicz v Commonwealth (No 2)* 173 ALD 277 at [18], [243] and [254] (Murphy J).

38 *Banksia (No 6)* at [49], [55], [173] and [190].

39 *Banksia (No 6)* at [60] and [173].

36. Contradictors may be used to overcome limitations arising from confidential material, which may not be able to be inspected or properly scrutinised by all parties.⁴⁰
37. Contradictors have played a significant role in applications for group costs orders under the recently introduced s 33ZDA of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**).
38. In *Fox v Westpac* [2021] VSC 573, Nichols J appointed a contradictor to assist her determination of the first applications for a group costs order.⁴¹ In that case, the contradictor submitted that the group costs order ought not be made at that juncture in the proceeding, given that it could not be said that the proposed order was necessary or appropriate to ensure that justice was done in proceeding (being the statutory test for the grant of a group costs order under s 33ZDA of the *Supreme Court Act*). This was because the existing contractual arrangements between the law practice and the plaintiffs provided for what was likely to be a more beneficial arrangement than the proposed group costs order at the proposed percentage rate. Justice Nichols accepted the submissions of the contradictor and declined to make the group costs order sought, but left it open for the plaintiffs to make a renewed application at a later time if so advised.⁴²
39. Earlier this year, in *Allen v G8 Education Ltd* [2022] VSC 32, Nichols J again appointed a contradictor in an application for a group costs order.⁴³ In that case, the contradictor also submitted that the application should be refused on the basis that it was not necessary or appropriate to ensure that justice was done in the proceeding given the likely continuation of existing funding arrangements under which the plaintiff law firm was conducting the proceeding on a no win no fee basis.⁴⁴
40. While Nichols J ultimately granted the application, her Honour emphasised the efficacy of contradictors, especially in circumstances where there may be a conflict between the interests of the plaintiff and the plaintiff law firm:⁴⁵

As to the construction question, by way of further context, s 33ZDA requires that an application for a Group Costs Order be made by a plaintiff (and not the law firm itself). The practical reality is, however, that in applications of this kind the plaintiff's solicitors (in the language of s 33ZDA, the law practice the calculation of whose fee will be the subject of a

40 See the discussion in *Banksia (No 6)* at [50]-[51]. See also *Fox v Westpac* [2021] VSC 573 (**Fox**) at [7] (Nichols J); *Allen v G8 Education Ltd* [2022] VSC (**G8 Education**) at [8] (Nichols J).

41 *Fox* at [4] (Nichols J).

⁴² *Fox* at [8].

43 *G8 Education* at [14] (Nichols J).

44 *G8 Education* at [4] and [14] (Nichols J).

45 *G8 Education* at [52] (Nichols J) (emphasis added); see also [94].

[Group Costs Order] if made) are in effect likely to be joint protagonists with the plaintiff. *The prospect of circumstances of that kind arising on applications of this kind points to a natural role for a Contradictor.* Senior Counsel for the plaintiffs properly acknowledged that there was a tension (if not a conflict) between the position of Slater and Gordon and that of the plaintiffs, her clients, in respect of this issue.

41. Contradictors may also play a role in scrutinising applications for common fund orders and fund equalisation orders. These mechanisms have the overarching intention of improving access to justice⁴⁶ and therefore readily lend themselves to the involvement of a contradictor.
42. Recent developments in the availability of common fund orders may present a further opportunity for the involvement of contradictors. In *BMW Australia Ltd v Brewster* [2019] HCA 45 (**Brewster**), the High Court of Australia held that the Federal Court of Australia did not have power to make a common fund order at an early stage in the proceeding under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**). There is some lingering uncertainty as to whether the Federal Court can make a common fund order as part of a settlement approval under s 33V of the Federal Court Act,⁴⁷ and whether funding equalisation orders should be preferred.⁴⁸ It may be that a contradictor in an application for a common fund order as part of a settlement approval application will have a role to make submissions as to the applicability of *Brewster* in that context, or the availability of more suitable alternatives.
43. A further role for a contradictor in class action litigation is in relation to the opt out procedure. For example, in *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (subject to deed of company arrangement) (No 3)* (2018) 133 ACSR 98 (**SurfStitch (No 3)**), the plaintiffs sought orders dispensing with the requirement to notify group members of their right to opt out and the requirement that the Court set a date by which group members may opt out or, alternatively, that group members who opted out would be bound by the costs and common funds orders sought in the settlement.⁴⁹ The Court accepted

46 The Honourable Justice Bernard Murphy, ‘*Navigating through the principles and practicalities of Group Cost Orders, Common Fund Orders and No Win No Fee*’ (Speech, Commercial Law Association Seminar, 18 March 2022).

47 See, for example, *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 (**Uren**) at [50] (Murphy J); *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [405]–[421] (Foster J); *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 (**7-Eleven**) at [42] (Lee J, with whom Middleton and Moshinsky JJ agreed); *Court v Spotless Group Holdings Limited* [2020] FCA 1730 at [78]–[80] (Murphy J).

48 *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579 at [72] (Moshinsky J); *Uren* at [55].

49 *TW McConnell Pty Ltd as trustee for the McConnell Superannuation Fund v SurfStitch Group Ltd (subject to deed of company arrangement) (No 3)* (2018) 133 ACSR 98 (**SurfStitch (No 3)**) at [14] (Stevenson J).

the submissions of the contradictor to the effect that the alternative orders sought would strip the right to opt out of any substantial value.⁵⁰

44. Earlier this year, Anderson J appointed an amicus curiae in the *Aveo Group* class action (VID 996/2017). The role of the amicus curiae was to represent the interests of certain unfunded group members in relation to an opt out notice proposed by the applicants. The amicus curiae made submissions as to the content of the opt out notice and appeared at the hearing of the application. It may be that there is a role for a contradictor in such contexts, taking account of their role to actively represent the interests of certain group members.

D. PRACTICAL AND PROCEDURAL CONSIDERATIONS

D.1 *Costs of the contradictor*

45. The costs associated with the appointment of a contradictor “will have to be borne by someone and it will not be the court”.⁵¹ In many cases, the costs of the contradictor are borne by the group members as a component of legal costs and disbursements.⁵² In some cases, the respondent or litigation funder may agree to pay the costs of the contradictor.⁵³ In all cases, it is possible that the parties will incur additional costs by reason of choices made by the contradictor.
46. Accordingly, as with amicus curiae, a contradictor should not be appointed unless the Court will be “significantly assisted”⁵⁴ by the appointment and it “will not result in additional costs to the parties, or delay in the proceeding, which would be disproportionate to the assistance expected to be derived”.⁵⁵
47. It is also desirable that the role of a contradictor properly delimited at the outset of a proceeding. Such an approach will almost certainly assist in moderating any complaints about the contradictor acting impermissibly or outside the limits of a proper role.

D.2 *Taking steps in the proceeding*

48. It is not settled whether, without leave to do so, a contradictor may take the same steps in a proceeding as parties, such as seeking answers in the nature of interrogatories, issuing subpoenas for production of documents or seeking orders for discovery and other compulsive

50 *SurfStitch (No 3)* at [56]. See also *SurfStitch (No 4)* at [296].

51 *Ridehalgh v Horsefield* [1994] Ch 205 at 238 (Bingham MR).

52 See, for example, *Prygodicz v Commonwealth (No 2)* 173 ALD 277 at 360 (Orders, 15(b)) (Murphy J).

53 See, for example, *7-Eleven* at [74].

54 *Levy* at 605; see also at 650–1 (Kirby J).

55 *Priest* at [33].

steps. More controversially, it is unclear whether a contradictor may independently make fresh allegations and claims, take the proceeding into new factual issues, call evidence, or ask the Court to make findings or orders not otherwise sought (as opposed to resisting the making of findings or orders sought by existing parties).

49. In *Banksia (No 6)*, the non parties submitted that the ambit of contradiction should be restricted to “making submissions on the issues joined and on the basis of the material before the court.”⁵⁶ Justice John Dixon disagreed, holding that the contradictor should have all the “powers, rights and privileges in challenging and contesting the payment sought by the [litigation funder] that would have been available to the [special purposes receivers of Banksia].”⁵⁷ His Honour further stated:⁵⁸

I will expressly declare that the Contradictor may take any step authorised or permitted by the *Supreme Court (General Civil Procedure) Rules 2015* to be taken in the proceeding by a party to the proceeding and the Contradictor shall take such steps having regard to the interests of the group members (debenture holders) for the purpose of assisting the court to determine whether the settlement is fair and reasonable as between the parties and is fair and reasonable in and between the interests of group members.

50. His Honour expressed the view that “the contradictor best assists the court when armed with the rights and powers of a party in the proceeding”.⁵⁹
51. It should be noted that this reasoning of John Dixon J was based on the particular circumstances of the proceeding in question, and should not be taken to represent a proposition of general application. It will not always be the case that a contradictor is allowed to perform all the functions of a party to the proceeding.

D.2 Ability to prosecute an appeal

52. While it is clear that an intervener can appeal,⁶⁰ and an amicus curiae cannot appeal,⁶¹ the position regarding contradictors is less settled. The issue of whether a contradictor may appeal could arise in a variety of contexts, including on the question of the availability of common fund orders (discussed above).

56 *Banksia (No 6)* at [49].

57 *Banksia (No 6)* at [75].

58 *Banksia (No 6)* at [80] (emphasis added).

59 *Banksia (No 6)* at [110].

60 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 396 (Hutley JA).

61 *Wilson v Manna Hill Mining Company Pty Ltd* [2004] FCA 1663 at [89] (Lander J).

53. As discussed above, the role of a contradictor falls somewhere in between an amicus curiae and an intervener, but is “more analogous” to the latter.⁶² Further, in recent cases, the contradictor has been empowered with “all the rights and powers of a party to the dispute”.⁶³ This seems to suggest that a contradictor will have a right of appeal where the outcome is disadvantageous to the interests they represent.
54. On the other hand, a contradictor is not necessarily a party to the proceeding, and so it is difficult to see how a contradictor-initiated appeal would work in practice. For example, there are questions as to who would file the notice of appeal, who would pay the costs of the appeal and other procedural matters. It may be appropriate for a contradictor to seek guidance from the Court on these issues.

E. CONCLUSION

55. The role of a contradictor in class action litigation is inherently flexible and they may be appointed to assist the Court in relation to aspects of a proceeding including settlement approval applications, applications for common fund orders, fund equalisation orders or group costs orders, and in circumstances involving information that is confidential to one or more parties, as well as a range of other circumstances.
56. The role of contradictors in class action litigation is likely to continue to expand, with consequent advantages for the robustness of the adversarial system of litigation.

31 August 2022

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Julia Nikolic

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62 *Banksia (No 6)* at [122].

63 *Banksia (No 6)* at [123].