KING&WOOD MALLESONS
金杜律师事务所

The Review

Class Actions in Australia

2019/2020

Contents

Introduction

Welcome to The Review – Class Actions in Australia 2019/2020, in which we consider significant judgments, events and developments between 1 July 2019 and 30 June 2020.

At least 55 class actions were filed, marking the third successive year that more than 50 class actions were commenced. We also saw at least 35 class action settlements approved by the Courts, representing over $1 billion in total settlement funds.

This could be seen as an indication that class action numbers have plateaued at a new normal. Concerns continue to be expressed, however, that the pressure that class actions place on executives and directors seeking to operate businesses (and government) in an uncertain economic environment continues to rise. The latest statistics certainly support this, with at least 28 class actions filed between 1 July and 31 October 2020.

Against this context, class action law and practice in Australia continues to evolve. Key developments include:

- Parliament launching an inquiry into litigation funding and the regulation of the class action industry, held by the Joint Committee on Corporations and Financial Services (due to report 7 December 2020);
- the Treasurer implementing legislative amendments requiring litigation funders to hold an Australian financial services licence and to comply with the statutory regime governing managed investment schemes;
- the High Court rejecting the making of common fund orders as a basis for approval of third-party litigation funding commissions, at least, prior to settlement;
- the Victorian Parliament passing legislation which, from 1 July 2020, permits plaintiffs' lawyers to charge contingency fees; and
- consideration of market-based causation arguments.

We hope you find this report informative.

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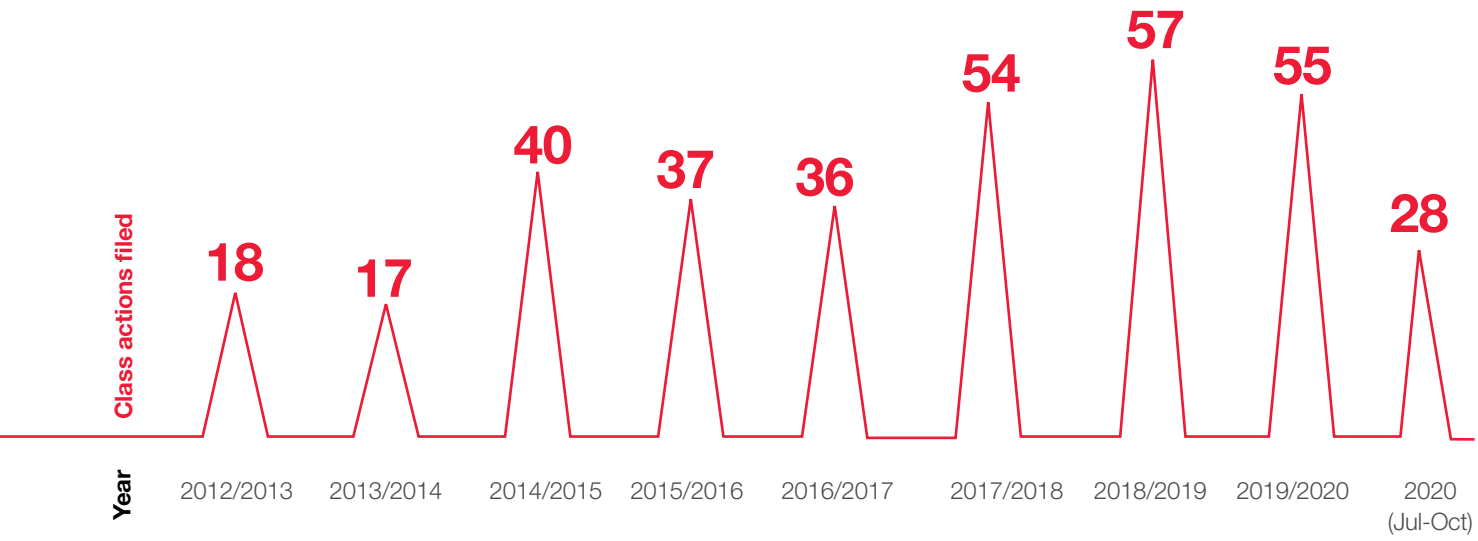
Headlines

What's new?

The year to 30 June 2020 has been **another big year with at least 55 new class actions filed.**



Securities and financial products/ investment claims remained attractive, with 27 actions commenced including:

- **Securities:** claims against Estia Health, Lendlease, Westpac, IOOF Holdings, Wellard, Boral, Treasury Wine Estates and Ardent Leisure, of which five had competing class actions.
- **Financial products/investments:** claims in relation to the Ralan Group collapse, fees on superannuation products and investments in Guvera.

Of the remaining categories, proceedings filed included:

- **Consumer claims:** a claim by farmers against Fonterra relating to milk prices; claims in relation to alleged building defects in the Opal Tower; a claim relating to alleged defective diesel particulate filters in some models of Toyota vehicles; claims related to Roundup/glyphosate; various claims of excessive fees for a variety of financial products.
- **Claims against the State:** the Robodebt class action against the Commonwealth; further claims relating to alleged environmental contamination.
- **Employment:** wage underpayment claims against Workpac, Skilled Workforce Solutions (NSW), Woolworths, Merivale, One Key Resources, Shahin Enterprises and Coles Group.

Types of claims

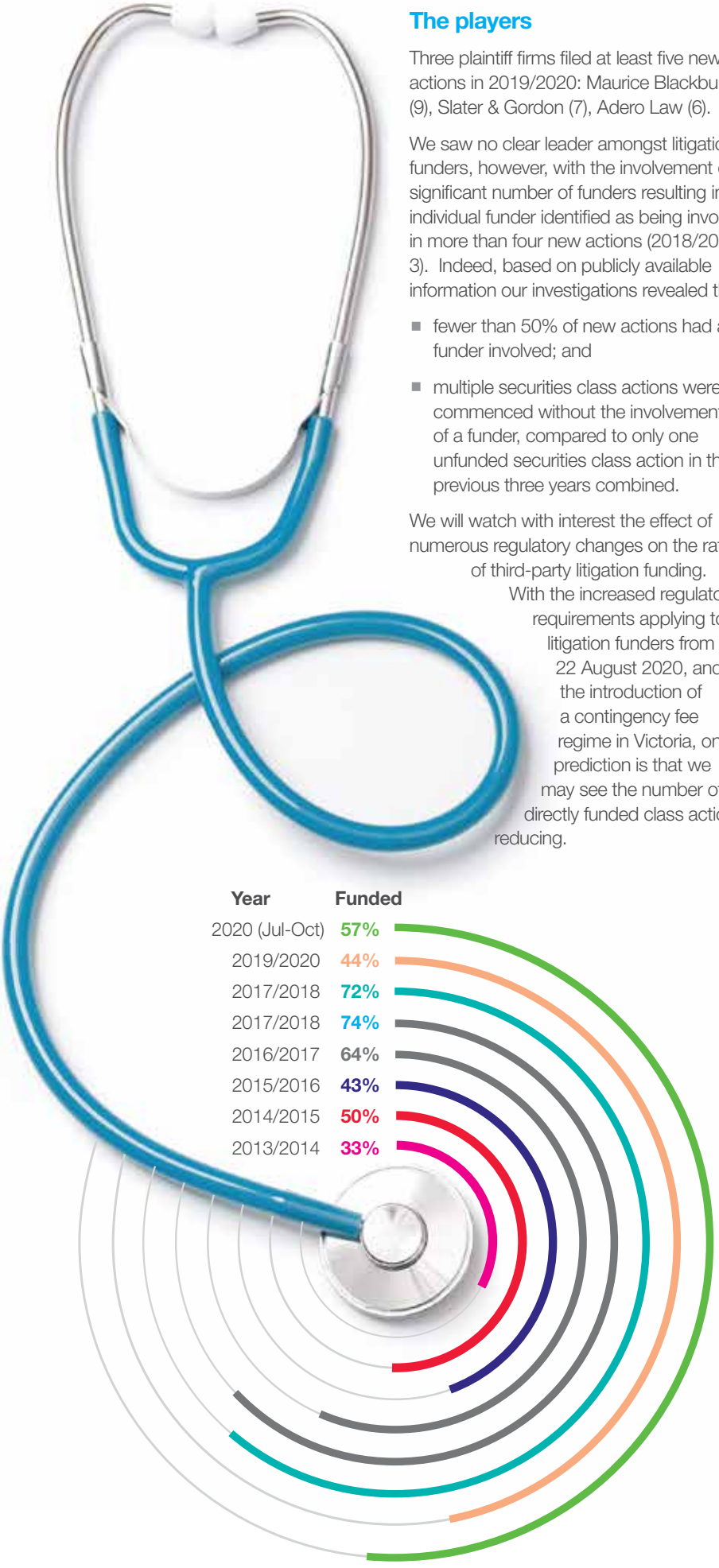
The players

Three plaintiff firms filed at least five new actions in 2019/2020: Maurice Blackburn (9), Slater & Gordon (7), Adero Law (6).

We saw no clear leader amongst litigation funders, however, with the involvement of a significant number of funders resulting in no individual funder identified as being involved in more than four new actions (2018/2019: 3). Indeed, based on publicly available information our investigations revealed that:

- fewer than 50% of new actions had a funder involved; and
- multiple securities class actions were commenced without the involvement of a funder, compared to only one unfunded securities class action in the previous three years combined.

We will watch with interest the effect of numerous regulatory changes on the rate of third-party litigation funding. With the increased regulatory requirements applying to litigation funders from 22 August 2020, and the introduction of a contingency fee regime in Victoria, one prediction is that we may see the number of directly funded class actions reducing.



Thus far, however, the two trends we have seen since 1 July are that:

- 16 of the 28 new class actions commenced have funding (57%); and
- there has been somewhat of a rush to file, with 14 actions in the week prior to 22 August 2020, 11 of which were filed on 20 or 21 August 2020.

Jurisdictional preferences

The bulk of class action activity remains in NSW and Victoria, with the Victorian Registry of the Federal Court recording the most filings (20), followed by the NSW Registry of the Federal Court (16) and the Victorian Supreme Court (9).

We expect the percentage of class actions commenced in Victoria to increase, following passage of legislation in Victoria permitting the charging of contingency fees. Eight new proceedings were filed in the Victorian Supreme Court between July and October 2020, which is a higher percentage than previous years; however, five of these class actions are related to events in Victoria arising from COVID-19 (two against the Victorian government, two in relation to aged care facilities and one against a security firm).

Judgments on liability

Although most class actions settle, 2019/2020 has been notable for the number of cases that proceeded to judgment (with some subject to appeal), including:

- judgment for the plaintiffs in the Live Cattle Export Ban class action;
- judgment for the plaintiffs in the class action against Johnson & Johnson and Ethicon Sarl over alleged faulty mesh implants (subject to an appeal);
- judgment for the plaintiffs in the securities class action against Myer (although no loss was caused by Myer's failure to correct earnings guidance); and
- judgment for the plaintiffs in the Queensland floods class action (subject to an appeal by some of the defendants).

Settlements

At least 35 class action settlements were approved by the Courts in 2019/20 and, while we do not know the full value of all settlements, publicly available information indicates at least $1 billion in settlement funds was approved.

A full list of settlements is set out on the following pages. Additional class action settlements remain subject to Court approval, which are detailed further in **Outlook**.

Class action settlements July 2019 – June 2020

	Class action	Respondents	Allegations include	Settlement sum (damages)[1]
1	**Famularo Advice**	Westpac Banking Corporation Limited	Breach of Corporations Act, breach of fiduciary duty, unjust contract	$10,000,000 (approved 24 July 2019)
2	**Fitch**	Fitch Ratings, Inc	Misleading or deceptive conduct, negligence	$27,000,000 (approved 25 July 2019)
3	**St Patricks Day Fires – Gnotuk/ Camperdown fire**	Powercor Australia Ltd	Negligence, breach of statutory duty imposed by *Electricity Safety Act 1998* (Vic), nuisance	Discontinued (approved 2 August 2019)
4	**Sirtex**	Sirtex Medical Limited	Misleading or deceptive conduct, breach of continuous disclosure obligations	$40,000,000 (approved 23 August 2019; reasons 26 August 2019)
5	**Melbourne recycling plant fire(s) (Coolaroo)**	SKM Services Pty Ltd	Negligence, nuisance	$1,200,000 (approved 1 August 2019; reasons 7 October 2019)
6	**Bank SA**	Bank SA, a division of Westpac Banking Corporation Limited	Breach of fiduciary duties, tort of conversion, breach of contract, misleading or deceptive conduct	$13,000,000 + $250,000 for applicant's credit reference claims (which are not group claims) (approved 14 October 2019)
7	**NSW Ambulance privacy breach**	Health Administration Corporation	Breach of contract, breach of confidence, contravention of Australian Consumer Law, breach of tort of invasion of privacy	$275,000 (approved 9 December 2019; reasons 12 December 2019)
8	**Forge**	Forge Group Limited	Misleading or deceptive conduct, breach of continuous disclosure obligations	$16,500,000 (approved 9 December 2019; reasons 13 December 2019)
9	**Murray Goulburn (1)**	Murray Goulburn Co-operative Co Limited	Misleading or deceptive conduct, breach of continuous disclosure obligations	$37,500,000 (approved 9 April 2020; reasons 22 July 2020)
10	**Murray Goulburn (2)**	MG Responsible Entity Limited	Misleading or deceptive conduct, breach of continuous disclosure obligations	$42,000,000 (approved 20 December 2019 and 9 July 2020)
11	**Radio Rentals**	Thorn Australia Pty Ltd trading as Radio Rentals	Misleading or deceptive conduct	$25,000,000 + $4,000,000 (paid by insurer AIG) (approved 20 December 2019)
12	**Stolen wages (Qld)**	State of Queensland	Breach of fiduciary duties or breach of trustee duties	$190,000,000 (approved 17 January 2020; reasons 8 May 2020)
13	**UGL**	UGL Pty Limited	Breach of continuous disclosure obligations	$18,000,000 (approved 17 December 2019; reasons 5 February 2020)
14	**NT youth detention**	Northern Territory of Australia	Breach of statutory duties, negligence and racial discrimination	No compensation sought (dismissed 26 September 2019; reasons 26 February 2020)
15	**Bank Fees: ANZ**	Australia and New Zealand Banking Group Limited	Breach of contract, penalty fees	Up to $1,500,000 (however only $763,901.89 claimed) (approved 6 December 2019; reasons 10 March 2020)

1. Gross settlement including applicants' legal costs unless noted otherwise.

Applicants' costs	Representative or group member payments	Litigation funder % or $	Administration costs
$1,834,963.06	$15,000 x 2	N/A	$134,500
Not disclosed	Not disclosed	Not disclosed	Not disclosed
N/A	N/A	N/A	N/A
$9,282,363.82	$25,000 x 2	$10,214,529.60	$275,000
$725,000	$5,000	N/A	Included in costs
$4,027,362.03	$40,000 (split between 6 people)	$3,300,000 commission + $666,413 reimbursement	$110,000
additional to settlement sum: $250,000	Approximately $10,000 (from media)	N/A	Born by fund after initial settlement entitlements paid
$4,200,000	$10,000	$3,950,000 (commission) + $90,000 (reimbursement)	Included in costs
$5,207,675 + $118,475 (contradictor)	$15,000	23%, ie $8,625,000 (commission)	Not disclosed
$2,562,393 + $19,310.10 (special referee)	$12,500	25%, ie $10,700,865 (commission) + $5,717.94 (reimbursement)	$130,000
Not disclosed	$10,000	N/A	Not disclosed
$13,881,952.17	$35,000	20%, ie $38,000,000	Not disclosed
$5,950,000	$82,281.64	$4,050,000 (commission) + $15,054.40 (reimbursement)	Included in costs
Parties bear their own costs	N/A	N/A	N/A
Not disclosed	$300 x 3	$500,000	$23,500

Class action settlements July 2019 – June 2020

	Class action	Respondents	Allegations include	Settlement sum (damages)[1]
16	**Cash Converters – Qld**	Cash Convertors Personal Finance Pty Ltd	Breach of maximum interest cap under *Consumer Credit (Queensland) Special Provisions Regulation 2008* (Qld), unconscionable conduct under ASIC Act	$42,500,000 (approved 24 March 2020)
17	**St Patricks Day Fires – Garvoc fire**	Powercor Australia Limited	Breach of statutory duty, negligence, nuisance	$5,000,000 (approved 20 December 2019, 6 April 2020 and 3 July 2020)
18	**St Patricks Day Fires – Terang/ Cobden Fire**	Powercor Australia Limited	Breach of statutory duty, negligence, nuisance	$17,500,000 (approved 20 December 2019, 6 April 2020 and 3 July 2020)
19	**Bellamy's (1)**	Bellamy's Australia Ltd	Breach of continuous disclosure obligations, misleading or deceptive conduct	$30,000,000 (approved 13 March 2020; reasons 8 April 2020)
20	**Bellamy's (2)**	Bellamy's Australia Ltd	Breach of continuous disclosure obligations, misleading or deceptive conduct	$19,700,000 (approved 13 March 2020; reasons 8 April 2020)
21	**CIMIC**	CIMIC Group Limited	Breach of continuous disclosure obligations, misleading or deceptive conduct	$32,400,000 (approved 28 April 2020)
22	**Vocus**	Vocus Group Limited	Breach of continuous disclosure obligations, misleading or deceptive conduct	$35,000,000 (approved 4 May 2020)
23	**Credit Card Insurance - NAB**	National Australia Bank Limited	Unconscionable conduct, misleading or deceptive conduct	$49,500,000 (approved 8 May 2020)
24	**Volkswagen (5 class actions)**	Volkswagen Group Australia Pty Limited, Volkswagen AG, Audi Australia Pty Limited, Skoda Auto A.S.	Breach of *Competition and Consumer Act 2010* (Cth) and *Trade Practices Act 1974* (Cth)	Up to $127,100,000 (approved 1 April 2020; reasons 13 May 2020)
25	**RMBL mortgage fund**	RMBL Investments Ltd	Breach of contract, misleading or deceptive conduct	$3,000,000 (approved 13 May 2020)
26	**Ralan Group collapse (3 class actions)**	DLZ Lawyers Pty. Ltd, Diligence Lawyers & Migration Agents Proprietary Limited, Gea Lawyers Pty Ltd	Negligence	Not disclosed (approved 14 May 2020)
27	**Defence contamination (1) – Williamtown**	Commonwealth of Australia (Department of Defence)	Negligence, nuisance, contravention of ***Environment Protection and Biodiversity Conservation Act 1999*** (Cth)	$86,000,000
28	**Defence contamination (2) – Oakey**	Commonwealth of Australia (Department of Defence)	Negligence, nuisance, contravention of *Environment Protection and Biodiversity Conservation Act 1999* (Cth)	$34,000,000
29	**Defence contamination (3) – Katherine**	Commonwealth of Australia (Department of Defence)	Negligence, nuisance, contravention of *Environment Protection and Biodiversity Conservation Act 1999* (Cth)	$92,500,000

1. Gross settlement including applicants' legal costs unless noted otherwise.

Applicants' costs	Representative or group member payments	Litigation funder % or $	Administration costs
$11,799,488.84	$15,000	N/A	$646,907.80
$2,250,000	$5,000	N/A	Included in costs
$4,041,799.1	$30,000	N/A	$242,763.88
$3,561,421.13	$30,000	28.99%	$203,264.70
$3,592,118	$25,000	28.99%	$135,793
$10,828,196.11	$25,000	$8,600,000	$94.051.10
$2,131,881.18	$15,500	$3,897,735.37 (commission) + $886.986.49 (reimbursement)	$265,427.15
$3,441,927.11	$20,000 + $3,000 x 8	N/A	$350,000
additional to settlement sum: $7,800,696.50 (Bannister Law) + $43,296,810.22 (Maurice Blackburn) + $752,844 (ATE Insurance Premium)	$20,000 x 6 + $10,000 x 1	Declined to make CFO or FEO orders sought	Not disclosed
$950,000	$5,000	25%, ie $750,000	Included in costs
Not disclosed	Not disclosed	Not disclosed	Not disclosed
$9,037,245.41	$120,000 (between 12 individuals, to be distributed by administrator)	25%, ie $21,500,000 (commission) + $646,177 (reimbursement)	Not disclosed
$7,925,000	$50,000 (first applicant) $20,000 (second applicant)	25%, ie $8,500,000 (commission) + $128,934 (reimbursement)	Not disclosed
$12,408,000	$20,000 x 2	25%, ie $23,125,000 (commission) + $113,245 (reimbursement)	Not disclosed

COVID-19

Continuous disclosure reforms

In response to widespread market volatility and uncertainty caused by the COVID-19 pandemic, the Federal Treasurer made a significant change to Australia's continuous disclosure laws using his emergency powers under s1362A of the *Corporations Act 2001* (Cth) in May 2020.

The change seeks to assist ASX-listed entities to comply with their continuous disclosure obligations during the pandemic and is currently in effect until 23 March 2021. It recognises that, under current market conditions, it is extremely difficult (or near impossible) to accurately predict the financial consequences of constantly evolving changes to business and the economy brought about by the pandemic.

Section 674 of the Act sets out the key continuous disclosure obligations for ASX-listed companies. Before the change, a company committed an offence if it failed to disclose non-public information that was information a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the relevant securities of that entity.

The change to the Act modifies s674 by replacing the test set out above and temporarily raising the bar for the type of information required to be disclosed. Essentially, the new test means that civil penalties for continuous disclosure will only arise where an ASX-listed company fails to disclose non-public information that the company knew (or was reckless or negligent with respect to whether) that information would have a material effect on the price or value of its securities.

This is a welcome change which should protect listed companies that are doing their best to understand the impacts of developments during the COVID-19 pandemic from becoming subject to opportunistic class actions, which often target breaches of the continuous disclosure rules.

2. All civil consequences of breaching the continuous disclosure provisions are affected by the Treasurer's determination. See further KWM Insight New COVID-19 continuous disclosure rules – Restoring balance <https://www.kwm.com/en/au/knowledge/insights/new-covid-continuous-disclosure-rules-restoring-balance-20200525>.

Test in s674(2) before change

If the entity has information and:

- that information is not generally available; and
- that information is information that **a reasonable person would expect**, if it were generally available, to have a material effect on the price or value of ED securities of the entity,

the entity must notify the market operator of that information.

Test in s674 after change

If the entity has information and:

- that information is not generally available; and
- **the entity knows or is reckless or negligent** with respect to whether that information would, if it were generally available, have a material effect on the price or value of ED securities of the entity,

the entity must notify the market operator of that information.

Consequences for insurers

There have been two interesting developments at both a domestic and international level relevant to the interplay between insurance and class actions.

- **Regulatory scrutiny**: Domestically, the House of Representatives Standing Committee on Economics is conducting a review into the insurance sector, the scope of which covers, amongst other things, COVID-19. At a hearing conducted on 28 and 29 April 2020, the responses of insurers on COVID-19 covered varied topics, including offering coverage to specific exclusions from pandemics, or for diseases notifiable under the *Biosecurity Act 2015* (Cth) or *Quarantine Act 1908* (Cth).
- **Test cases:** Test cases are being run in many jurisdictions worldwide seeking to clarify whether there is coverage under business interruption policies for losses as a result of COVID-19 (which ordinarily cover business interruption / interference arising out of physical damage to the business property, unless the policy otherwise extends the scope of cover). In particular:
  - In Australia:
    - A test case was brought in the NSW Supreme Court to consider whether the words "diseases declared to be quarantinable diseases under the *Quarantine Act 1908* (Cth) and subsequent amendments" should be read as diseases "which are listed human diseases under the *Biosecurity Act 2015* (Cth) and subsequent amendments". This case was leapfrogged to the NSW Court of Appeal and heard by a five judge bench, with judgment delivered on 18 November 2020.
    - Policyholders have begun commencing proceedings against insurers who have denied their claims, including in the Federal Court.
  - In America, six insurers - Aspen American Insurance, Auto-Owners Insurance, Lloyd's of London, Society Insurance, Oregon Mutual Insurance, and Topa Insurance Company - have been named in actions brought in the Federal jurisdiction in different States by varied businesses (i.e. restaurant/ nightclub; bridal retailer; dental practice). Each of the lawsuits claim that the business bought property insurance coverage to protect against business interruptions or disruptions outside their control (and did not exclude loss caused by COVID-19).
  - In the UK, a test case was commenced by the Financial Conduct Authority (**FCA**) on 1 May 2020 in order to obtain declaratory relief on the scope of cover afforded by policies issued by 17 insurers. The questions for determination included: whether there is insurance coverage under the non-damage heads of cover; what a policyholder has to prove to establish that there has been a "prevention of access" and the applicable test for causation. A lengthy judgment was delivered on 15 September 2020 and an appeal directly to the UK Supreme Court (the UK's top court) has commenced.

Government class actions

In late August, Quinn Emanuel Urquhart & Sullivan commenced a class action against the Victorian government in regard to its handling of the hotel quarantine program.

The lead plaintiff, a suburban burger restaurant, is seeking compensation for losses suffered due to the state re-entering stage 3 and 4 lockdowns after the quarantine breaches led to the state's second wave. Further actions have since been commenced.

The damage to businesses from the pandemic has been most keenly felt by those based in Victoria, but other firms may consider similar actions on behalf of businesses in other states especially affected by other public actions, such as the closure of state borders.

Consumer class actions

The United States has already seen many consumer class actions commenced across a broad range of claims, including:

- claims against online platform operators with allegations of price gouging on toilet paper, masks and hand sanitiser;
- manufacturers of hand sanitiser facing class actions regarding the efficacy claims made about their products;
- ride sharing platforms facing class actions regarding the classification of drivers as contractors and the according lack of entitlement to sick leave; and
- information technology companies, who have seen their businesses grow due to the shift to working from home arrangements, defending class actions in relation to their data security arrangements and privacy protection. The most notable target of these class actions thus far is against a videoconferencing provider, which has had several class actions filed against it alleging that it violated privacy rights, failed to disclose its data sharing practices, and failed to secure its data from hackers.

We consider below the extent to which these types of claims could follow here, as well as some local circumstances.

Airlines, cruises and tour operators

The first (and perhaps largest) casualties of the COVID-19 pandemic were businesses operating within tourism and leisure industries. Airlines, cruise ship and tour operators, accommodation providers and third-party booking sites have all been forced to refund or reschedule services which had already been booked and paid for by consumers.

A number of class actions have already been filed in the US addressing the contractual cancellation and refund terms that such businesses relied upon when the crisis began.

The ACCC has been quick to take action in relation to refunds, establishing a COVID-19 taskforce to investigate alleged breaches of the Australian Consumer Law and negotiate outcomes which have included airlines agreeing to offer full refunds to customers whose flights had been cancelled due to COVID-19, and travel agencies agreeing to cease charging cancellation fees and refunding those customers who had been charged.

The Ruby Princess class action filed by Shine Lawyers in July 2020 was the first of what is expected to be many COVID-19 related class actions filed in Australia, and is similar to a number of class actions filed in the US against cruise operators. The Ruby Princess class action relates to allegations of negligence by the cruise operator, Princess Cruises, with consumers directly suffering en masse the effects of exposure to COVID-19. We also expect consumer class actions to be linked to the consequences of COVID-19 restrictions and business response to the pandemic.

Subscription service interruption

Just as the closure of state and international borders affected service delivery for travel companies, so too the mandated lockdown and social-distancing rules may lead to class actions brought by consumers paying for services they are unable to receive under a subscription or membership model, such as gyms and sporting clubs.

The class action mechanism can be used to seek a reduction of fees commensurate to the interruption of services, or complaints regarding the cancellation or administration fees charged by these businesses during lockdown. For example, the ACCC has reported that certain major gym chains have been charging an administration fee, labelled as a "freeze fee", throughout the lockdown period while their gyms were closed. While the ACCC has resolved certain occurrences of these fees being charged, it is likely that similar scenarios continue. In the USA, class actions have been filed against national gym chains 24 hour fitness, LA Fitness, and Planet Fitness.

COVID-19 related product claims

The unprecedented demand for personal protective equipment and preventative/ curative measures to tackle the pandemic may have enticed certain businesses to make broad claims as to the efficacy of their products. In the US, class actions have been commenced alleging misleading or deceptive conduct in relation to marketing as well as specific action by regulators to prohibit the promotion of certain products.

In Australia, while there have been no class actions to date, the Therapeutic Goods Administration (**TGA**), a body of the Department of Health, and the Australian Health Practitioner Regulation Agency have both issued stern warnings to businesses and advertisers regarding claims they make about the effect of products on COVID-19. Perhaps the most high-profile company to be fined for breaching advertising standards is Lorna Jane Pty Ltd, which has been fined by the TGA for advertising "anti-virus activewear". The TGA has also investigated claims made by high profile individuals regarding claims made relating to COVID-19 treatments including celebrity chef Pete Evans and Clive Palmer (although the TGA did not fine Mr Palmer in relation to his claims regarding hydroxychloroquine).

Price gouging

The **International developments** section of this report describes the US laws that specifically prohibit price gouging. While laws of this nature are not replicated in Australia, as the demand for certain PPE and staple products exploded the ACCC has referred to complaints received regarding increased pricing for these goods. In addition to direct pricing, there may be risk to marketplace platforms that do not intervene in the regulation of prices set by vendors on their platforms. Consumer advocacy group CHOICE has launched a petition to clarify the law in Australia regarding price gouging.

Aged care class actions

As the unfortunate centre of much of the COVID-19 pandemic in Australia, aged care facilities and service providers can expect class actions in relation to standards of care. Two such class actions were commenced in August, against the St Basil's and Epping Gardens aged care facilities.

Focus will return to the aged care industry when the Royal Commission into Aged Care Quality and Safety reports in February 2021. Class action litigants may seek to harness any adverse findings made against industry operators by the Royal Commission in future class actions.

Employee class actions

The pandemic has required rapid adaptation by businesses that sought to continue trading, especially those that require on-site attendance by its employees. If an employer fails to implement appropriate safety measures to protect workers whose attendance is required, they may be at risk of a class action based on a breach of duty of care. Claims in the US and Canada have included claims for failure to protect workers as well as wrongful termination claims.

Litigation funding issues

Following the High Court's ruling that common fund orders (**CFOs**) cannot be made under s33ZF of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**) or s183 of the *Civil Procedure Act 2005* (NSW) (the **CPA NSW**), Courts have considered alternative mechanisms by which to make funding orders in class action proceedings.

The High Court's decision in *BMW*

On 4 December 2019, the High Court delivered judgment in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall* [2019] HCA 45 (***BMW***).[3] The High Court held by a 5:2 majority that s33ZF of the FCA Act and s183 of the CPA NSW do not empower the Federal Court or the Supreme Court of NSW respectively to make a CFO. Since then, a number of decisions have considered whether other legislative provisions may empower the Court to make a CFO, particularly at a later stage of proceedings.

CFOs have been commonplace since the 2016 *Money Max* decision (the first time a CFO was made in Australia).[4] CFOs gave litigation funders a high degree of certainty about their ability to receive a portion of any proceeds obtained by the class at an early stage in the proceedings. The High Court's decision in *BMW* has fundamentally recalibrated how litigation funders will assess the potential profitability of class actions going forward.

The position prior to *BMW*

Prior to *BMW*, Courts had relied on s33ZF of the FCA Act and the equivalent provisions under state legislation (such as s183 of the CPA NSW) to make CFOs (although such orders were far more common in the Federal Court). Those provisions empower a Court in a class action to make 'any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding'.

By allowing a litigation funder to take part of the proceeds obtained by the class as a whole in any settlement or judgment, the order was said to overcome the so-called 'free-rider' problem — where group members who did not sign a funding agreement obtained the benefits of the funder's financial support without paying any portion of the cost of the litigation, including a commission to the funder.

A CFO could ensure a return for the funder in successful proceedings without the need for a 'book-build' (signing up numerous individual group members to a funding agreement). Instead, a funder could fund an open class action as soon as a representative group member was found to commence the proceedings (provided six or more other group members had been identified), safe in the knowledge that a CFO would normally be ordered at an early stage of proceedings, ensuring the funder could ultimately recover a commission from all group members.

It was not uncommon for litigation funders to obtain 25% to 30% of group members' recovery under a CFO (in the form of a commission). This led to concerns that funders were profiting at the expense of group members who may never have agreed to enter into a funding arrangement.

The *BMW* decision

In each of the underlying proceedings in *BMW*, only a minority of group members had entered into a funding agreement with the litigation funder, and the funder sought a CFO. The appeal to the High Court challenged the Courts' power to make such orders.

A majority of the High Court considered that s33ZF of the FCA Act and s183 of the CPA NSW, although cast in broad terms, did not empower the relevant

3. See KWM Insight Litigation funders get lump of coal for Christmas <https://www.kwm.com/en/au/knowledge/insights/litigation-funding-20191202>.

4. *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191; [2016] FCAFC 148.

Courts to make a CFO, where its purpose was to ensure that a potential litigation funder obtained a sufficient return on its investment so that the funder would back a particular proceeding. In doing so, the majority reasoned that the sections empowered a Court to ensure that justice was done between the parties to an existing proceeding, but did not extend to ensuring that the class action itself could be commenced as a result of sufficient funding being available.[5]

The appellants in *BMW* argued that CFOs were unconstitutional, but the majority ultimately did not find it necessary to decide this issue.

The High Court also made clear that avoiding the free-rider problem is '… better achieved by the making of a [Funding Equalisation Order (**FEO**)] which takes, as its starting point, the actual cost incurred in funding the litigation.'[6]

An FEO allows for the returns obtained by unfunded group members to be reduced by an amount equivalent to the costs incurred by the funded group members (by way of funding commission), and for these amounts to be re-distributed among the group members on a pro rata basis. The effect is that all group members, whether funded or not, will have their return reduced by an equivalent percentage in order to meet the funder's commission, but the total amount that will be paid to the funder will not exceed the total that the funded group members were contractually obliged to pay the funder.

An FEO thus provides a mechanism to equalise costs among group members, but does not result in an uplift in the funder's return beyond its contractual entitlements. Further, as an FEO is ordered at the end of proceedings, it may require funded group members to take on significant contractual burdens under funding agreements in the period before an FEO is ultimately made to spread the burden across the wider class. Naturally, litigation funders have displayed a strong preference for CFOs over FEOs.

Responses to BMW

On 20 December 2019, a little over two weeks after *BMW* was handed down, the Federal Court updated its Class Actions Practice Note (GPN-CA), including a new paragraph 15.4 which acknowledges the likelihood of an order being made by the Court to ensure that legal costs, including the commission of a funder, be distributed 'equitably and fairly among all persons who have benefited from the action'.[7]

A number of subsequent Federal Court decisions have suggested (albeit in dicta, or distinguishable factual circumstances) that the Court may have power to make a common fund order under s33V of the

5. *BMW* at [3] and [50] per Kiefel CJ, Bell and Keane JJ.
6. *BMW* at [88] per Kiefel CJ, Bell and Keane JJ.
7. This is discussed by Foster J in *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637 at [441] where his Honour states that paragraph 15.4 is 'expressed in very general terms' and 'is merely meant to indicate that the Court will consider appropriate applications for orders sharing the costs of class actions at the conclusion of such proceedings.'

FCA Act, notwithstanding (non-binding) observations in *BMW* which impugn this course. Section 33V requires that any settlement or discontinuance of a class action be approved by the Court, and permits the Court to make any orders it considers 'just' with respect to the distribution of any settlement sum. That section was not expressly considered by the High Court in *BMW*.

Post-*BMW*, there have been three different approaches to funding proposals taken in the Federal Court.

CFOs made under s33V (but in unique circumstances)

In three cases this year, Justice Murphy made CFOs under s33V (or did not vacate an existing order made prior to *BMW*), on the basis that the High Court in *BMW* did not make a binding ruling on whether s33V could be used for this purpose. In each case, his Honour considered that it was 'just' to order a CFO. In Justice Murphy's view, the factors that might be considered within the concept of 'just' under s33V(2) are not confined to the circumstances that might be considered when determining if an order 'were appropriate or necessary to ensure justice is done in the proceeding' under s33ZF.[8] For example, in *RMBL* Justice Murphy had particular regard to the fact that the 'case could not have been undertaken without litigation funding',[9] a factor which, as discussed above, the High Court in *BMW* found should not be considered when making an order under s33ZF.

While Justice Murphy is the only judge to have made a CFO since *BMW*, each of the three cases involved unique factors that did not arise in *BMW*. In two of these three cases, the Court had previously (prior to *BMW*) made a CFO in the proceedings.[10]

In the third case, *Murray Goulburn*,[11] there was no extant CFO, and Justice Murphy made a new order to that effect (which his Honour termed "an expense sharing order"). But notably in this case, the contradictor (who had been appointed to represent the interests of the group members) argued that the Court should make a CFO. Justice Murphy placed significant weight on the contradictor's submissions. Moreover, Murphy J reasoned that a CFO was preferable to an FEO in this case because the only class member from whom the funder was contractually entitled to receive a commission was the lead plaintiff – no other class members had signed a funding agreement. In those circumstances, making an FEO would grant the funder a commission referable only to the recovery of one person. Murphy J considered it would be unjust for this to occur, particularly when the Court had previously "exhorted plaintiff law firms and funders not to engage in the wasted expense of book-building". Further, his Honour also observed that the funder had funded the litigation in a period prior to *BMW* when there was "a reasonable basis for the Funder to apprehend" that a CFO would be made. Of course it may now be difficult for a funder who decides to fund litigation post *BMW* to argue that it had a reasonable expectation that a CFO would be made.

FEOs made instead of CFOs

In three cases post-*BMW*, the Federal Court has made an FEO rather than a CFO, but in each case has observed that *BMW* does not rule out s33V(2) being used to make a CFO upon settlement.[12]

In *Bellamy's*, Justice Beach accepted the applicants' proposal that the Court make an FEO[13] but simultaneously noted several reasons why a CFO might be preferable to an FEO.[14] His Honour noted that CFOs give the Court direct control over the commission percentage a funder will ultimately obtain from each group member, whereas an FEO does not expressly vary the rate of commission paid under each funding agreement (although the notional commission paid by a funded group member will be lower than the percentage stipulated in the funding agreement, as a result of the costs of the commission being spread across both funded and unfunded group members). His Honour ultimately chose to make an FEO rather than a CFO because the funders agreed to reduce their commission rates. Had they not done so, Justice Beach would have considered making a CFO that required the funders to reduce their commissions.

In *Vocus Group*, Justice Moshinsky chose to make an FEO rather than a CFO. While his Honour considered that *BMW* did not clearly deprive the Federal Court of the power to make a CFO under s33V at the time of settlement, his Honour noted that a CFO would have imposed additional cost on the group and would go further than necessary to address the 'free rider' problem of unfunded group members.

Finally, in UGL the Court made an FEO after the funder withdrew its application for a CFO. Justice Anastassiou made an FEO which his Honour referred to as 'the now orthodox and "accepted solution" for amortising the funding costs equitably between all group members' but observed that the High Court did not strictly decide whether s33V(2) conferred a power to make a CFO at the time of the settlement.

CFOs not permitted

Since *BMW*, no Court has (at the time of this article) expressly ruled out the ability for a Court to make a CFO under s33V when approving a settlement. The closest a Court has come to adopting that position was Justice Foster's decision in *Cantor*.[15] Justice Foster considered that:

- the plurality's views in *BMW* 'probably forecloses resort to s33V of the FCA Act' to make a CFO even at the end of a proceeding (although did not say so conclusively);[16] and

8. *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647 at [54].
9. Ibid at [57].
10. Ibid, and *Pearson v State of Queensland (No 2)* [2020] FCA 619.
11. *Webster (Trustee) v Murray Goulburn Co-Operative Co Ltd (No 4)* [2020] FCA 1053.

- even if a CFO could be made under s33V at the end of a proceeding, the plurality likely did not consider such an order to be appropriate 'for the purpose of sharing the costs of that litigation.'[17]

His Honour was not ultimately required to decide whether the making of a CFO was within the Court's power, since his Honour rejected the applications for CFOs on discretionary grounds.

The position after *BMW*

Litigation funding arrangements following *BMW* are subject to significant uncertainty.

The Full Federal Court and the NSW Court of Appeal have recently declined to formally decide whether a CFO is available under ss33V, 33Z or 33ZF of the FCA Act and s173 of the CPA NSW (the NSW equivalent to s33V) respectively.[18] In both cases, the parties had not yet reached a settlement. Both Courts held that the power to make a CFO at the conclusion of the proceedings was contingent on the precise terms of any settlement presented to the Court for approval, or the findings in any judgment handed down in the proceedings.[19] These decisions leave open the possibility that a CFO may be granted once the proceedings are resolved.

As a result, the ongoing availability of CFOs remains somewhat unclear. Even where judges have been willing to consider a CFO, they have deferred the decision until the end of the proceedings (when making a settlement order) and have been more inclined to consider alternatives to a CFO even at that stage.

The ability of a funder to obtain a CFO at any stage of a proceeding is now far from a forgone conclusion. Since *BMW*, the only successful path to a CFO has been under s33V of the FCA Act during settlement.

Consequently, a funder's calculations as to whether to fund a proceeding must now incorporate the substantial risk that the funder might not ultimately benefit from a CFO.

Amendments to legislation could always provide the Courts with the necessary express power (subject to constitutional arguments, still unresolved). In fact, legislative reform in relation to funding arrangements has already begun and is likely to continue over the coming year. The Australian Law Reform Commission and Victorian Law Reform Commission both recommended in 2018 that Courts be given express statutory power to make CFOs, and on 13 May 2020 the Commonwealth House of Representatives referred to the Parliamentary Joint Committee on Corporations and Financial Services an inquiry into litigation funding and the regulation of the class action industry. The Committee held public hearings in mid-2020 and is due to report by December 2020 (considered in the **Law Reform** section of this report).

In June 2020, the Victorian Parliament passed legislation (which took effect on 1 July 2020) permitting the Supreme Court to make 'group costs orders', which allows the plaintiffs' legal representatives to recover a percentage of any settlement or award in the proceedings. This is effectively a CFO by another name (although for the benefit of the plaintiff's lawyers not the funder directly), given the Victorian legislation allows the Court to order that liability for the payment of legal costs must be shared amongst all group members. It is not yet clear how other jurisdictions will respond to these changes. At the time of publication, the Victorian Supreme Court has yet to exercise this power.

As a result of the ongoing legislative review processes, it is unclear whether the role of CFOs will be clarified or if alternative funding arrangements will become predominant.

Regardless of the ultimate outcome, funders will have to face considerable uncertainty in the intervening period and will likely need to consider alternative approaches to ensure the viability of funding a class action. As a result, we may see funders prioritise funding class actions where:

- potential group members are relatively easy to identify and contact as part of a book-build process; and/or
- potential claims per group member are relatively high, to limit the need to book build very large classes of low value claims.

Overall we expect to see:

- a reduction in the total number of funded class actions, particularly those involving a large class with small individual claims;
- increased divergence in the permissible funding arrangements between various Australian jurisdictions as a result of legislative change, with the availability of particular funding arrangements becoming a significant factor influencing applicants' choice of forum; and
- ongoing uncertainty in relation to the availability of CFOs, unless there is legislative amendment, although there is an underlying constitutional question left unresolved by the High Court in *BMW*.[20]

12. *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 3)* [2020] FCA 461; *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579; *Clime Capital Ltd v UGL Pty Ltd* [2020] FCA 66.
13. One of the applicants had obtained a CFO in the proceedings, which they no longer pursued. The other applicant had not obtained any funding order previously.
14. In *Cantor v Audi Australia Pty Ltd (No 5)* [2020] FCA 637, Foster J noted at [390] that it is "a little difficult" to ascertain whether the order in *Bellamy's* is an FEO rather than a CFO, although on our review of the case, it appears more likely to be the former.
15. *Cantor v Audi Australia Pty Ltd* (*No 5)* [2020] FCA 637.
16. Ibid at [421].
17. Ibid at [413].
18. *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; *Brewster v BMW Australia Ltd* [2020] NSWCA 272.
19. *7-Eleven* at [46] and [67]; Brewster at [44].
20. In *BMW*, the respondents argued that s33ZF FCA Act and s183 CPA NSW infringed Chapter III and/or s51(xxxi) of the *Constitution*. The majority did not decide the question because they found that CFOs were not authorised by s33ZF and s183 for other reasons. In his Honour's dissenting judgment, Gageler J rejected these constitutional arguments.

Law reform – inquiries

Parliamentary Joint Committee on Corporations and Financial Services Inquiry

The Parliamentary Inquiry is examining whether further regulation of litigation funders is needed to improve justice outcomes and will consider the broader impact of the increase in class actions on the Australian economy, particularly in the wake of the COVID-19 pandemic.

The Committee has been asked to inquire into whether the present level of regulation applying to "Australia's growing class action industry" is impacting fair and equitable outcomes for group members, with particular reference to the following:

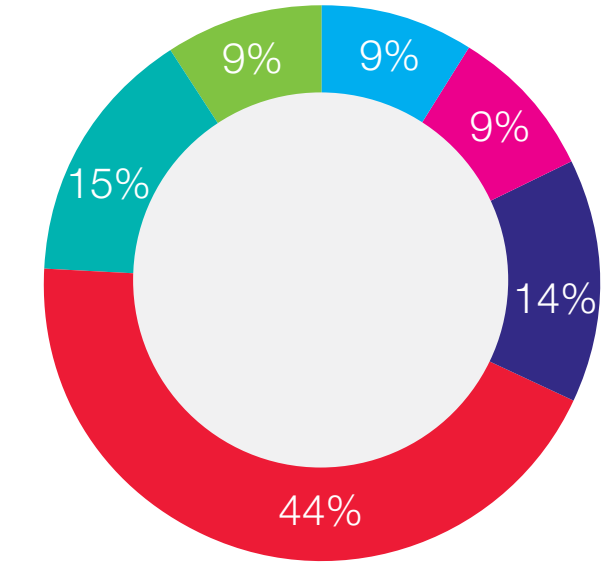
1. what evidence is available regarding the quantum of fees, costs and commissions earned by litigation funders and the treatment of that income;
2. the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;
3. the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs;
4. the financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;
5. the Australian financial services regulatory regime and its application to litigation funding;
6. the regulation and oversight of the litigation funding industry and litigation funding agreements;
7. the application of common fund orders and similar arrangements in class actions;
8. factors driving the increasing prevalence of class action proceedings in Australia;
9. what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy;
10. the effect of unilateral legislative and regulatory changes to class action procedure and litigation funding;
11. the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement;
12. the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic;
13. evidence of any other developments in Australia's rapidly evolving class action industry since the Australian Law Reform Commission's inquiry into class action proceedings and third-party litigation funders; and
14. any matters related to the terms of reference.

and reports

Submissions

The Committee received over 90 submissions from individuals and organisations. Some submissions argue that the current class action regime in Australia should remain unchanged while others support the increased regulation of litigation funders announced by the Treasurer in May. In general, there is support for legislation to stipulate whether or not Courts can make common fund orders. Opinions differ, however, as to whether such legislation should allow or prohibit the Courts from making such orders. Most plaintiff law firms contend that contingency fees should be allowed, arguing that such fees will make pursuing legal rights more affordable for everyday Australians.

The graph below shows our indicative breakdown of the submissions received:



Other submissions addressed aspects of underlying substantive laws that are driving class action activity, with several proposing that the current temporary changes to the continuous disclosure rules due to COVID-19 should become permanent.

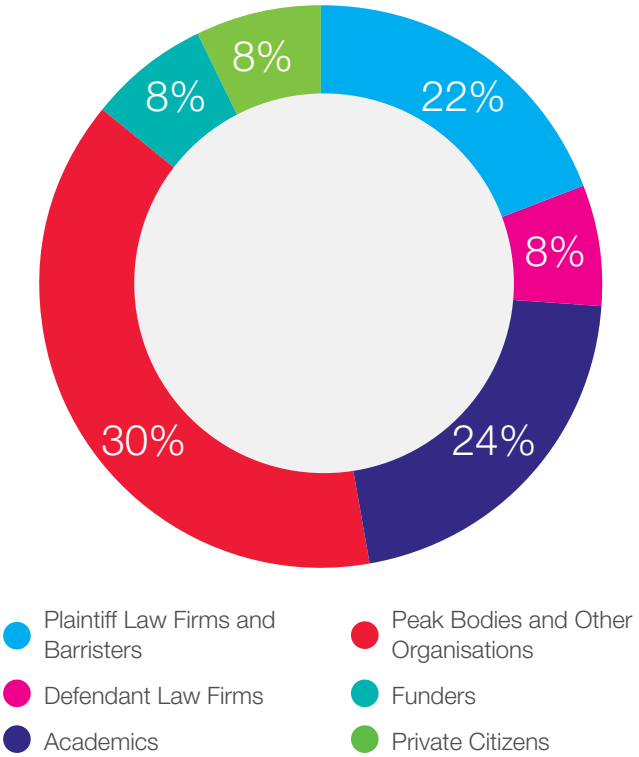
King & Wood Mallesons' submission focussed on the deficiencies that currently exist in the commercial environment surrounding class actions. The submission noted the frequency with which money is redistributed from current to former securityholders of listed issuers without the need to prove blameworthy intent, recklessness or negligence on the part of defendant issuers or their management while plaintiff lawyers and class action funders claim a sizeable proportion of such funds for themselves. In the submission we proposed that there should be:

- early scrutiny of the appropriateness of the class action mechanism for advancing a claim;[21]
- clear legislation prohibiting common fund orders; and
- a prohibition on contingency fee arrangements in class actions advancing federal causes of action, having regard to the differential position emerging in state-based regulatory regimes.

Public hearings

Five days of public hearings took place from 13 July to 3 August 2020 with approximately 50 people appearing as individuals, academics or from a variety of plaintiff and defendant law firms or peak bodies and organisations including ASIC, ASX, ACCC, Law Council of Australia, Australian Institute of Company Directors and the Business Council of Australia.[22]

The graph below shows our indicative breakdown of appearances at the public hearings:



21. KWM submission, available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Submissions>.

22. Transcripts of the hearings, including appearances by KWM partners Alexander Morris and Justin McDonnell, are available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Litigationfunding/Public_Hearings>.

Report

The Committee has been asked to report to Parliament by 7 December 2020. The Attorney-General hopes the work of the Committee will complement the work already conducted by the ALRC's Inquiry into Class Action Proceedings in 2018. The ALRC presented its Final Report to the Attorney-General on 21 December 2018, and the Government has indicated that it intends to release its response to the Final Report shortly.

Australian financial services licences for litigation funders

Coinciding with the establishment of the Parliamentary Inquiry, the Treasurer announced in late May that litigation funders would be subject to additional regulation under the Corporations Act.[23]

The amendments to the managed investment scheme regime require litigation funders to obtain an Australian financial services licence (**AFSL**) from ASIC and litigation funding schemes need to be registered.

In introducing the new licensing requirements, the Treasurer noted that they would ensure that litigation funders were operating transparently and accountably. The regulations to implement the licensing regime commenced on 24 July 2020 with effect from 22 August 2020.[24]

The reforms follow a proposal by the ALRC in its discussion paper on class actions that litigation funders be licensed.[25] That recommendation was criticised by ASIC, which argued that funding arrangements were not financial products,[26] and the recommendation was ultimately excluded from the ALRC's Final Report. Instead, in its Final Report the ALRC recommended improved court oversight of third-party litigation funders on a case-by-case basis.[27] Justifying the change in position, the ALRC stated that if it were to recommend financial services licensing it would be doing so:

- 'in circumstances where the existing licensing regime has been revealed to have manifest limitations and is likely to be subject to a protracted process of reform'; and
- 'in the context of significant criticism of not just the regulator, but the regulator's enforcement framework'.[28]

23. See further KWM Insight Litigation funders: towards restoring regulatory balance <https://www.kwm.com/en/au/knowledge/insights/litigation-funding-reforms-20200522>.
24. At the time of writing, the federal opposition has brought a motion to disallow the regulations, which will likely be determined in December 2020.
25. Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Discussion Paper 85, May 2018), Proposal 3, available at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/dp85_1_june_2018_.pdf.>.
26. Tom McIlroy and Michael Kelly, 'Crackdown on class action funders', *Australian Financial Review*, 21 May 2020, available at: <https://www.afr.com/politics/federal/crackdown-on-class-action-funders-20200521-p54va0>.
27. Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, Dec 2018), Recommendations 11 and 12.
28. Ibid, [6.39]-[6.40].
29. Ibid, [6.40]-[6.41].

The ALRC concluded that such licensing was 'unlikely to improve regulatory compliance in the third-party litigation funding industry in the short to medium term' and it was 'unlikely to ever receive significant attention from the regulator' due to the small size of the litigation funding industry.[29] ASIC has already issued a number of exemptions to specific obligations and stated that it will not take action as funders manage their transitions in respect of some elements of the reforms.[30]

Justice Legislation Miscellaneous Amendments Act 2020

The *Justice Legislation Miscellaneous Amendments Act 2020* (Vic) (**the Act**) has expanded the options for funding class actions in Victoria.

Following the recent amendments, plaintiff lawyers will be allowed to receive a contingency fee with the introduction of a new power under which the Court may make a 'group cost order'. A group cost order enables the Court to set a percentage of any amount recovered in the class action which the plaintiff lawyers would then receive as payment for legal costs.

The Act was introduced following recommendations made by the ALRC and the Victorian Law Reform Commission that legal practitioners should be permitted to charge contingency fees.[31] In addressing the recommendations, the Act's stated aim is to improve access to justice for plaintiffs bringing class actions in the Supreme Court of Victoria. The new group cost orders will require plaintiff lawyers to indemnify the lead plaintiff for any adverse costs orders, or orders to give security for costs. It will also require all class members to share liability for the payment of legal costs if the litigation is successful.[32]

While plaintiff firms have argued that plaintiffs will retain more of any judgment or settlement, we wait to see whether the amendments have an effect on either the number of unfunded actions filed in Victoria or, in time, on the percentage received by class members.[33]

30. See ASIC media release "20-192MR ASIC manages transition to new regulatory regime for litigation funding schemes" (21 August 2020), available at <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2020-releases/20-192mr-asic-manages-transition-to-new-regulatory-regime-for-litigation-funding-schemes/>.
31. Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, Dec 2018) Recommendation 17; Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, Mar 2018), Recommendation 7.
32. Second Reading Speech, available at: <http://hansard.parliament.vic.gov.au/?IW_INDEX=Hansard-2018-1&IW_FIELD_TEXT=SpeechIdKey%20CONTAINS%20(27-11-2019_assembly_1911271316)%20AND%20OrderId%20CONTAINS%20(0)&LDMS=Y>.
33. Australian Law Reform Commission, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report 134, Dec 2018), [7.62].

Competing class actions

Competing class actions continue to dominate class action filings in Australia. While Courts have clearly and consistently expressed the view that multiplicity of proceedings is inimical to the overarching purpose of the class action regimes, what is less clear are the principles by which courts should compare competing proceedings, and what considerations are permissible when undertaking that comparison.

In light of the absence of a consistent approach for evaluating competing proceedings, it is likely that the upcoming decision of the High Court in the Wigmans matter will be a major development in class action jurisprudence.[34]

Recent developments

Pending High Court appeal casts uncertainty over the Courts' powers to manage competing class actions

Background

In the wake of evidence provided by AMP Ltd on 16 and 17 April 2018 to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, five separate open representative proceedings were brought on behalf of shareholders alleging damage resulting from AMP's breach of its continuous disclosure obligations.

In 2019,[35] Ward CJ in Eq of the NSW Supreme Court approached the evaluation by means of a multi-factorial analysis that was subsequently endorsed by the Federal Court in the GetSwift class action.[36] Her Honour considered the competing funding proposals, class sizes, causes of action and the state of progress of the proceedings, placing the greatest weight on the successful proceeding's no win/no fee model, stating this was most likely to produce the highest net return for group members in this instance. This proceeding was permitted to continue, whilst the rest were permanently stayed.

The Court of Appeal decision

The lead plaintiff in one of the unsuccessful competing proceedings, Ms Wigmans, appealed this decision to the NSW Court of Appeal,[37] contending that the later-commenced proceedings were "vexatious and oppressive", abuses of process and contrary to the structure of the class action regime and the overriding purpose, and that her (first-in-time) proceeding should be allowed to proceed as it was "not clearly inappropriate". Ms Wigmans also argued that the first instance Court had improperly considered the "comparative hypothetical net return" to group members as part of its multi-factorial analysis.

The Court of Appeal:

- rejected Ms Wigmans' contention that the later in time institution of duplicative class action proceedings was vexatious, oppressive or an abuse of process, noting that to do otherwise would unduly benefit first-movers and potentially incentivise a "race to the courthouse steps", with consequent deleterious impacts;
- accepted that a strong policy of the law is to avoid multiplicity of proceedings, noting that multiple overlapping open class actions unnecessarily duplicate legal work and are an inefficient use of court resources;
- noted that in justly and efficiently determining claims, Courts are to give primary consideration to the represented group members and the defendants and are not concerned with promoting or protecting the interests of law firms or litigation funders; and
- affirmed Ward CJ in Eq's exercise of the multi-factorial analysis, noting that the assessment of the comparative hypothetical net returns to group members was a permissible consideration. In determining this hypothetical net return, Ward CJ in Eq was permitted to assume that the proceedings' respective legal teams were of equal competence, and equally capable of efficiently conducting the litigation.

Notably, the Court of Appeal stated that there are a variety of ways in which overlapping class actions may be managed. These include:

- staying all but one set of proceedings;
- a joint trial of all proceedings;
- de-classing one or more sets of proceedings;
- closing the class in all but one of the proceedings and leaving the remaining proceeding as an open class action, with a joint trial of all proceedings;
- consolidation, both of proceedings and litigation funders; or
- cooperation orders.

The High Court Appeal

The High Court granted special leave to appeal from the Court of Appeal's decision,[38] and the matter was heard on 10 November 2020.

In the application for special leave, the appellants put forward two main questions:

- whether, in conducting the multifactorial analysis referred to in *GetSwift*, the Court is permitted to consider the prospective net or gross financial return to group members; and
- whether later-filed representative proceedings should be prima facie viewed as vexatious and oppressive.

The appellants stated that the order in which proceedings are filed should not be determinative of which proceeding continues, but that, consistent with the principles upon which *forum non conveniens* applications are determined, a later filed duplicative proceeding would need to demonstrate some cogent juridical advantage in their proceeding sufficient to outweigh the prima facie

34. S67/2020 *Wigmans v AMP Limited*, hearing 10 November 2020.
35. *Wigmans v AMP Ltd; Fernbrook (Aust) Investments Pty Ltd v AMP; Wileypark Pty Ltd v AMP Ltd; Georgiou v AMP Ltd; Komlotex Pty Ltd v AMP Ltd* [2019] NSWSC 603.
36. *Perera v GetSwift Ltd* (2018) 263 FCR 92.
37. *Wigmans v AMP Ltd* (2019) 373 ALR 323.

vexation in bringing a later-in-time proceeding.

The appellants are also seeking clarity on the principles by which a Court resolves the issue of competing class actions. While the appellants accept that the class action statutory regime does not create an exhaustive "code" of the principles by which class actions are regulated, and so recourse may be had to the broader law, they contend that the Court should not engage in a speculative forward looking exercise seeking to predict which of two proceedings is likely to produce a greater return for the plaintiffs, as this is an exercise in which the Court has never historically engaged. The High Court will undoubtedly take this opportunity to further refine the approach to evaluating competing class actions.

Plaintiff firms contest who should be solicitor on the record

The NSW Supreme Court has ruled against allowing two plaintiff law firms to represent the one consolidated proceeding.[39] The duplicative proceedings were both brought in mid-2019, alleging that Lendlease Corporation Limited had breached its continuous disclosure obligations. The plaintiffs agreed to consolidate the proceedings, however this agreement was predicated on the consolidated proceeding being jointly represented by both the firms originally on the record, Maurice Blackburn Lawyers and Phi Finney McDonald.

The Court noted the longstanding rule that plaintiffs should be represented by one solicitor, however stated that this rule may be departed from in the interests of justice.

Maurice Blackburn and Phi Finney McDonald produced a "litigation protocol" by which they proposed to cooperatively conduct the proceedings. The firms contended that the consolidated proceeding would receive the benefit of two experienced class action firms acting on their behalf, with the "relatively minor" increase in costs offset by avoiding the prospect of a costly contest between the firms as to who would take the proceeding forward.

In rejecting these arguments, and ordering that the proceeding be represented by one firm Hammerschlag J said that:

- the costly contest between the firms as to who would proceed with the matter was an empty threat. Any contest would be on the papers, adopting a method specified by the Court and used to determine forum non conveniens applications;
- nothing prevents the plaintiffs from retaining the other firm to consult or provide work. Joint representation on the record is not needed to effect such an arrangement; and
- whilst some group members may opt out, as they strongly desire to be represented by a certain firm, this will simply mean that their claims are not resolved as expeditiously as had they remained a part of the consolidated proceedings.

Maurice Blackburn is taking the proceeding forward.

38. Case No. S67/2020; *Wigmans v AMP Limited & Ors* [2020] HCATrans 52 (17 April 2020).

39. *David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Limited; Martin John Fletcher v Lendlease Corporation Limited* [2019] NSWSC 1631.

Competing Jurisdictions

Various proceedings (including three class actions) were instituted against Monsanto (and related parties) in relation to alleged health impacts arising from the use of its Roundup weed-killer product. The Federal Court has declassed one proceeding after it was transferred from the Victorian Supreme Court, stating that allowing the proceeding to continue would not provide an efficient and effective means of dealing with the claims of group members. Another class action was stayed, while the last class action proceeds in the Federal Court.

Creativity in dealing with competing litigation funders

The Commercial List of the NSW Supreme Court has ordered a commercially creative solution to the problem of three competing class actions against RCR Tomlinson funded by Omni Bridgeway, Investor Claim Partners and Burford Capital respectively. After considering the relative economic merits of the funding proposals, Hammerschlag J noted that there were no determinative factors separating the proceedings, and that the proceedings should be consolidated. The Court ordered that the first proceeding, brought by superannuation trustee Ashita Tomi, should proceed, and that the litigation funders be given the option of funding one-third each of the proceeding. Omni Bridgeway (IMF Bentham) and Burford Capital subsequently continued to fund, whilst Investor Claim Partners declined.

Court requests notice of competing proceedings & directs that competing proceedings resolve dispute between themselves

Westpac is facing three securities class actions in the Federal Court alleging that the bank failed to disclose the risk and extent of alleged anti-money laundering law contraventions, engaged in misleading or deceptive conduct and breached its continuous disclosure obligations.

Initial proceedings were instituted by Phi Finney McDonald in December of 2019, funded by Woodsford Litigation Funding (**Yong Proceeding**).[40]

At an initial case management hearing, Middleton J requested that any solicitors intending to bring further proceedings in relation to the same claims provide notice to the Court.

A second proceeding was instituted in the US by US law firm Rosen Law Firm in January 2020, representing US investors in relation to the same alleged conduct.

The third proceeding was instituted in March 2020 by Melbourne-based law firm Johnson Winter and Slattery, funded by Burford Capital (**Parkinson Proceeding**).[41]

Orders were made in early 2020 requiring the applicants in the Yong and Parkinson Proceedings to:

- exchange unredacted copies of their respective litigation funding agreements;
- confirm the total number of shares acquired by their respective group members on both the ASX and NZX within the relevant period;
- confirm the number of American Depository Receipts acquired by their respective group members within the relevant period; and
- serve this material on Westpac (being permitted to redact aspects of the litigation funding agreements).

Westpac and the respective applicants were ordered to confer in an attempt to produce draft orders resolving or effectively managing the issue of multiplicity of proceedings. The Parkinson Proceeding was subsequently discontinued.

Since this development the Federal Court has amended its practice note GPN-CA to require the parties to identify, at the first case management hearing, whether any competing class actions have been foreshadowed, and set out guidelines for ongoing case management including conferral between the solicitors and provision to the Court of a proposal to resolve issues arising from the existence of the competing actions.

Determination delayed pending outcome of the Wigmans High Court appeal

In the *Boral* class action Lee J considered three competing class actions, one brought by Quinn Emanuel Urquhart & Sullivan on 19 March 2020, on behalf of CJMCG Pty Ltd as Trustee for the CJMCG Superannuation Fund, the second by Maurice Blackburn on 28 May 2020, on behalf of Andrew Parkin, and a third foreshadowed, but not commenced, by Phi Finney McDonald (subsequently filed in August 2020).

Each related to substantially similar allegations to the effect that Boral Ltd breached its continuous disclosure obligations by misreporting financial irregularities.

Justice Lee was critical of both Maurice Blackburn and Phi Finney McDonald, in circumstances where the decision to delay the institution of proceedings had delayed the matter that had been filed. Accepting that the Courts are loath to incentivise a race to the courthouse steps, that solicitors should properly satisfy themselves that there is a proper basis for anticipated proceedings, and that genuine steps should be taken to attempt to resolve any disputes, Lee J noted nonetheless that the parties' delay was inimical to the overarching purpose of the FCA Act to achieve the quick, inexpensive and efficient resolution of disputes.

Justice Lee noted that he would ordinarily only allow one open class action to proceed, and that the law has a strong aversion to multiplicity of proceedings, including open class actions. While the class action regime does contemplate multiplicity of proceedings (by way of

40. *Edmund How Fen Yong v Westpac Banking Corporation* (ACN 007 457 141) VID1373/2019.

41. *David John Parkinson and Glenda Anne Parkinson as trustees for the Parkinson Superannuation Fund* ABN 67 061 534 341 v *Westpac Banking Corporation* (ACN 007 457 141) & Anor VID177/2020.

the threshold criteria and the opt-out mechanism), Lee J considered such multiplicity to be fundamentally contrary to the overarching purpose and the administration of justice generally.

Ultimately Lee J has ordered the proceedings be case managed together, noting that a decision in the Wigmans High Court appeal could bear on the powers of the Court.

Conclusion

The Courts have consistently accepted that multiplicity of proceedings results in an inefficient use of resources for both litigants and the Courts, and detracts from the overarching purpose of the class action regimes.

Recent decisions suggest that Courts may be more willing to effect creative solutions, including, in several instances, by placing the onus upon parties to find ways of cooperatively managing proceedings. This is demonstrated by the increasing use of "litigation protocols" and other cooperation documents.

The question of costs appears key, with the Courts giving preferential consideration to proceedings that will produce the highest net return for group members (typically through minimising costs), whilst simultaneously rejecting arrangements that are duplicative or otherwise inefficient.

The upcoming Wigmans High Court judgment will undoubtedly provide further guidance on the principles by which Courts are to determine which proceeding should continue. It appears unlikely that the High Court will adopt the "first-in-time" approach favoured by the appellants, given the "race to the courthouse steps" this would involve, with resultant detraction from the proper consideration and formulation of pleadings.

Class closure issues

The approach to class closure orders in Australia has shifted drastically over the past year - a shift precipitated by the High Court's decision in *BMW*.[42]

The application of the High Court's narrow interpretation of s33ZF of the FCA Act and its state equivalents appears to leave little scope for any sort of early class closure, whether "hard" or "soft".[43]

The previous position

Under s33ZF of the FCA Act (and its state equivalents), the Court may make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.

Previously, Courts had used this power to make "class closure orders" requiring group members to register their claims so as to facilitate settlement, the rationale being that both sides would have a better understanding of the size of the class and the total quantum of the claims. Class closure orders could either be:

- "soft", under which the causes of action held by group members who had neither opted out of the class actions nor registered their intention to participate would be extinguished if an in principle settlement was reached (but would otherwise remain on foot); or
- "hard", applying to the claims of those group members that did not register or opt out, regardless of the outcome of any settlement discussions, such that only the claims of those that registered would be taken forward and able to share in the fruits of the action.

This view was premised on the notion that s33ZF was intended to confer the "*widest possible power*" on the Court.[44]

BMW, Haselhurst and beyond

Whilst *BMW* was principally focussed on the power to make a CFO, the High Court's interpretation of s33ZF of the FCA Act and its equivalents has been treated by other Courts as applicable to the scope of the power under those sections more generally.

The High Court characterised s33ZF as a "*supplementary*" or "*gap-filling*" power to do what is appropriate or necessary to advance the objectives of the class action regime. The plurality (Kiefel CJ, Bell and Keane JJ) considered that the objectives of the regime were essentially to enhance access to justice for claimants by allowing for the collectivisation of claims, and to increase the efficiency of the administration of justice by allowing a common binding decision to be made in one proceeding rather than multiple suits. The plurality noted that s33ZF "*cannot be given a more expansive construction and a wider scope of operation than the other provisions of the scheme.*"[45]

In *Haselhurst* v *Toyota Motor Corporation Australia Ltd* (**Haselhurst**),[46] the NSW Court of Appeal applied *BMW* in the context of a class closure order. In that case, a "soft" closure order was sought in order to facilitate a settlement (i.e. in advance of settlement itself). This was described by Payne JA as a contingent extinguishment of unregistered group members' rights as against the respondent, which his Honour found problematic because (among other things) the order sought went beyond the scope of the representative proceedings scheme in Pt 10 of the CPA NSW.

His Honour concluded that s183 was not a source of power to do work beyond that done by the specific provisions which the text and structure of the legislation show the section was intended to supplement. This, among other things, led his Honour to the following conclusion:[47]

> *As I have said, order 16 contingently extinguishes unregistered Group Members' rights against the respondents. This gives rise to an incongruity of the kind identified by the plurality [in BMW] in construing s 183 as providing power to extinguish Group Members' rights, even contingently, before the time that Part 10 specifically envisages, being approval of settlement (s 173) or following a judgment (s 177).*

Justice Payne's position was that the NSW regime in Part 10 of the CPA NSW (and, by extension, Pt IVA of the FCA Act) confers power to order class closure, "soft" or "hard", only at approval of settlement or following a judgment.

Haselhurst has been followed in a number of recent decisions dealing with class

42. *BMW Australia Ltd v Brewster* [2019] HCA 45.
43. "Hard" and "soft" closure is described in *Gill v Ethicon Sàrl* (No 2) [2019] FCA 177 at [1].
44. *McMullin v ICI Australia Operations Pty Ltd* (No 6) (1998) 84 FCR 1, 4; see also *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148 at [165]; *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21.
45. *BMW* at [70].

closure orders.[48] In a class action against cladding manufacturers and distributors, a class closure order was sought as a necessary step to guard against the risk that the respondent's contribution claims against third-party builders, architects and engineers would expire unless the identity of the group members that had engaged such parties was known. The respondent argued that a class closure order would remedy this risk by identifying the group members and the relevant third parties so that those contribution claims could be brought without further delay. While Wigney J accepted that there was a risk that some of the contribution claims may become statute barred, his Honour found that the Court was not empowered to make the class closure order sought, citing *BMW* and *Haselhurst*.[49]

His Honour found that such an order was:

(a) not truly supplementary to, but instead went well beyond the scope of, the specific provisions in the statutory scheme concerning distribution of money paid under a settlement approved by the Court, the orders that may be made in determining a matter in a representative proceeding, and the effect of a judgment given in a representative proceeding; and

(b) substantially at odds with the opt out nature of representative proceedings under Pt IVA of the FCA Act.

Justice Wigney also noted in obiter that the Court does not have the power to make a "deemed opt out" order, being an order which deems a group member who does not register their claim by a certain date to have opted out of the proceeding.[50]

Haselhurst has since been applied in *Wigmans*, in which the NSW Court of Appeal held that s183 did not empower the Court to authorise issuing a notice to group members communicating the plaintiffs' and defendant's intention to seek, in the event of a settlement, an order extinguishing the rights of any group member who had not registered or opted out by the deadline. While issuing a notice of the type in question may "facilitate" a settlement, the Court held that it was not "necessary" to achieve that aim.[51]

Law Reform

A number of the public submissions to the Parliamentary Inquiry have criticised the Court's decision in *Haselhurst*, arguing that it overstates the concern that class closure orders undercut the "opt-out" rationale underpinning class proceedings while arguing that respondents may be less willing and able to engage in settlement discussions at an early stage of proceedings.

Several submissions (including from some law firms and the Australian Institute of Company Directors) advocate for courts to be provided an express statutory power to make class closure orders. This could be achieved by introducing an equivalent to Victoria's s33ZG,[52] which expressly empowers the Supreme Court of Victoria to close the class prior to settlement or judgment, into cognate legislation in other jurisdictions.

The practical implication of the current situation is that, unless and until the position in *Haselhurst* is reversed, parties to a class action (respondents in particular) may face a heightened degree of uncertainty when trying to negotiate a commercial resolution. This may result in lengthier settlement negotiations, with cases staying longer in the court docket before settlement is reached, as well as higher costs.[53]

46. [2020] NSWCA 66. See KWM Insight Closing the door on closing the class <https://www.kwm.com/en/au/knowledge/insights/closing-the-door-on-closing-the-class-20200423>.
47. Ibid at [108].
48. *Inabu Pty Ltd as trustee for the Alidas Superannuation Fund v CIMIC Group Ltd* [2020] FCA 510; *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579.
49. *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 3)* [2020] FCA 748 at [126]-[128] and [214].
50. Ibid at [263]-[268].
51. *Wigmans v AMP Ltd* [2020] NSWCA 104.
52. Section 33ZG of the Supreme *Court of Victoria Act 1986* (Vic) expressly empowers the Supreme Court to make orders requiring group members to take a positive step (such as responding to a class closure notice), which could have the effect of closing the class prior to settlement or judgment.
53. See KWM Insight Closing the door on closing the class, which suggests some alternative mechanisms available to provide a degree of certainty conducive to settlement, including a settlement structured on a pro rata basis as opposed to global sum, capping any settlement amount, amending the class definition on settlement, and a registration and closure process after settlement.

Trends in case management

In 2019/2020, Australian courts maintained their proactive approach to case management in class actions. On a number of key issues, however, including common questions and group member representation, and the exercise of the Courts' discretionary powers, tensions have been visible between case management imperatives and the fundamental purpose and function of the class action regimes.

Key trend: common questions and representation

The past year saw a number of interlocutory decisions relevant to the core function of class action proceedings: the determination of common issues of law and fact.

Non-party group members are bound in respect of the common issues of law and fact by a statutory estoppel that arises pursuant to the "most important provision" in Part IVA of the FCA Act: s33ZB.[54] This section (and its equivalents in other class action regimes) provides that a judgment given in a representative proceeding must describe or otherwise identify the group members who will be affected by it and binds all such persons other than any person who has opted out of the proceeding.

The determination of the common questions, which specify the questions of law or fact common to the claims of the group members, is a key procedural step in a representative proceeding as it sets the extent to which group members are bound by the findings of the initial trial.

Since 2009, common questions have typically been finalised prior to the conclusion of the initial trial by the making of "Merck orders", which derive their name from a Full Court decision recognising the importance of resolving any controversy as to common questions in the initial trial.[55] The process of assessing the adequacy of proposed Merck orders also allows the Court to identify whether *"the representative applicant's case provides an appropriate vehicle to resolve some of those issues, or an additional claim is required to be accelerated lest there be a danger the Court may stray into an impermissible hypothetical exercise."*[56]

Common issues or issues of commonality?

On 19 December in *Belconnen Lakeview*, Lee J held that the Court was empowered to determine "*issues of commonality*" which are not "common issues" in the sense that they arise on the claim of all group members and the lead applicant, but are material to the determination of the claims of some identifiable group members (and are not abstract or hypothetical).

His Honour's decision is part of trend that has developed over a number of years, in which the Court has declined to adopt a restrictive approach to the question of whether common questions are, in fact, common. This approach is informed by a desire to determine as many of the questions that are of utility to the resolution of the group members' claims as possible without unduly burdening the Court and the applicant. As Lee J put it:

> *"[at] the end of the day, it is case management imperatives, procedural fairness and the mandate of the overarching purpose which informs the identification of issues to be determined initially and the scope of what can be determined can, in appropriate cases, extend to … "issues of commonality", as well as common issues that arise in relation to all of the cases of group members."*[57]

The problem of representation

Each Australian jurisdiction with a formal class action regime already provides for a mechanism whereby the Court can determine issues that are common to some, but not all, group members by appointing sub-group members.[58]

Courts have increasingly eschewed the practice of appointing sub-group members in favour of appointing "sample" group members and directing that the applicant serve points of claim in respect of the claims of those group members. The reason for this practice is to avoid burdening sample group members with liability for the costs of determining the issues relevant to their claim.

The appropriateness of this practice may however be reconsidered in light of the Full Court decision in the Malaysian Airlines class action. The appellants were the parents of one of the passengers on flight MH17 and discovered after the matter had settled that they were no longer in the class due to a concession made by the lead applicant that their claims were not justiciable. That concession was made without authority or instructions. The appellants successfully applied for orders that had the effect of allowing them to reopen the class action and obtain a "declassing" order under s33N to allow the proceeding to proceed as an individual proceeding rather than a class action.

Murphy and Colvin JJ affirmed existing High Court authority that the representative capacity of a lead applicant in a class action is limited to the claims giving rise to the common claims the subject of the proceedings and stated that an applicant could not *"presume to deal with the individual claims of class members howsoever they arise, as distinct from the*

54. *Lloyd v Belconnen Lakeview Pty Ltd* (2019) 377 ALR 234 at [374].
55. *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2009) 355 ALR 20.
56. *Lloyd v Belconnen Lakeview Pty Ltd* (2019) 377 ALR 234 at [377].
57. Ibid at [376].
58. *Federal Court of Australia Act 1976* (Cth) s33Q and s33R; *Civil Procedure Act 2005* (NSW) s168 and s169; *Supreme Court Act 1986* (Vic) s33Q and S33R; *Civil Proceedings Act 2011* (Qld) s103M and s103N.
59. *Dyczynski v Gibson* [2020] FCAFC 120 at [251].

common claims which are the subject of the class action".[59]

In his separate (and concurring) judgment, Lee J did not see any conflict between this principle and the practice of appointing sample group members, although his Honour considered that the claim of an individual group member (to the extent that that claim involves individual rather than common issues) could not be determined without hearing from that group member.

Plaintiff lawyers will reflect on this judgment and its implication for many types of class action, in particular the extent to which the lead applicant is an appropriate representative of the class in respect of facts or issues that do not arise in his or her particular claim.

Other trends in case management

Confidentiality obligations

The Full Court confirmed in the Crown class action that the Court will not relieve third parties of any obligations of confidence arising under a contract of employment for case management reasons, in order to ensure the efficient conduct of litigation. The Full Court distinguished an earlier decision of Forrest J in the Christmas Island class action[60] which set aside an obligation of confidence on the basis that the former employee in that case could give relevant and detailed evidence on a topic in respect of which further evidence was otherwise limited.

The Full Court confirmed that the correct test is whether "the obligation actually interferes adversely with the administration of justice so as to render the obligation void or unenforceable at law".[61]

Opt out notices

There has been continued judicial scrutiny of the content of opt out notices proposed to be issued by applicants in the Federal Court this year. The Court has also acted to order the issue of opt out notices to clarify a potential misunderstanding arising from a communication between a respondent and class members, to ensure that all group members are equally informed.[62]

Consistent with the Court's interest in the form and content of communications with group members, an opt out notice in the *Lenthall* class action was re-drafted by Lee J in order to reduce complexity.[63]

Costs

Over the past year, the Courts have demonstrated a willingness to make non-standard costs orders in class actions.

In a class action claiming personal injury from the use of pelvic implant products, Lee J made personal costs orders against solicitors who engaged in a "a scandalous waste of resources and … misuse of the court system" by commencing actions on behalf of a large number of individuals whose claims broadly overlapped with group members in three existing class actions.[64]

The Full Court in the Malaysian Airlines class action indicated an intention to make costs orders against legal representatives (including counsel) for failure to obtain instructions from the appellant group members and for breaching their duty to avoid conflict and to not to take steps contrary to the interests of the group members. The Full Court indicated a willingness to award costs on an indemnity basis.

In a class action alleging that certain labour hire practices were inconsistent with the *Fair Work Act 2009* (Cth) (**FWA**), the Full Federal Court has held that UK litigation funder Augusta Ventures cannot be ordered to pay security for costs in circumstances where the FWA provides that a party to proceedings pursuant to that Act can only be ordered to pay costs if they act vexatiously or unreasonably.[65] Chief Justice Allsop (with whom the other judges agreed) specifically acknowledged that a funder could nonetheless be ordered to pay security in proceedings not affected by the FWA. The decision is likely to have implications for a range of class actions bringing similar claims and the willingness of litigation funders to provide support.

Damages and causation

One case to keep an eye on is the Queensland floods class action. Decisions were handed down in November 2019 and May 2020, whereby the plaintiff was awarded just over $250,000 and common questions were answered. However, for the remaining 6,500 class members, causation and any damage still have to be argued, while an appeal takes place (set down for 12 days in May 2021). The issues are intriguing. When the matter does not settle and the defendants challenge quantum, what can the Court do, especially for a large class? Funders and plaintiff law firms will look on as issues such as whether insurance recoveries are claimable, can sampling be used, and can Government relief payments be deducted are all to be determined.

60. *AS v Minister for Immigration and Border Protection (Ruling No 6)* [2016] VSC 774; 53 VR 631.
61. *Crown Resorts Limited v Zantran Pty Limited* [2020] FCAFC 1 at [135].
62. *Uren v RMBL Investments Ltd* [2019] FCA 1163.
63. *Lenthall v Westpac Banking Corporation* (No 2) [2020] FCA 423.
64. *West v Rane* (No 2) [2020] FCA 616.
65. *Augusta Ventures Limited v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194.

Securities class actions: Market-based causation

Securities class actions are a major risk for listed companies and there have been over 120 securities class actions filed, of which more than 80% were funded.[66] The essence of a securities class action is a claim for misleading or deceptive conduct and a breach of continuous disclosure obligations. Following a company's sudden and significant performance downgrade, earlier optimistic public statements about the performance of the company are alleged to have misled investors.

While a lot has been said about securities class actions in Australia, there are few substantive judgments because most securities class actions settle before trial. This is one reason why the legal industry and companies closely monitor class action litigation for possible future judgments.

A matter crucial to the viability of securities class actions, and so the subject of specific scrutiny, is 'market-based' causation.

What is market-based causation and how does it make securities class actions viable? First, the law usually requires that a plaintiff prove direct reliance on a misleading or deceptive representation before they can claim that they were damaged by it. For example, a plaintiff must usually prove that they actually read and relied on a particular publication (such as a prospectus) to make the decision to invest in a company. This might be simple enough for a handful of investors who assiduously study company documents before investing. However, it is perhaps not unreasonable to speculate that this is not the case for most investors.

Market-based causation bypasses the need to prove direct reliance for all group members in a securities class action. This alleviates a significant evidentiary burden for plaintiff law firms and litigation funders, multiplies the number of group members who may be able to prove loss and significantly increases the final potential damages bill. Market-based causation is a form of indirect causation. It permits a court to find that, while investors did not individually rely on a misleading or deceptive representation, the market as a whole was misled because the misleading information was factored into an inflated share price.

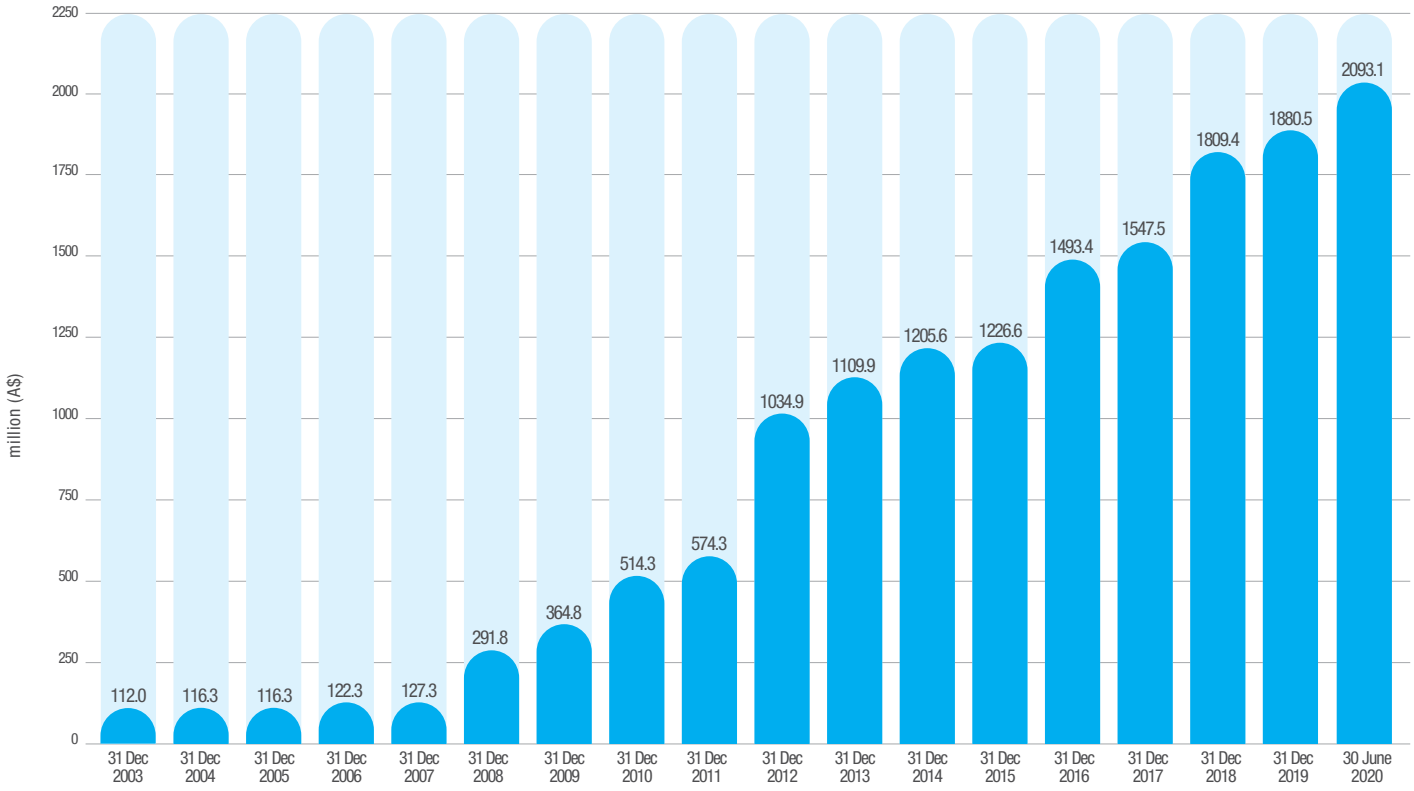
The following is a short timeline of the few authorities that have sought to address or comment on market-based causation:

- First,[67] the Full Federal Court considered market-based causation in *Caason Investments Pty Ltd v Cao*.[68] The case was a securities class action in the traditional mould. However, market-based causation was only discussed in the context of whether the Court would allow it to be pleaded – which it did. The Full Court did not finally decide whether market-based causation existed. Like most securities class actions, the matter settled before trial and the Court did not get the opportunity.

66. See V Morabito "Shareholder class actions in Australia - myths v facts" (November 2019), pages 15 and 19, available at < https://ssrn.com/abstract=3484660>.

67. There are earlier cases suggesting that a direct causal link might not be required but this is the first case that deals so directly with market-based causation: see, for example, *Grant-Taylor v Babcock & Brown Limited* (In Liquidation) [2015] FCA 149. The concept also comes from the United States where there is a similar 'fraud on the market' concept and so the Australian legal profession was aware of the potential for future market-based causation arguments.

Significant securities class action settlements (cumulative)



- Second, market-causation was considered, and found to exist for the first time, in *Re HIH*.[69] Delivered in 2016, this was a judgment of a single judge of the NSW Supreme Court. Justice Brereton held that investors did not need to prove that they directly relied on the alleged misleading conduct of the company. In that case, the misleading conduct waslaw that the company had overstated its profits in public documents which then inflated the share price and thus the price paid by investors for the period affected by the overstatement. The legal analysis in support of market-based causation was, however, limited. Also, being a decision of a single judge, the case is open to being reversed by an appellate court.
- Third, in October 2019, much attention was directed to the case of *Myer*.[70] Many anticipated that the judgment would finally provide certainty around the existence of market-based causation in Australia. While the reasons for judgment engaged in a deep analysis of the issues surrounding market-based causation, Justice Beach ultimately avoided making a finding on market-based causation, calling the issues '*matters for another day*'.[71] His Honour decided instead that there was no evidence that the price was actually affected by any misleading conduct. Principally, the market analysts appeared to have disregarded the optimistic statements made by the company CEO.
- The *Worley* class action was the next candidate on many watch lists. However, in a judgment handed down in October 2020, the Court did not need to address the issue at all. In dismissing the claim, it found that Worley had neither contravened its continuous disclosure obligations nor engaged in misleading or deceptive conduct.[72] While the judge accepted that the representative applicant had relied on Worley's August 2013 earnings guidance to buy Worley shares a few weeks later, her Honour did not need to decide whether Worley's alleged contraventions had a causative effect on the price of its shares at the relevant times, nor to engage more broadly with the controversial question of market-based causation.

Accordingly, for now, listed companies and the legal industry must wait for a case where market-based causation is able to be determined by a court in a contest about reliance on the statements made. However, the *Myer* and *Worley* judgments may suggest that it could be some time until such a case arises. Securities class actions can fail because proving that public statements, in the form of performance estimates, are misleading or deceptive can be a significant factual hurdle.

Finally, in the recently held Parliamentary Inquiry (considered in the **Law Reform** section of this report) into litigation funding and the regulation of the class action industry, securities class actions were a primary focus. The reform agenda of the Australian Parliament, if any, is not known and a final report from the Inquiry is pending. However, perhaps something to add to the watch list.

68. [2015] FCAFC 94.
69. *HIH Insurance Limited (In Liquidation) and others* [2016] NSWSC 482.
70. *TPT Patrol Pty Limited as trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747; there is also the decision of Masters v Lombe (liquidator): *In the Matter of Babcock & Brown Limited* (In Liq) [2019] FCA 1720 which was delivered in the same week as *Myer* and discusses market-based causation but this is not strictly a securities class action.
71. *Myer* at [1672].
72. See further KWM Insight Case dismissed: aggrieved investor fails in class action against Worley <https://www.kwm.com/en/au/knowledge/insights/case-dismissed-aggrieved-investor-fails-in-class-action-against-worley-20201022>.

Securities class actions: An insolvency perspective

With the current Parliamentary Inquiry (discussed in the Law Reform section of this report) directed to consider the potential economic impacts of the class action industry on businesses in financial distress and the likely future impact on the broader economy if class action cases continue to grow at their current rate, it is timely to consider the important role played by the law of insolvency in the development of class action practice in Australia.

In current economic conditions, the continuation of shareholder class actions in their current form may be the "last straw" to push many vulnerable businesses into insolvency despite the best intentions of the existing, temporary safe harbour protections the Commonwealth Government has introduced. Therefore, as part of the present review, the overlay of the insolvency law system is worth revisiting.

Background

Given the circumstances that usually surround a major corporate collapse, it is not surprising that insolvency law played a critical part in the early development of class actions, litigation funding and the assignment of choses in action. The insolvency law system has already had to deal with the need for greater regulation of registered liquidators to avoid perceptions of excessive fee gouging and the restoration of the established basic company law principle that the claims of shareholders are subordinate to those of creditors. The following are some examples:

- The law of insolvency acted as a catalyst to the wider legitimacy of third-party litigation funding arrangements in Australia,[73] with liquidators using their special statutory functions as an exception to the prohibitions against maintenance and champerty.[74]
- More recently, by insolvency law reform, the liquidator's power to assign choses in action was extended to insolvent trading and other voidable transaction claims,[75] which traditionally were held not to be assignable as they were personal rights of the liquidator.
- In *CGU Insurance Limited v Blakeley* [2016] HCA 2, the High Court held that the liquidator plaintiff could pursue a claim directly against an insolvent company's insurer under that company's insurance policy with such a right now more broadly conferred by legislation.[76]
- The Federal Court has contemplated the scenario where a litigation funder has become insolvent and unable to honour its litigation funding commitments, thereby causing the class action to collapse.[77] In fact, the insolvency of an offshore funder has already led to the premature settlement of at least one funded class action.[78]
- Concerns that auditors and other deep pocketed professionals were being targeted as defendants to assume full responsibility for corporate failures, led to the introduction of apportionment legislation to reduce professional indemnity insurance premiums and allow courts to apportion the legal responsibility for causing loss between concurrent wrongdoers when just to do so.[79]

Current practice issues

Multiple and expensive class actions, aggressively driven on behalf of shareholders, are prematurely pushing companies into insolvency.[80] In turn, this has started the race to the only material asset in the liquidation, being the directors' and officers' liability insurance policy (**D&O Policy**).

This situation is unsatisfactory and has the result, in practice, of elevating the claims of shareholders to the detriment of the claims of creditors and indeed, the company as a whole. Some of the current issues that must be addressed by liquidators in practice include:

- Given that shareholders now have a statutory right to commence action against the directors (and any insurer) without joining the company, the usual stay and requirement for leave has been avoided by shareholder plaintiffs and their funders. This subsequently hampers the liquidators in the performance of their functions and creates distractions in the liquidation, as the race begins to access the limits of the D&O Policy by securing an early judgment or settlement. The liquidators, being the last party involved with limited funding, are at an obvious disadvantage.
- Despite the law of insolvency opening the door to the growth of the litigation funding industry, liquidators still remain obligated to obtain prior creditor, committee or court approval for such funding.[81] Such controls do not apply to class actions.
- Pursuant to s564 of the Corporations *Act 2001* (Cth) (**Act**), any creditor who funds litigation is entitled to seek priority for their debt, in addition to their funding. However, as such orders will not be granted up front in advance, the funding creditor has no certainty as to priority until the conclusion of the proceeding.[82]
- Given the absence of any material tangible assets owned by a company in most modern day insolvencies, liquidators have had to seek funding from the Commonwealth Government via the Australian Taxation Office (which is usually one of the largest creditors),

73. *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.
74. *Re Movitor Pty Ltd* (1996) 14 ACLC 587; *Ultra Tune Australia Pty Ltd v UTSA Pty Ltd* (1996) 14 ACLC 1,610.
75. Section 100-5 of the *Insolvency Practice Schedule (Corporations) 2016* (Cth).
76. *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) which creates its own priority in favour of claimants who obtain settlement or judgment first, contrary to the pari passu principle which applies under the Corporations Act 2001 (Cth).

the Attorney-General's Department (which administers the Fair Entitlements Guarantee scheme which underwrites the employee minimum safety net entitlements in an insolvency) or ASIC (which offers assetless administration funding targeted at phoenix activity). Given the favourable terms upon which this Government funding is offered, if it can be obtained it will generally be preferred by a liquidator to litigation funding as it will make a better return to creditors.

Purpose of the law of insolvency

Given these issues, it is timely to again review our insolvency law more generally and its interaction with shareholder class actions, the priority of shareholders' claims and the risk of premature insolvencies, in order to assess whether our laws are currently meeting expectations and duly holding to account those responsible for breaches of the law. It has always been the role of insolvency law under the control of an independent registered liquidator to, within their limited funds, conduct full investigations into the company's affairs, report offences and hold those responsible to account. This important role should continue, with liquidators being equipped with greater powers and more efficient procedures to properly represent the interests of all stakeholders in the liquidation fairly in accordance with established policies and priorities.

The following are some potential proposals which may be worth considering that may impact on the commercial viability of class actions:

- Amending s562 of the Act to make it clear that shareholder claims against the company under an insurance policy are subordinate to those of creditors. The interaction and potential conflicts with the statutory right in NSW to pursue an insurer directly should also be clarified as to which party has control and priority over the proceeds of an insolvent company's insurance policies. Such clarification will serve to mitigate the risk of the available insurance limit being eroded by litigation costs.
- The introduction of a new procedure which provides listed companies in financial difficulty with a viable way to cleanse the company and ring-fence the shareholders' claims and applicable insurance proceeds. This would avoid such claims and the costs of multiple proceedings becoming a distraction and resulting in the company being unable to raise further funds and secure ongoing insurance to avoid insolvency.
- Further clarification of the liquidator's duties and obligations in relation to D&O Policies and when managing competing claims, with a carve out allowing liquidators to disclose the D&O Policy where considered to be in the interests of the company and its unsubordinated creditors without being in breach of their duties or the D&O Policy.
- The introduction of a regime to avoid shareholders obtaining a "head start" and exhausting the relevant limits under the D&O Policy before liquidators have finalised their investigations. The regime could be potentially based upon the insolvent trading provisions where the liquidator has the sole right to commence proceedings against the directors within the requisite period and it is only after the liquidator has made the election not to commence proceedings that creditors can commence their own. All proceedings, including shareholder class actions, in respect of the company's affairs would need to be stayed during any liquidator election period.
- Simplification of the process for the approval of liquidator litigation funding agreements, with oversight by ASIC.
- There should be a discretionary court power to grant s564 priority orders up front.

Conclusion

As is apparent from this brief discussion, many of the relevant legal and practical issues in our insolvency system are uncertain and complex, as are the policy considerations in relation to the ranking of claims (assuming one accepts the proposition that the claims of creditors, other than employees, rank equally and the claims of shareholders are subordinate). By clarifying the rules surrounding access to insurance policies and the ranking of competing claims, we expect companies will be better positioned to obtain informed advice should they find themselves in distress and dealing with competing actions.

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77. See for example *Perera v GetSwift Ltd* (2018) 363 ALR 394 at 420 [115].
78. *Clasul Pty Ltd v Commonwealth of Australia* [2016] FCA 1119 (the equine influenza class action).
79. See for example the *Civil Liability Act 2003* (Qld); *Corporations Act 2001* (Cth) ss1041L-1041S; *Australian Securities and Investments Commission Act 2001* (Cth) ss12GP-12GW; *Competition and Consumer Act 2010* (Cth) ss87CB-CI.
80. By way of example, the administration of SurfStitch Group Limited and most recently, the administration of Fairview Architectural Pty Ltd.
81. Section 477(2B) of the *Corporations Act 2001* (Cth).
82. *Bell Group Ltd (in liq) v Westpac* (1996) 22 ACSR 337 at 348 (per Templeman J) where his Honour held that '*an order made in advance of litigation must be hypothetical, or of uncertain operation*' and that it was unlikely that the Parliament intended s564 to apply in those circumstances.

International developments

USA

In the first half of 2020, 171 Federal securities class actions were filed in the USA, reflecting continually high numbers year on year with many claims in the technology/communications and consumer sectors.[83]

There have also been key developments in actions relating to data breaches and workplace harassment. With the onset of the COVID-19 pandemic, however, numerous class actions have focussed on price gouging and insurance.

COVID-19

Price gouging has been a key point of litigation, with Amazon, eBay and supermarket Albertsons all defending accusations of price gouging from customers. In addition to disputes arising out of customer/retailer relationships, producers are also filing class actions against distributors and retailers. The 'egg' class action, for example, was brought by Californian egg farmers against defendants involved in egg production, distribution and wholesale delivery as well as retailers such as Whole Foods, Costco, Wal Mart, Trader Joe's and others.

California has been the jurisdiction of choice for all of these actions. Unlike the Federal and many other state jurisdictions, California has an expressed legislative prohibition on increasing prices on consumer goods or services beyond 10% following the declaration of a State of Emergency.[84] The cases mentioned include allegations of price increases ranging from 51% to 300%.

Australia does not have a specific law prohibiting price gouging, although limited prohibitions were introduced early in the pandemic relating to the selling of "essential goods" at more than 120% of the value of the consideration for which the goods were purchased.[85] "Essential goods" are defined as equipment that is capable of limiting the transmission of organisms to humans, and include disposable face masks, disposable gloves, disposable gowns, goggles, glasses, eye visors, alcohol wipes or hand sanitizer. At a more general level, the ACCC has said that the issue is one of their priorities during this time and increasing prices may give rise to actions under misleading claims or, in extreme cases, unconscionable conduct.[86]

While plaintiff firms in Australia have been investigating class action opportunities arising from COVID-19 generally (e.g. Ruby Princess and aged care facilities), to date there has been no extensive discussion about the issue of price gouging.

As noted in the **COVID-19** section of this report, insurers have also been subject to COVID-19 related actions relating to business interruption insurance, an issue being explored in Australia by way of test cases.

Data breaches

Equifax has reached a proposed settlement arising out of a data breach announced on 7 September 2017, which impacted about 147 million Americans and resulted in about 300 class actions that were eventually consolidated. The proposed settlement will see Equifax pay $380,500,000 into a fund for compensation, legal fees, expenses, service awards, and notice and administration costs; with up to an additional $125,000,000 if needed to satisfy claims for certain out-of-pocket losses, and potentially $2 billion more if all 147 million class members sign up for credit monitoring.

While the quantum of this this case is not reflective of the Australian experience, data breach class actions are a growing area in Australia. In December 2019 the NSW Supreme Court approved the settlement of a data breach class action against the NSW Ambulance Service for $275,000 plus $250,000 in costs.[87] Plaintiff firms have investigated data breach actions against the Department of Immigration and Border Protection and Optus.

Sexual Harassment Class Actions

In last year's report, we outlined a number of class actions brought against media and technology companies that alleged the concealment of sexual misconduct. Since then, McDonalds has become another high-profile case after Florida employees brought a case seeking $500M.

The last 12 months have also seen settlements in high profile cases. The class action brought against former film producer Harvey Weinstein settled for $19M. The University of Southern California also settled an action for $215M regarding sexual assaults of patients at USC's student health centre.

While Australia is yet to see sexual harassment class actions, it is certainly an interest area for plaintiff law firms.

Europe

Continued progress towards an EU collective redress scheme

In the review period the EU has continued to make gradual progress towards the introduction of a harmonised scheme for consumers in the EU to access collective redress against infringements of EU law.

In the latest development, on 30 June 2020 the European Commission published the agreed text of the draft directive, which

83. Stanford Law School, *Federal Securities Class Action Litigation 1996-YTD*, available at: <http://securities.stanford.edu/charts.html>.

84. California Penal Code, s396.

85. *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Essential Goods) Determination 2020, s5.*

86. Australian Competition and Consumer Commissioner, *ACCC response to COVID-19 pandemic* (Media Release, 27 March 2020) available at: <https://www.accc.gov.au/media-release/accc-response-to-covid-19-pandemic>.

87. *Evans v Health Administration Corporation* [2019] NSWSC 1781.

will still need to receive approval from the European Parliament and national parliaments. The directive would empower regulatory entities designated by individual member states to seek relief on behalf of consumers in respect of breaches of specific EU statutes, relating in general terms to financial services, health, data protection, communications and tourism, and would operate on the basis of a "loser pays" model. While final implementation of the directive is still some way off, real progress is being made.

The view from the UK

Unlike in the USA and Australia, the UK does not have a generally accessible "opt-out" class action regime. Instead, the UK's primary class action procedure – the Group Litigation Order (**GLO**) regime – requires plaintiffs to book build and bear the risk of adverse costs orders. There are two main exceptions to this:

- First is the possibility of representative actions, which proceed on an opt-out basis. Large-scale representative actions, however, are difficult to formulate given the narrow interpretation of the requirement that all represented class members have "the same interest" in the proceedings.[88] Despite the obstacles, recent case law discussed below suggests representative actions may provide a viable procedure for the litigation of data and privacy breach class actions.
- Second is in relation to group competition claims under the *Competition Act 1998* (UK) which, following amendments in 2015, may be brought under a far less restrictive opt-out procedure – the key requirements are that the claimants' claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

Over the past year, several significant cases have made their way through the English courts. Highlights include:

- **New GLOs**. GLOs are relatively rare. Only a single GLO was made in 2019, by customers of British Airways who were subject to a 2018 data breach through which the personal data of approximately 500,000 customers was stolen by hackers. That same event also led the Information Commissioner's Office to issue a notice of intent to fine British Airways £183.39M, though the amount of the penalty is under review and is yet to be finalised.
  Only a single additional GLO has been made so far in 2020, in relation to ongoing group litigation against Vedanta Resources on behalf of thousands of Zambian farmers claiming to be affected by the operations of the Nchanga copper mine. The GLO was unusual in that it was sought by the defendants to consolidate three separate sets of proceedings against them, brought by two separate law firms. The Court agreed with the defendants that consolidation was likely to save costs and reduce complexity.
- **First UK decision on group shareholder actions.** On 15 November 2019, the High Court handed down its decision in the Lloyds/HBOS litigation – the first judgment in shareholder GLO proceedings in England and Wales.[89] The case arose from the decision of the directors of Lloyds Bank to recommend to shareholders to vote in favour of a reverse takeover of HBOS in 2008, including through the publication of a 289-page circular. The claimants alleged HBOS had been significantly overvalued, and the takeover damaged the value of their shareholdings. They claimed Lloyds directors had breached their duties both by recommending the takeover at all and by failing to provide adequate information in the circular as to HBOS's financial position.
  In finding for the directors, the Court found that, while certain additional disclosures should have been made in the circular, their omission was not causative of any loss to group members, and any damages award would in any event have been precluded by the operation of the principle against recovery of reflective loss.[90] The decision is illustrative of the reluctance of the Courts to second-guess commercial decisions, and of the significant hurdles facing shareholder group actions.
- **Data breach representative action**. In *Lloyd v Google* LLC [2019] EWCA Civ 1599, the Court of Appeal unanimously allowed the representative applicant's appeal, allowing the claim to continue as a representative action. The Supreme Court granted leave for Google to appeal against that decision in March this year, with the appeal yet to be heard.
  The claim was brought by the representative applicant on behalf of approximately four million residents of England and Wales who were alleged to have had their internet activity secretly tracked by Google while using their Apple iPhone devices. Google's activity is alleged to have breached UK data protection laws.

  Significantly, in allowing the appeal, the Court of Appeal determined that:

  - the members of the class were properly considered to have the "same interest" in the proceedings – each were alleged to have had their data taken by Google without their consent in the same period, suffered the same alleged loss, and were not seeking to rely on any individual

88. See, eg, *Emerald Supplies Ltd and another v British Airways PLC* [2010] EWCA Civ 1284 where the narrow test was set out.
89. *Sharp & others v Blank & others* (HBOS) [2019] EWHC 3096 (Ch).
90. That conclusion in the context of Lloyds/HBOS would appear not to be affected by the recent Supreme Court decision in *Marex Financial Ltd v Sevilleja* [2020] UKSC 31, through which the principle of reflective loss has been significantly curtailed.
91. *Mastercard Incorporated and others (Appellants) v Walter Hugh Merricks CBE (Respondent)* UK Case ID UKSC 2019/0118.
92. See *Merricks v Mastercard Incorporated and others* [2019] EWCA Civ 674.

circumstances in pursuing the claim; and

- damages are in principle capable of being awarded for a loss of control of data, even in the absence of pecuniary loss or distress.

While the decision is pending appeal to the Supreme Court, it appears to have already paved the way for further group actions seeking compensation for data breaches. In August 2020, a funded representative action was filed against Marriot International on behalf of millions of hotel guests affected by a cyberattack data breach.

- **Competition**. On 13 and 14 May 2020, the Supreme Court heard Mastercard's appeal against the Court of Appeal's 2019 decision approving a £14 billion class action against Mastercard relating to the setting of default multi-lateral interchange fees.[91] The class was estimated to comprise 46.2 million people.[92] The Court of Appeal's decision approving the class action was the first appellate decision of the English courts on the 'opt out' collective action regime introduced in 2015 for competition claims. Judgment remains pending. The Supreme Court's decision is expected to be of fundamental importance to the way English courts approach the approval of collective proceedings orders under the competition collective action regime going forward. [93]

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93. In relation to the substantive issues raised in the case, on 17 June 2020, the Supreme Court unanimously dismissed an appeal by Visa and Mastercard in separate but similar proceedings brought by retailers, upholding the decision of the Court of Appeal to the effect that the charging of default multi-lateral interchange fees to retailers on card purchases infringed EU and UK competition law.

Outlook – what's next for class actions in Australia?

On the radar

Hearings that have been set down include:

- February 2021: Woolworths (securities class action)
- March 2021: Iluka; Hendra virus; climate change risk in relation to Whitehaven's Vickery coal mine
- May 2021: Sydney light rail; Westpac life insurance; air bags
- August 2021: 7-Eleven; Estia Health
- October 2021: ISG Management; Crown Resorts
- March 2022: Colonial MySuper; Roundup.

Judgments

We await judgment on:

- The High Court appeal in the Wigmans matter, heard in November 2020, which should provide guidance on the powers of courts to deal with competing class actions.
- The Montara oil spill class action, which was heard in 2019.

Significant appeals

- February 2021: class action against Johnson & Johnson and Ethicon Sarl over faulty mesh implants.
- May 2021: Queensland floods.

Proposed class actions

A significant number of matters are being examined by law firms or reported by media outlets as potential class action candidates. Potential actions include:

- **Securities and financial product claims:** against Mayne Pharma Group.
- **Government and public interest claims:** further COVID-19 actions alleging negligence.
- **Employment claims:** against McDonalds, YHA Australia, Target, Mantle Hospitality Group.
- **Consumer claims:** against Monash IVF relating to embryo testing; against Queensland electricity generators relating to alleged misuse of market power; against makers and distributors of opioid treatment products.

Stop press

Just outside the review period we have seen:

- **Class actions commenced:** at least 28 actions have been filed, including further securities class actions against Boral and CIMIC; further actions relating to life insurance and superannuation fees; six actions in relation to COVID-19; an action against the State of Western Australia relating to wages of Indigenous Australians; two climate change related actions: one aiming to prevent the expansion of Whitehaven's Vickery coal mine, and the other relating to alleged failure to disclose climate change risks when issuing bonds; a class action relating to administration fees for Queensland toll road users.
- **Settlements:** at least 10 settlements have been approved since 1 July 2020 or are awaiting the Court's approval, including a $95M settlement in the Spotless securities class action and settlements awaiting approval in two add-on car insurance class actions.
- **Common fund orders:** Following separate hearings on 27 October 2020, both the Full Federal Court (in the 7-Eleven class action) and the NSW Court of Appeal (in the air bags class actions) declined to consider referred questions regarding the Courts' powers to make common fund orders at settlement. The Courts indicated that the issue should be examined by reference to known facts in relation to an actual settlement or application for such an order.
- **Consolidations:** of the Treasury Wine Estates class actions.
- **Practice and procedure:** The Supreme Court of Victoria has established a Group Proceedings (Class Actions) List and revised its Conduct of Group Proceedings Practice note.
- **Litigation funding:** The formation of the International Legal Finance Association in Washington DC, which aims to "engage, educate and influence legislative, regulatory and judicial landscapes as the global voice of the commercial legal finance industry".[94]

94. See <https://www.ilfa.com/>.

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Acknowledgements

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Design/production: Mohamad Bahmad, Tessa Eustace, Anthony Georges, Adriana Paul, Clarissa Reid, Pino Sellaro

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Successfully bringing a class action to finality requires a combination of subject matter expertise – whether securities and financial services, cartel and competition disputes or product and public liability – and skill in class action procedure with novel approaches to strategy. Our clients rely on us to deliver on all fronts.

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Securities

- **Allianz:** acting for Allianz in two add on insurance class actions.
- **Westpac:** acting for Westpac in the class action relating to flex commissions.
- **AMP:** acting in relation to Buyer of Last Resort (BOLR) class actions, and acting in relation to two insurance class actions.
- **Suncorp and NULIS:** acting in class action proceedings regarding grandfathering of superannuation commissions.
- **NAB:** settling the first post-Royal Commission consumer credit insurance class action.
- **Westpac:** acting for Westpac in class action proceedings alleging breaches of responsible lending legislation (and successfully defending the related ASIC civil penalty proceedings).
- **Woolworths:** acting for Woolworths in class action proceedings brought on behalf of shareholders.
- **IAG:** acting for Swann Insurance (Australia) Pty Ltd and Insurance Australia Limited in class action proceedings in relation to the sale of add on insurance products.
- **IOOF Holdings:** acting for IOOF in defending a class action brought on behalf of shareholders.
- **Shine Lawyers:** acting for Shine (an ASX listed law firm specialising in class actions) in defending a securities class action brought against it in the Queensland Supreme Court.
- **Brookfield:** acting for Brookfield Multiplex in a securities class action concerning the Wembley National Stadium project.

Product liability

- **Aspen Pharmacare:** acting for Aspen Pharmacare defending class action proceedings in the Federal Court alleging misleading or deceptive conduct in respect of the sale of a pharmaceutical product.
- **Cladding:** acting for a German manufacturer of cladding defending class action proceedings in the Federal Court alleging breaches of consumer guarantees and seeking damages for the costs of removing and replacing cladding and associated costs.

Projects, Infrastructure, Energy & Resources

- **Transurban:** acting for the tollroad operator in defending a class action alleging unreasonable fees for late payment of tolls.
- **Seqwater:** acting for the Queensland Government dam authority in defending one of Australia's largest ever class actions arising from the 2011 Brisbane floods.
- **Gladstone Ports:** acting for Gladstone Ports in defending a $100M class action brought by commercial fisherman alleging financial loss suffered as a result of damage to a bund wall at the Port of Gladstone.

Antitrust

- **British Airways:** acting as Asia-Pacific counsel in responding to the regulatory investigations and prosecutions of the air cargo price fixing cartel and the follow-on class action for damages.
- **Foreign exchange:** acting for a global bank in class action proceedings alleging cartel conduct and other anti-competitive arrangements or understandings in relation to the alleged manipulation of foreign exchange benchmark rates and other financial instruments.

Other

- **Commonwealth of Australia (Department of Defence):** acting in multiple class action proceedings brought by residents and business-owners in various locations alleging negligence and nuisance and seeking compensation for alleged property value diminution in relation to PFAS contamination.
- **BHP:** acting for a BHP subsidiary in the defence of class action proceedings brought on behalf of labour hire workers at the Mt Arthur coal mine, which is owned and operated by BHP.

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