KING&WOOD MALLESONS
金杜律师事务所

The Power of Together

The Review

Class Actions in Australia

2018/2019

Contents

Introduction

Welcome to The Review – Class Actions in Australia 2018/2019, in which we consider significant judgments, events and developments between 1 July 2018 and 30 June 2019.

It was another big year for new filings, with at least 54 class actions commenced – the same number of new actions as last year (up from previous periods). Twenty-two class action settlements were approved, which by our estimates exceeds $500M in total settlement funds.

There have been a number of developments over the past year that continue to shape class actions law and practice, including:

- the growth of financial services class actions, especially in the wake of the Banking Royal Commission;
- a dilemma for Courts in dealing with increasing numbers of competing class actions;
- continuing challenges to the fairness of commissions payable to third party litigation funders, with the Courts' powers to make common fund orders being affirmed by the Full Federal Court and NSW Court of Appeal but now subject to a pending High Court decision; and
- a range of broad reforms recommended by the Australian Law Reform Commission in its Inquiry into Class Action Proceedings.

In this year's review, we also consider thematic issues across class action claims in the financial services sector, trends in government liability, the rise in negligence claims and claims in the health sector.

We also take a close look at trends in third party litigation funding, including the use of common fund orders. With more than 72% of new class actions filed in 2018/2019 now funded, this now decade old trend continues.

We hope you find this report informative.

Moira Saville
Partner, Sydney
King & Wood Mallesons

Peta Stevenson
Partner, Sydney
King & Wood Mallesons

Justin McDonnell
Partner, Brisbane
King & Wood Mallesons

Kione Johnson
Senior Associate, Brisbane
King & Wood Mallesons

Headlines

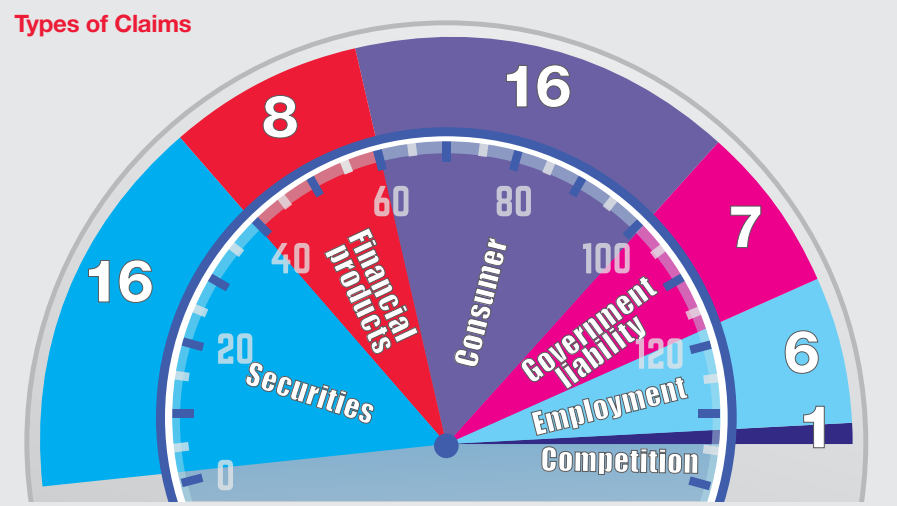
What's new?

The year to 30 June 2019 has been **another big year with at least 54 new class actions filed**,[1] equalling the record 54 new class actions filed in the year to 30 June 2018. Is this higher level of class action activity the "new normal"?

In 2018/19 there has been a rise in the number of employment class actions, with 6 new class actions filed (2017/18: 3) in addition to test cases, union actions, the Uber class action and at least 5 further proposed employment class actions.

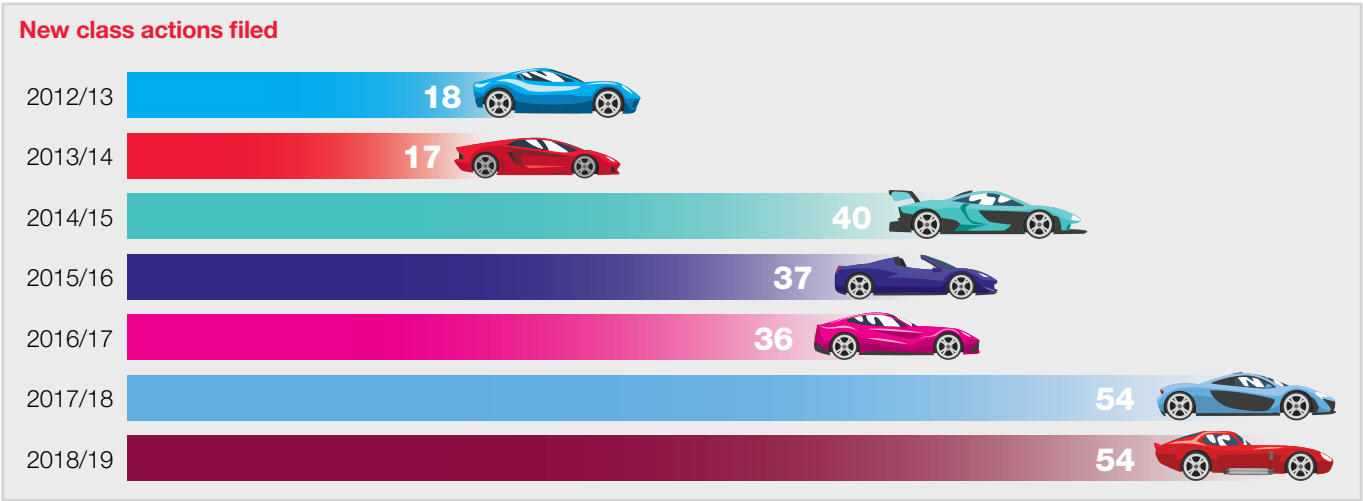
Securities and financial products/investment claims remained prevalent, with 24 actions commenced,[1] including:

- **Securities**: claims against Vocus Group, Lendlease, RCR Tomlinson, IOOF, Sims Metals, BHP Group, Woolworths, Murray Goulburn and Brambles.
- **Financial products/investments**: claims by local councils that they were charged excessive insurance premiums; claims in relation to fees on superannuation products; claims against RMBL Investments of excessive 'collection charges'.

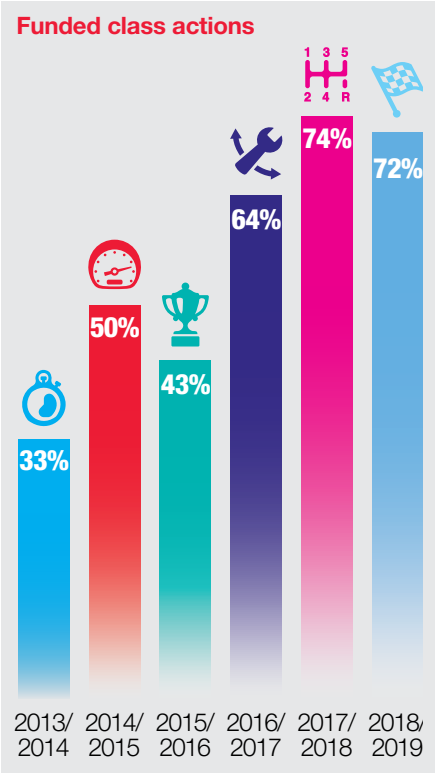


Of the remaining categories, proceedings filed included:

- **Consumer claims**: product liability claims in relation to the Essure contraceptive device, Hardi spray units, faulty airbags and aluminium composite panel cladding; claims in relation to the sale of add-on car insurance; an action by the taxi industry seeking compensation from Uber; various claims of excessive banking charges or legal fees.
- **Claims against the State**: a claim against the Murray Darling Basin Authority in relation to water management; against Transport for NSW by business owners and residents seeking compensation for light rail construction; against the State of NSW by guarantors of hospital patients ineligible for Medicare cards.
- **Competition**: claims against various banks accused of engaging in cartel conduct in the foreign exchange market.



1 Includes two representative proceedings filed as interlocutory processes in the long-running HIH administration, which resulted in orders extending the time for shareholders to make claims in the Schemes: [2018] NSWSC 1969.



The players

The usual protagonists dominated the new actions commenced in 2018/19:

- **Plaintiff firms**: Maurice Blackburn (10), Slater & Gordon (7), Quinn Emanuel (4), Shine (4), William Roberts Lawyers (4).
- **Funders**: IMF Bentham (8), Harbour Litigation Funding (7), Augusta Ventures (5).

More than 72% of new actions had a funder involved (according to publicly available information), almost matching the experience in the year to 30 June 2018.

Jurisdictional preferences

The bulk of class action activity remains in NSW and Victoria, with the Victorian Registry of the Federal Court recording the most recent filings (21), followed by the NSW Supreme Court (14) and NSW Registry of the Federal Court (9).

Settlements

Twenty-two class action settlements were approved by the Courts in 2018/19 and, while we do not know the full value of all settlements, publicly available information indicates at least $500M in settlement funds was approved.

The most significant settlements were:

- the $215M settlement of various actions against Standard & Poor's/ McGraw-Hill companies in relation to the rating of structured debt products and synthetic CDOs; and
- the $132.5M settlement of the QBE securities class action.

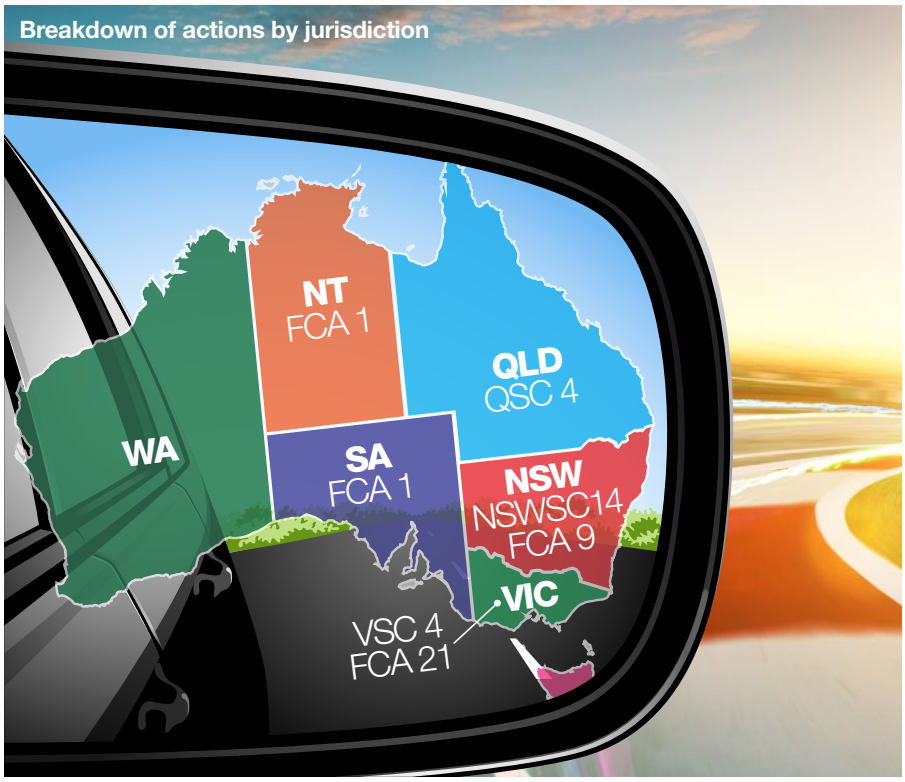
A full list of settlements is set out on page 6.

At least 10 class actions have also been settled but remain subject to Court approval, which are detailed further in 'Outlook'.

Game over

The past year has been remarkable for the number of cases that have been concluded other than by settlement:

- judgment for the plaintiffs in the Sports Trading Club class action;
- primary judgment for the defendant in Airservices Australia, Home insulation – pink batts, Navy trade training (appeal allowed), Walla Walla rubbish tip fire (appeal allowed) and MyBudget;
- 3 actions consolidated with competing proceedings (AMP; Brambles; Quintis);
- 3 actions discontinued (Settlers Investment Management; Leighton Holdings (action by Melbourne City Investments); Scene 3 apartments);
- 2 actions summarily dismissed (St Patricks Day Fires – Gazette; an unlawful detention claim which the Federal Court did not have jurisdiction to hear); and
- 3 actions permanently stayed (AMP – subject to appeal).



Class action settlements July 2018 - June 2019

Class action	Respondents	Allegations include	Settlement sum (damages)[2]
QBE	QBE Insurance Group Limited	Continuous disclosure, misleading or deceptive conduct	$132.5M (approved 9 July 2018)
Asbestos landfill – Liverpool City Council	Liverpool City Council	Negligence, nuisance	$200,000 (approved 13 July 2018)
Sandhurst Trustees – LKM Capital	Sandhurst Trustees Limited	Breach of trustee's duties	$28,158,500 (approved 26 July 2018)
Standard & Poor's	McGraw-Hill Financial, Inc (now known as S&P Global Inc) Standard & Poor's International, LLC	Misleading or deceptive conduct	$215M (approved 19 August 2018)
Kagara	8 former directors	Continuous disclosure, misleading or deceptive conduct	$3M (approved 27 August 2018)
Provident Capital - Creighton	Australian Executor Trustees Limited	Breach of trustee's duties	$28.5M (approved 23 October 2018)
Provident Capital - Smith	Australian Executor Trustees Limited	Breach of trustee's duties	$15.75M (approved 23 October 2018)
Bank of Queensland re Sherwin	Bank of Queensland Limited ABN 32 009 656 740 DDH Graham Limited	Breach of fiduciary duty	$12M (approved 23 November 2018)
Bushfire – 2017 Tarago/ Currandooley (NSW)	Infigen Energy Limited	Negligence, personal injury, property damage	Undisclosed (approved 10 December 2018)
Altus Development at Docklands	238 Harbour Esplanade Pty Ltd Altus Development Pty Ltd	Breach of contract, misleading or deceptive conduct	Undisclosed (approved 7 December 2018)
Macmahon Holdings (by ACA)	Macmahon Holdings Limited (ACN 007 634 406)	Continuous disclosure, misleading or deceptive conduct	$6.7M (approved 12 December 2018)
Slater & Gordon	Slater & Gordon Limited (ACN 097 297 400)	Continuous disclosure, misleading or deceptive conduct	$36.5M (approved 14 Dec 2017; reasons 21 Dec 2018)
Cash Converters – Qld	Cash Converters International Ltd	Unconscionable conduct	$16.4M (approved 31 January 2019)
Discovery Metals	KPMG Financial Advisory Services (Australia) Pty Ltd	Continuous disclosure, misleading or deceptive conduct	Undisclosed (approved 28 May 2019)
Ashley Services	Ashley Services Group Limited	Continuous disclosure, misleading or deceptive conduct	$14.6M (approved 13 June 2019)
Quakers Hill Nursing Ho0me	DPG Services Pty Ltd	Negligence, breach of contract and breach of Australian Consumer Law	$1.1M[3] (approved 14 June 2019)
MH17	Malaysian Airline System Berhad (ARBN 996 903)	Compensation under the Civil Aviation (Carriers' Liability) Act 1959 (Cth)	Undisclosed (approved 26 June 2019)

2 Gross settlement including applicants' legal costs unless noted otherwise.
3 As reported (amount not disclosed in judgment) www.lawyerly.com.au/court-approves-1-1m-settlement-in-quaker-hill-nursing-home-class-action.

	Applicants' costs	Representative or group member reimbursements	Litigation funder % or $	Administration costs
	Initial: $21,875,678.51 Additional: $771,123.67 plus USD $357,414.67	$33,000	23.208%	$272,361,16
	$200,000	N/A	N/A	N/A
	$3,825,058.00	$50,000	25%	$260,000
	$20,363,855.75	$140,000 (estimated in judgment)	$92,031,923	Not disclosed
	$1.5M	N/A	$500,000	N/A
	$12.8M	$13,000	N/A	Not disclosed
	$5,268,778.87	N/A	27%, ie $4,252,500	$220,000
	$2,746,445	$25,000	$1,000,000	$109,000
	Undisclosed	Undisclosed	N/A	N/A
	Undisclosed	Undisclosed	N/A	N/A
	$3M	N/A	19%, ie $1,295,000	Not disclosed
	$4M	$12,000	$8M ($4.5M + $3.5M)	$1,397,275.00
	$5.8M	$10,000	N/A	Undisclosed
	$3M	Undisclosed	30%	Undisclosed
	$3,569,755	$21,900	33.18% with equalisation (from 40.77% of funded members)	$151,250
	In addition to settlement sum	N/A	N/A	N/A
	Undisclosed	N/A	N/A	Undisclosed

Class action case management

Active case management is a key feature of civil litigation in Australia. Since the High Court in Aon[4] clarified the importance of case management principles in the exercise of the Court's procedural powers, Australian courts have become more active in monitoring and managing the conduct and progress of the cases before them - from the commencement of a matter right through to its finalisation.

Class action proceedings have a significant impact on the operation and workload of the Courts, with the average proceeding taking around two and a half years to resolve,[5] and many lasting significantly longer. The increase in the number of class actions being commenced has led to the Courts' readiness to adopt a broad range of case management options in order to ensure the quick, inexpensive and efficient administration of justice.

The relevant power

This priority has been made a statutory requirement, with each of the four jurisdictions in Australia that have formal class action regimes (the Federal Court and the Queensland, NSW and Victorian Supreme Courts) being guided by the overarching purpose provisions to ensure that the proceedings are conducted as expeditiously and as cost effectively as possible.[6]

Section 37M of the Federal Court of Australia Act requires the parties and their representatives to conduct proceedings consistent with the overarching purpose to facilitate the just resolution of disputes according to law.

Lee J, when considering whether to make a referral in the MiiResorts class action, made the following comments about s 37M(2):[7]

> *s 37M(2) gives some guidance as to how this is done by setting out a number of objectives which, without limiting s 37M(1), comprise the following:*
>
> *a. the just determination of all proceedings before the Court (s 37M(2)(a)) (Justice Factor);*
>
> *b. the efficient use of the judicial and administrative resources available for the purposes of the Court, and the efficient disposal of the Court's overall caseload (s 37M(2)(b)-(c)) (Efficiency Factor);*
>
> *c. the disposal of the proceeding in a timely manner (s 37M(2)(d) (Timeliness Factor); and*
>
> *d. the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute (s 37M(2)(e)) (Cost-effectiveness Factor).*
>
> *As can be seen, these four factors reflect what might be described as both party-centric and the macro considerations in relation to the administration of justice.*

It is now 12 years since the commencement of the overarching purpose provisions and their effect permeates the case management decisions being made by judges in class action disputes, whether in their handling of competing class actions, expert evidence, interlocutory applications, security for costs or opening/closing the class.

Case management in 2018/19

In the past year we have seen an increase in judges adopting more proactive case management practices for class actions, including:

- placing a stronger onus on parties to resolve issues outside of Court to ensure:
  - a reduction in placing an unnecessary workload on the Court;
  - that there are fewer issues in contest (and that the factual investigation into those issues is no greater than justice requires); and
  - that there are fewer interlocutory applications being brought;
- the appointment of a Case Management Judge to expeditiously and efficiently case manage the proceedings as well as hear any interlocutory disputes and certain applications that it may not be appropriate for the Trial Judge (who will hear the trial of the proceeding and will deal with all pre-trial issues) to hear;
- the assignment of a Class Actions Registrar to assist the judge(s) and the parties in the proceeding, including oversight of without prejudice discussions to review the scope of disputes and facilitate expert referrals; and
- a flexible and tailored approach to each class action.[8]

In MiiResorts, Lee J made clear that the Court's focus in class action case management has shifted beyond just the interests of the immediate parties to a dispute.

4 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, [93]-[98].
5 Vince Morabito, 'The First Twenty-Five Years of Class Actions in Australia: An Empirical Study of Australia's Class Action Regimes, Fifth Report' (July 2017) at 31-32 as referenced in the ALRC Report 134 "An Inquiry into Class Action Proceedings and Third-Party Litigation Funders".
6 Civil Procedure Act 2005 (NSW), ss 56-58; Uniform Civil Procedure Rules 1999 (Qld), r 5; Civil Procedure Act 2010 (Vic), ss 7-8; Supreme Court (General Civil Procedure) Rules 2005 (Vic), r 1.14.
7 *Kadam v MiiResorts Group 1 Pty Ltd* (No 4) (2017) 252 FCR 298 at 312, [57]-[58].
8 These objectives are enshrined in the Federal Court Class Actions Practice Note (GPN-CA).

In practice, over the past year we have seen:

- **Expert Referrals**: there is an increasing trend for the Courts to refer expert evidence to referees in order to facilitate the proper understanding of the issues and to manage expert evidence in accordance with the overarching purpose. Most Australian courts have the power to refer certain matters to referees. As foreshadowed by Gleeson CJ in 1992, the proposition that all litigants are entitled to have a judge decide all issues of fact and law that arise in any litigation is now unsustainable.[9]
- **Overlapping class actions**: when dealing with overlapping or competing class actions, the Court has frequently asserted that it will not countenance increased legal costs, wastage of court resources, delay or unfairness to respondents.[10] This has resulted in different tailored approaches, as discussed in the next section.
- **Cooperation between jurisdictions**: in June 2019, the Chief Justice of the Federal Court and the Chief Justice of the Supreme Court of Victoria agreed to a protocol for communication and cooperation between the two courts to address the shortcomings in the cross-vesting procedure for class actions. A similar protocol was agreed with the Supreme Court of NSW in November 2018. When competing class actions are filed in different courts, a joint case management conference will be convened to decide which case will go forward and the appropriate forum for the proceeding.
- **Increased judicial scrutiny** of the proportionality of litigation funding charges and legal costs to ensure that the "legitimate use of the Court's processes are not undermined by proceedings that disproportionally benefit the funder and solicitor rather than the litigants".[11] Examples of this increased scrutiny include: appointing contradictors to represent class members' interests, conducting tender processes in competing class actions that require cost budgets to be provided, and auditing cost experts' reports.
- **Contradictors and amicus** being appointed to assist the Court in exercising its supervisory jurisdiction to protect the interests of group members. See page 16 for more detail.

9 *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 at 558.
10 *Money Max Int Pty Ltd (trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 at [196].
11 Justice Derrington in M Pelly "Judge takes aim at class action 'trafficking", as quoted by Australian Financial Review, 26 October 2018.

Going 'Off Road'

Courts set their own course in resolving competing class actions

The Courts have had limited success in adopting a consistent approach to the management of competing class actions in recent years. A common theme – most often where the claims and claim period of the actions overlap considerably – is the unsurprising desire of the Courts to minimise inefficiencies and promote group member rights over the interests of funders and solicitors.

Beyond that, the approach taken by the Courts to resolving rival claims is not uniform. For instance, the recent 'consolidation' by the Full Federal Court of several actions filed against mining entity BHP represents a very different result to the 'stay of proceedings' implemented in the earlier GetSwift decision.

A roadmap – what approaches have been taken by the courts to date?

Four main avenues have emerged from the case law as options available to Courts to resolve competing actions:

- allowing one class action to proceed while the other class actions are permanently stayed;
- class closure - allowing one class action to continue as an "open" class action and the other as a "closed" class action, with a joint trial of both;
- consolidating some or all of the actions; and
- holding a joint trial of the separate proceedings (the "do nothing" approach).

Examples of each are discussed below.

The approach taken by a Court for resolving competing actions is ultimately a case management issue that is answered by reference to the individual circumstances at hand.

In the recent AMP[12] decision the NSW Supreme Court considered that (at least) the following factors were relevant to consolidation (as originally established in GetSwift):[13]

- the competing funding proposals, costs estimates and net hypothetical return to group members;
- the security for costs proposals of each party;
- the nature and scope of the causes of action advanced and relevant case theories;
- the size of the respective classes;
- the extent of any bookbuild;
- the experience of the lawyers (and funders, where applicable), and the availability of resources;
- the state of preparation of the proceedings; and
- the conduct of the representative plaintiffs to date.

The Consolidation Approach - the AMP and Brambles class actions

Five separate class actions were filed against AMP arising from the Banking Royal Commission. The Court made orders consolidating the separately commenced Komoltex and Fernbrook class actions while the other class actions were permanently stayed.

With the exception of the funding and security for costs proposals, the remaining factors (as originally articulated in GetSwift) were considered by the Court to be neutral. Notably, the class action that was allowed to proceed was the only proceeding that was not financed by a litigation funder. Rather, the plaintiff firm representing the 'winning' proceeding is acting on a "no win, no fee" basis.

The Court found that the "no win, no fee" model appropriately placed the risk of the litigation with the solicitors who were incentivised through an uplift on fees, which would only be achieved if the stipulated threshold for a resolution sum was achieved.

In Brambles,[14] the Court made an order consolidating two securities class actions that had been commenced against Brambles and ordered that a "litigation protocol" be put in place. The protocol was to govern the manner in which the two law firms representing the group members were to cooperate in the conduct of the consolidated proceeding. The concept of a litigation committee was first mooted by Finkelstein J in the early days of the Centro class action but not progressed.[15]

In deciding to consolidate the Brambles proceedings, the Court took into account the large number of group members who had signed up to both proceedings – 4,900 in one proceeding and 2,400 in the other proceeding. A decision by the Court to only allow one of the actions to proceed, given the number of class members with sizeable claims sitting outside that action, may have adversely impacted the prospects of settlement.

12 *Wigmans v AMP Ltd; Fambrook (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 at [126].
13 *Perera v GetSwift Limited* [2018] FCAFC 202.
14 *Southernwood v Brambles Limited* [2019] FCA 1021.
15 *Kirby v Centro Properties Limited* [2008] FCA 1505.

The Hybrid Approach - the BHP proceedings

A slightly different approach was taken to resolving the three competing proceedings commenced against BHP on behalf of shareholders in relation to a Brazilian mine collapse in 2015.[16] Each proceeding alleged BHP had breached its continuous disclosure obligations in failing to inform the market of the risk of the mine collapsing. The Primary Judge originally made orders to resolve the overlap between the proceedings by selecting the Impiombato proceeding to proceed, permanently staying the Klemweb proceeding and temporarily staying the LACERA proceeding.[17]

On appeal, the Full Federal Court granted Klemweb's appeal (in part) against the order permanently staying those proceedings, and partly granted Klemweb's appeal against the orders made in the Impiombato proceedings. The Full Court was required to re-exercise its discretion to resolve the competing actions. The Impiombato and Klemweb parties were given an opportunity to consider which of the proceedings should go forward, or whether they should be consolidated. The parties proposed a formal consolidation and also agreed to amend the proposed consolidated proceeding to expand the group definition and incorporate the additional claims pleaded in the LACERA proceedings. The Full Court made the orders sought, finding that "consolidation of the type proposed is a sensible course" and "appropriate in the interests of justice".[18]

Class closure – the Bellamy's scenario

In Bellamy's, the Court opted to permit both proceedings to remain on foot, while 'closing the class' in one proceeding and leaving the other class open. In declining to stay the proceedings, the Court took into account that there was no agreement between the parties in both proceedings to consolidation.[19] Like Brambles (which also involved a considerable number of claimants who had signed funding agreements and/or retainers with the law firms acting for them), Bellamy's suggests that a permanent stay may be less likely to be ordered where a large number of group members have signed up to litigation funding agreements and retainer agreements with their chosen lawyers.

Case	Approach taken by the Court	Other relevant factors
AMP	Two actions consolidated; Three actions permanently stayed	"No win, no fee model" and an uplift on fees available to the solicitors if a particular settlement figure or above was achieved Court rejected the argument that the first action to be filed should be favoured
BHP	On appeal – parties agreed to consolidate two actions; additional claims from third class action incorporated into pleading in 'consolidated' action	Comparison between "No win, no fee model" and funder Cooperative Litigation Protocol (in similar form to the Brambles protocol)
Brambles	Two actions consolidated	Over 4900 group members in one proceeding and over 2400 group members in the other proceeding had entered into funding agreements and retainers with their chosen solicitors Cooperative Litigation Protocol
GetSwift	Two proceedings permanently stayed; one action proceeded as open class	State of proceedings not considered to be an important factor The number of group members who had signed funding agreements was low Court considered that interfering with right of group members to contract with solicitors/funders of their choice was warranted in particular context of the case[20] Which action was commenced 'first in time' was not given any weight
Bellamy's	Class closed in one proceeding; class left open in other proceeding – court declined to stay either proceeding and both permitted to proceed	Over 1000 group members in one proceeding and over 1500 group members in the other proceeding had already signed up to funding agreements and retainers with their chosen solicitors No agreement between the parties as to consolidation Case theories and stage of both proceedings were equally balanced

16 *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v BHP Group Limited* [2019] FCAFC 107 (BHP Appeal).
17 *Impiombato v BHP Billiton Ltd (No 2)* [2018] FCA 2045.
18 At [155].
19 *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947 at [12].
20 *Perera v GetSwift Limited* [2018] FCA 732 at [332].

Towards the finish line – what unifying principles can be drawn from the case law?

Significance of funding model

The AMP decision may impact upon the role of litigation funders in class actions going forward, in circumstances where the Court chose the only action not funded by a third party as the one that was permitted to proceed. The Court noted that a "no win, no fee model" will not always carry the conclusion that it is likely to provide the best return to group members, and stated that it should "not…create such a precedent going forward" (at [216]).

The approach taken by Ward CJ in Equity in AMP in respect of the "no win, no fee" model was endorsed by the Full Court in the BHP Appeal.[21]

The Full Court in the BHP Appeal also contemplated a scenario in which a "no win, no fee" model would not be the most advantageous funding model for group members. For instance, where an external funder was involved and both the legal fees and the commission paid to the funder were capped at a particular percentage of total recovery, the Court suggested there may be advantages over a "no win, no fee" model that had no overall cap on fees.[22]

Cooperative Litigation Protocols

A trend emerging is the Courts' inclination to make orders requiring parties to enter into Cooperative Litigation Protocols to manage the conduct of consolidated proceedings, where applicants are jointly represented by multiple law firms.

In the two class actions faced by the CBA, the Court found that "Absent cooperation between the Applicants in the conduct of the two proceedings, such as now proposed [by the Cooperative Litigation Protocol], there will inevitably be a large amount of duplicated work undertaken in respect of the management of the two proceedings".[23] The Court rejected arguments by CBA that the proposed arrangements in the Litigation Protocol for discovery and the briefing of counsel "would in any way lead to 'further inefficiencies and complications'".[24]

The terms of a Cooperative Litigation Protocol were also approved by Murphy J in Brambles, and in the BHP proceedings the Full Court required the joint applicants to bring orders before the Court within 14 days, which mirrored the Cooperative Litigation Protocol in Brambles as much as possible.[25]

Number of funded group members

As noted above, **Brambles and Bellamy's appear to suggest that where a large number of group members have signed up to litigation funding agreements, the Court may be less willing to grant a stay of proceedings.** The Court in Bellamy's (as cited with approval in GetSwift) did however note that while this factor may have been decisive in that particular case, it "should not be seen as an incentive to sign up group members before issue".[26]

21 BHP Appeal at [24] (The AMP decision has since been appealed).
22 BHP Appeal at [28].
23 *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 2)* [2019] FCA 1061 at [110].
24 At [121] – [122].
25 BHP Appeal at [160].
26 *Bellamy's* at [96]-[97]; *GetSwift* at [211].

Reform to litigation funding

The regulation of class actions in Australia has been the subject of recent reports[27] by the Victorian Law Reform Commission (**VLRC**) and Australian Law Reform Commission (**ALRC**).

Contingency fees

Contingency fee arrangements, under which solicitors' fees are set to a percentage of any settlement or judgment sum, are presently prohibited in each jurisdiction in Australia.

The ALRC and VLRC reports recommended permitting solicitors to enter into percentage-based fee arrangements in some circumstances, subject to limitations which include that:

- the percentage-based fee should include all professional service fees and disbursements; and
- a solicitor cannot recover a percentage-based fee if a litigation funder is also charging on a contingent basis.

The ALRC and VLRC recommended that any contingency fee arrangement would be subject to court approval or variation and could be the subject of common fund orders. The ALRC considered that a percentage-based fee agreement should be enforceable only with leave of the Federal Court.

The ALRC did not propose that a statutory cap should be imposed on contingency fees, provided that the 'package' of limitations on the power to enter percentage-based fee arrangements is accepted. However, the VLRC rejected the imposition of statutory caps in principle because the imposition of such a cap could create a culture where lawyers routinely seek the maximum amount.

Regulating litigation funding

The ALRC and VLRC recognised the need for national regulation of the litigation funding industry. However, the ALRC did not recommend mandatory licensing for litigation funders, recognising that a regime imposing minimum capital requirements on litigation funders might stifle competition through raising barriers to entry and may artificially inflate the cost of funding. The VLRC discussed imposing capital adequacy requirements on litigation funders, but considered that it was properly the subject of national regulation.

The ALRC's rejection of mandatory licensing to ensure capital adequacy of litigation funders is not consistent with the assessment of the Productivity Commission in 2014, which concluded that any barriers to entry or incumbent-advantages created through imposing licensing requirements were 'justified to ensure that only reputable and capable funders enter the market'. It is also out of step with reforms relating to the imposition of capital adequacy requirements for litigation funders in other jurisdictions, including in Singapore (2017) and Hong Kong (2018), and under the England and Wales Code of Conduct for Litigation Funders since 2014. If capital adequacy requirements are to be imposed on litigation funders in Australia, a related question arises as to whether solicitors that incur the costs of litigation upfront (whether on a contingency or no-win no-fee basis) should be subject to similar requirements.

The ALRC considered that court oversight of the litigation funding agreement, a requirement that the litigation funder indemnify the lead plaintiff against an adverse costs order, and the creation of a presumption in favour of security for costs would provide a suitable substitute for licensing requirements. It should be noted however that the ability to provide security for costs does not ensure that the litigation funder or law firm is able to sustain the ongoing costs associated with maintaining the litigation.

Other issues

The VLRC proposed a relaxation of the standard rule that 'costs follow the event', or that representative plaintiffs should offer security for costs, in low value claims that:

- promote access to justice;
- are 'test' cases or involve novel areas of law; or
- otherwise involve a matter of public interest.

This proposal was not addressed in detail in the ALRC Report, and was not adopted in the ALRC's 1988 report that led to the adoption of the Federal class action regime.[28]

27 VLRC Report "Access to Justice: Litigation Funding and Group Proceedings" (March 2018); ALRC Report 134, "Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (December 2018).
28 *Grouped Proceedings in the Federal Court* (ALRC No 46, 1988).

Common fund orders

Trends in class actions litigation funding and common fund orders

In FY2018-19, at least 54 class actions were filed in Australian courts. At least 72% of these class actions are supported by litigation funding. This broadly matches FY2017-18.

These figures can be compared with FY2015-16 – the year before the first common fund order (CFO) in Money Max[29] – in which 37 class actions were filed of which 43% received litigation funding.

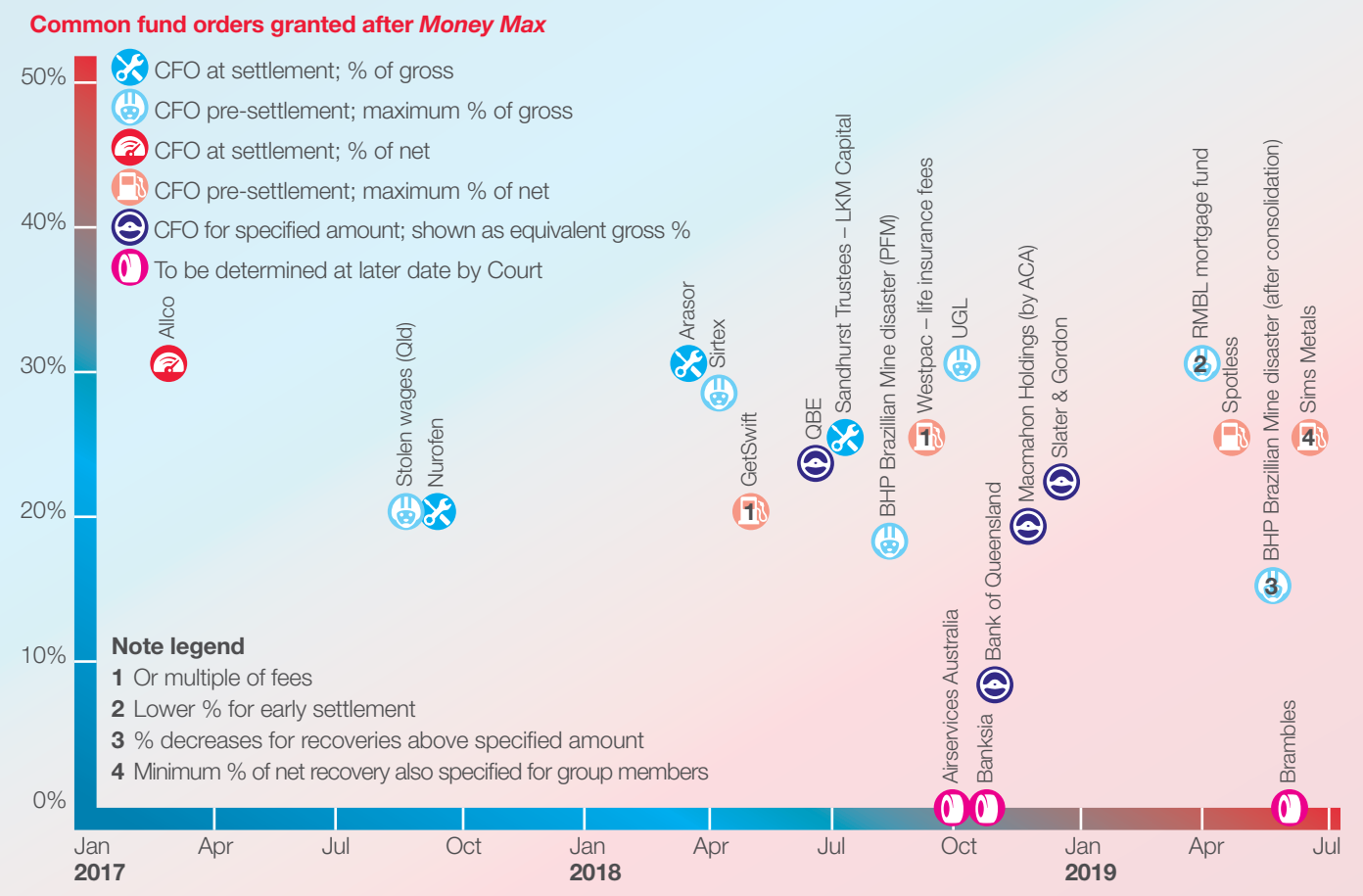
The increased proportion of funded litigation between 2015-16 and 2018-19 is in part related to the Federal Court's approval of CFOs, which provides for greater certainty and returns for litigation funders. An increase in the supply of litigation funding also explains the increased frequency of class actions over the same time period, because it reduces the barriers to, and economic risk associated with, commencing collective proceedings.

All CFOs made thus far in which the Court has set out a determinate mechanism for ascertaining the litigation funder's fees were based on a percentage of gross (50% of orders made) or net (28%) recoveries, or the ordering of a specific amount (22%). No clear difference has yet emerged between the percentages for net and gross recovery scenarios, which suggests that other factors are more likely to determine the funding rate.

In cases to date:

- Two orders have provided for a funder to recover the *lesser of* a percentage of net recoveries *or* multiple of fees. While 'hybrid' orders have been sought on at least one occasion (ie, orders which determine the funding rate by reference to *both* a percentage of recoveries *and* multiple of fees), no such order has been made.
- Only one order has imposed a minimum recovery for group members in the proceedings as a percentage of net recoveries.

29 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.



Common fund orders

Parties have relied on section 33ZF of the Federal Court of Australia Act 1976 (Cth) (FCA Act) as the source of the Court's jurisdiction to make CFOs where 'necessary or appropriate' to ensure that justice is done in the proceedings. In exercising this jurisdiction, the Court assumes a 'protective and supervisory role in respect of group members'.[30] That is because the making of a CFO involves the unilateral and non-voluntary imposition of legal obligations on unfunded and unrepresented group members to contribute to the payment of legal expenses and funding fees for proceedings which they did not institute, but from which they may receive benefits.

Given the important function of the Court in protecting the interests of group members not represented in the proceedings, the Full Court in Money Max ordered that a CFO should be made on the condition that the entire class would be left 'no worse off' than they would have been had no such order been made. That was because there was evidence that a funding equalisation order (FEO) at 32.5% or 35% would have produced a better outcome for the entire class than a CFO at 30%, provided that the ratio of unfunded to funded class members remained below around 80:20.

FEOs had previously been made by the Court to prevent unfunded group members free riding on the investment by funded group members. A FEO involves two stages:

- deducting from the value of settlement or judgment to which the unfunded group members are entitled the amount that the unfunded group members would have paid in funding fees and litigation costs had they been funded; and
- reallocating that sum among all funded and unfunded group members according to their proportional entitlement to settlement or judgment.[31]

This seeks to achieve equality between classes without increasing the aggregate fees payable to the funder that would result from applying the funding rate across a larger number of group members.

An example:
30 funded group members enter into a litigation funding agreement with LitFund which applies a 35% percentage-based funding fee on net recoveries. There are 70 unfunded group members in the proceedings. Each group member has an equal interest in a claim valued at $120M, for which legal costs are $20M. The entire class would be better off under an FEO than a CFO, unless the funding rate for the CFO was not more than 10.5% of net recoveries. Even this simple example shows the importance that each integer plays in the comparison.

Following Money Max, Courts have transitioned from FEOs to CFOs due to concerns relating to 'saddling' unfunded group members with deductions from recoveries, requiring them to pay contributions to management fees, and increasing 'book building' costs. The first two of these arguments assume the very point in issue; the latter turns on an empirical state of affairs about which there appears to be limited evidence. And to the extent that these arguments turn on broader industry concerns, it is not clear they are relevant given that s 33ZF and its State analogues requires the Court to consider whether the CFO is 'appropriate or necessary to ensure that justice is done in the extant proceedings' not 'by reference to broad policy considerations.'

Interestingly, a different approach was adopted by Rares J in a recent case, ordering as part of pre-trial case management that the funding rate be no greater than 25% of net claim proceeds (ie, gross recovery minus the lawyers' fees), and that group members should receive not less than 50% of the net claim proceeds.[32] Although this cannot guarantee that the class is left no worse off by reason of the CFO having been made, it does provide certainty to group members by setting out the minimum rate at which group members would be entitled to participate in net recoveries.

There would be a strong argument for imposing a floor condition as a percentage of gross recovery in later litigation, which might be scaled based on the value of recovery. This would reduce uncertainty by ensuring that costs and disbursements (eg, legal fees and project costs) must be satisfied within the ordered percentage of judgment or settlement. It would also re-allocate the economic risk relating to the cost of litigating class actions to those best positioned to assess and control that risk: the solicitors and funders who choose to speculate on class actions.

30 *Bartlett & Anor v Commonwealth of Australia* [2019] FCA 571, [21].
31 *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [57]-[58].
32 *Carpenders Park Pty Ltd v Sims Metal Management Ltd* [2019] FCA 1040.

Contradictors

As a procedural safeguard for the interests of group members, the Court may appoint a contradictor to review the evidence and proposed CFO to ensure that it is consistent with the interests of the group members they represent. This discretion will be exercised if a Court considers that the value derived from appointing a contradictor is proportionate to the costs associated with the appointment. And the costs can be controlled through calibrating the contradictor's role to the needs of the case.

In *Bartlett v Commonwealth of Australia* [2019] FCA 571, Lee J was considering an application for a CFO as part of case management before trial. His Honour considered that 'to be faithful… [to his] supervisory role' it was appropriate to appoint a contradictor to provide the court with limited assistance, given: (a) the volume of evidence and submissions in the proceedings; and (b) uncertainty as to the terms of the CFO. His Honour thought that the value the contradictor would contribute in protecting group members' interests was proportionate to the 'very modest cost' associated with their retention. Nevertheless, no such order was made because the applicant withdrew its application for a CFO, rather than have a contradictor appointed to represent the interests of group members.

In *Tredrea v KPMG Financial Advisory Services (Australia) Pty Ltd (No 3)* [2019] NSWSC 871, Parker J in considering whether to approve a settlement involving a proposed CFO ordered the appointment of a contradictor in relation to a litigation funder's commission and legal costs in circumstances within which he considered that the evidence 'did not compellingly demonstrate that the quantum of commission sought in the common fund order or the quantum of costs was necessarily reasonable… [and] that there were potential arguments which might qualify those claims'. The Court declined the application on the terms proposed (a CFO with a 30% funding fee on gross recovery). The Court appointed Grant Thornton as the contradictor.

Although the making of CFOs is a discretionary jurisdiction, a refusal to order the appointment of a contradictor may be so unreasonable or plainly unjust that an appellate Court might infer that there has been a failure to properly exercise the discretion. For example, in *Botsman v Bolitho* [2018] VSCA 278 the Court of Appeal held that the trial judge erred in not appointing a contradictor in circumstances where there were significant conflicts of interest among group members and between the funder and group members, and confidentiality orders limited the extent to which the parties were able to assist the Court in deciding whether the funding fees and legal costs should be approved. The Court of Appeal approved the fairness and reasonableness of the overall settlement sum and remitted the matter of legal fees and funder's commission to the trial judge.

Validity of common fund orders

Following a historic joint sitting of the Full Federal Court and the NSW Court of Appeal, both Courts held that the making of CFOs was a lawful exercise of jurisdiction under s 33ZF of the FCA Act and its NSW analogue.[33]

The Courts held that:

- The power to make any order 'appropriate or necessary to ensure that justice is done' is aimed at enabling the Court to develop new procedures responding to the practical and economic conditions of class actions. As such, it would contradict the objective of these provisions to construe them narrowly to exclude the power to make CFOs.
- It is not inimical to characterising a power as 'judicial' that its exercise would create new rights and obligations between the parties, as in the case of security for costs or freezing orders. The making of CFOs involves balancing imprecise and indeterminate considerations, but it also remains an exercise of judicial power as it involved the application of legal principle (ie, that which is appropriate or necessary to do justice) to the facts which had been determined on the basis of evidence tendered in the proceedings.
- The provisions were not laws with respect to the acquisition of property on other than just terms, and so were not invalid under s 51(xxxi) of the Australian Constitution. That was because the main object of the sections was to provide for the management of class actions, such that any acquisition of property was subservient to that purpose. Additionally, there was no 'acquisition' of property, in that the making of the CFO merely adjusts the competing rights and obligations of the parties.

The High Court granted special leave to appeal against both decisions, which was heard in mid-August 2019.

Final notes on litigation funding

A few additional discrete points are worth noting in relation to litigation funding in recent years:

1 There is increasing competition in the broader litigation funding market. Since 2017, prominent new entrants have entered the Australian market, including Augusta Ventures and Burford Capital – both well-established overseas funders. This has increased price competition, which is becoming relevant to competing class actions.

2 The nature and composition of investors in litigation funding is changing. This is driven, in part, by historically low interest rates across the world which has led to a need for greater risk exposure by professional investors. IMF Bentham's recent Fund 5 launched on 20 June 2019 and includes commitments from well-known overseas investment companies, such as Harvard Management Company and Partners Capital Investment Group. The shift to greater reliance on external capital (and overseas capital at that) raises questions as to whether some litigation funders should be viewed as fund managers of an emerging asset class.

3 Despite predictions of litigation funding products for defendants emerging, little change appears to have in fact occurred. Time will tell whether in-house lawyers will be attracted to moving legal expenditure off their corporate balance sheets, but structuring the transaction has proven challenging. Possible options which have been raised include a funding-for-equity model (for smaller firms defending say an IP claim) or institutions where it both issues and defends a number of pieces of litigation at any one time such that a portfolio arrangement can be structured. In any event, it remains an interesting proposition that ought to be watched in the future.

4 Funders agree to pay the costs of litigation in exchange for the right to participate in any proceeds of the litigation. There is no settled rule that prohibits litigation funders from conveying to a third party a right to participate in a proportion of its funding fees in return for an agreed sum. If that is so, there is no settled law which precludes litigation funders from conveying to a third party a right to participate in a proportion of funding fees across several claims, where the risk associated with the right has been rated so that it might be traded on a secondary market.

Early and less sophisticated instances of this type of transaction have already occurred in the international market. For example, Burford Capital, a new entrant to the Australian market, recently sold 25% of its entitlements to the proceeds of an action against the Argentinian Government for $106M. Its investment was $18M and the claim is being run out of the United States.

ALRC President Sarah Derrington J has expressed a view that such an arrangement in Australia would meet the description of 'trafficking in litigation' which could result in the securitisation agreement being unenforceable on the grounds of public policy. **The limits of public policy are however, yet to be defined and the substantial economic returns from this practice overseas means that this area should be marked as a future battleground.**

33 *Westpac Banking Corporation & Anor v Lenthall & Ors* [2019] FCAFC 34 and *Brewster* v *BMW Australia Ltd* [2019] NSWCA 35.

Settlement
Increasing scrutiny

The settlement deed has been signed. An announcement has been made to the market. As two recent Federal Court decisions demonstrate, your settlement will not simply be "rubber-stamped". Rather, the process of seeking Court approval involves the court closely scrutinising the quantum of legal costs, size of funding commission, and the return to group members.

Liverpool City Council v McGraw-Hill Financial, Inc

Lee J was asked to approve settlement terms providing for an "unprecedentedly large" funding commission and legal costs "close to" the largest ever placed before the Court.[34]

The parties had agreed to a gross settlement sum of $215M, an amount that was in Lee J's view "plainly" fair and reasonable.

Of some controversy, however, was the fact that only 42.87% of that sum would be available for distribution among group members. The funders, Litigation Capital Partners LPP Pte Ltd and International Litigation Partners (No 5) Ltd, sought a commission of approximately $92M. The applicants' solicitors claimed costs of approximately $20M.

The "sheer size" of these figures led His Honour to appoint an amicus curiae to provide independent assistance to the Court on questions related to the reasonableness of the proposed deductions. His Honour noted his general view that "there is some merit, in complex and large settlement applications, in obtaining assistance from a 'friend of the Court' in addition to 'friends of the deal'".

After hearing from the amicus, His Honour:

- Held the funding commission to be fair and reasonable, "notwithstanding the extraordinarily large amount … proposed to be paid to the funder". This was because:
  - its size was a consequence of both the breadth of the litigation, which involved six related proceedings, and of the gross settlement sum, which represented a 90% return on the quantum of damages claimed;
  - the litigation was complex, and was not guaranteed to succeed when the funders agreed to support it. Classifying the proceedings as straightforward in light of the plaintiffs' success as at the 38th day of trial (when the proceedings settled) would be to view it with hindsight bias. Further, the commission rate was not "markedly different" from that generally levied in much less complex class actions;
  - the funders had exposed themselves to significant risks in supporting the litigation, as demonstrated by a number of other funders having declined to do so;
  - when determining whether a funding commission is excessive, reference should be made not just to the risks involved in the individual case at hand, but also to the risks the funder is undertaking across its entire business, and to the possibility that it may well fail in other class actions; and
  - any attempt to lower the funding commission rate, would leave a judge "left adrift searching for a lodestar", due to Parliament not having provided any statutory criteria for a re-calculation of that type.
- Ordered that the legal costs claimed by the applicants' solicitors be referred to an independent and experienced costs consultant for review. The complexity of the litigation meant that "determining what is reasonable … is far from a straightforward exercise."
- Commented that in order to maintain public confidence in Court approval of settlements, and to ensure disputes are resolved "as inexpensively and efficiently as possible", the Courts must closely scrutinise the legal costs claimed. This is so even where, as here, the solicitors involved have achieved a large settlement sum in their clients' favour.

Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd and Another

The parties had reached a gross settlement, subject to Court approval, of $12M. After the actual legal costs and a commission for the funder, Vannin, of 25% of the gross recovery, this left just $250,000 or 2% for distribution to class members.[35]

Murphy J ordered that the legal fees sought be discounted by 40% and that the funding commission be limited to $1M (or 13.7% of the net settlement) on a common fund basis. In doing so, His Honour noted that disproportionate legal costs and funding charges represent an "increasing problem" in class actions.

In considering the proportionality of the percentages claimed, His Honour stated that the correct approach is to compare the costs incurred with a reasonable estimate of the worth of the claim, being careful not to approach the issue with hindsight bias.

34 *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289.
35 *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd and Another* [2018] FCA 1842.

In respect of the legal costs, Murphy J found that:

- when the proceeding was first filed, the applicants' solicitors had estimated the case to be worth approximately $60M. That this view was incorrect, due to many of the claims being statute-barred, would have been apparent to the applicants' solicitors had they performed the work necessary to establish a reasonable estimate;
- because they had not done this work, which Murphy J described as "essential", until shortly before trial, the fees and disbursements incurred up to that point were disproportionate; and
- it is not satisfactory for solicitors to take a "stab in the dark" in estimating the likely value of the claim.

In considering the funding commission, His Honour noted "there must be good reason why a settlement could be considered fair from the perspective of group members, when the lawyers, experts and the funders get more out of it than the people who have allegedly suffered a wrong." His Honour could identify no such 'good reason' here.

In applying a limit to the funding commission, His Honour found that:

- the funder's exposure to an adverse costs order was low, and its expense in insuring that risk was low;
- the funder's costs expenditure was also low, it did not risk paying legal fees if the case proceeded to trial, and the applicants' solicitors rather than the funder was carrying the majority of these costs;
- although the funder had advanced $1.486M in security for costs, the funds were not at real risk due to the funder's ATE insurance policy; and
- the funding agreements provided for reimbursement incurred largely in pursuit of its own commercial interests, further reducing the level of risk the funder took on.

Conclusion

These decisions not only highlight the scrutiny the Courts will apply to the settlements of class actions in order to protect the interests of group members, but also the dichotomy between what could be ineloquently labelled "successful" and "unsuccessful" settlements.

As Petersen demonstrates, when class actions settle for substantially less than initially anticipated, it is not only the group members, but also those who seek to benefit commercially from the litigation – lawyers and funders – who bear the financial consequences. We expect the Courts to place increasing focus on the actual return to group members in the year ahead.

Developments in class closure orders

Class closure orders remain an area in representative proceedings in which the Court exercises its general power to ensure that justice is done, without reference to any particular set of principles or parameters.

As the ALRC noted in its recent report, the Court has the power to order class closure immediately prior to mediation so as to facilitate a settlement, but emphasised that a careful balance needs to be struck between facilitating the resolution of disputes through mediation and the development of a de-facto closed class regime at the point that the proceedings are prepared for mediation.[36] The ALRC considered that the Court is in the best place to strike that balance and that the relevant Practice Note should be amended to provide guidance on the criteria the Court will apply in determining whether class closure is appropriate.

Closure of the class has a significant impact on the parties to a representative proceeding and, if incorrectly applied, has the potential to undermine the purposes behind the opt-out model adopted in Australia, namely to provide access to justice and to provide an efficient and effective procedure to deal with multiple claims. Similarly, failure to make a class closure order in circumstances where it would be appropriate could result in prejudice to the parties (eg where a settlement would have been reached but for a lack of certainty around the class).

It follows that there is a need for clarification around the making of class closure orders either through amendment to the Practice Note or possibly through the legislature. The need for clarity must, of course, be balanced with the fact that the power under which class closure orders are made, s 33ZF in the Federal Court, is intended to confer the "widest possible power" on the Court in order to avoid the necessity for frequent resort to Parliament for amendments to the legislation.[37]

Recent developments

Subsequent to the ALRC's report, Lee J delivered reasons in which he outlined the dichotomy between what have become known as "hard" and "soft" class closure orders.[38]

- **Hard**: a closure of the class which extinguishes a group member's rights to share the fruits of a subsequent judgment unless the class member takes steps to register in the proceeding or "opt-in".
- **Soft**: orders that are made to facilitate settlement, which provide for group members to register ("opt-in") by a particular date in order to participate in the settlement provided such settlement takes place by a specified date in the future. If no settlement is reached, the class reopens and group members who did not register to participate in settlement continue to participate in the class action.

The prevailing view is that the Courts are very reluctant to order "hard" closure of the class. "Soft" closure, on the other hand, appears to be more aligned with the overall purposes of the class action regime and less offensive to the opt-out model employed in Australia.

Where to from here?

The Courts have regularly reiterated the undesirability of any fixed rules when dealing with issues of practice and procedure in the context of representative proceedings.[39] Indeed, the ALRC has previously recommended (to no effect) that Part IVA be amended to require class closure at a specified time before judgment.[40] As such, the most palatable approach to enshrining a set of parameters and principles would be via a non-exhaustive list of factors, either in the Practice Note or in the legislation, to be taken into account by the Court before imposing any class closure order. This could conceivably consist of:

- whether, failing registration, the order would permanently extinguish a group member's rights stemming from a subsequent judgment;
- whether the order is for the purpose of facilitating settlement;
- the timeframe in which group members must register their participation;
- the stage in the proceeding at which the order would take effect;
- in the absence of an order, any prejudice to the respondent over and above that which would be a normal consequence of the opt-out model, such as uncertainty regarding the quantum of class members' claims; and
- any other factors material to the question of whether such an order is appropriate or necessary to ensure that justice is done in the proceeding.

36 ALRC Report 134, "Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" (December 2018).
37 *McMullin v ICA Operations Pty Ltd (No 6)* (1998) 84 FCR 1 at 4.
38 *Gill v Ethicon Sàrl (No 2)* [2019] FCA 177.
39 For example: *Regent Holdings Pty Ltd (as trustee for V L Halliday Investment Trust) v Victoria* [2012] VSCA 221 at [19]; *Gill v Ethicon Sàrl (No 2)* [2019] FCA 177 at [6] and [9]; *Abbott v Zoetis Australia Pty Ltd (No 2)* [2019] FCA 462 at [2].
40 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

Financial services

Securities class actions

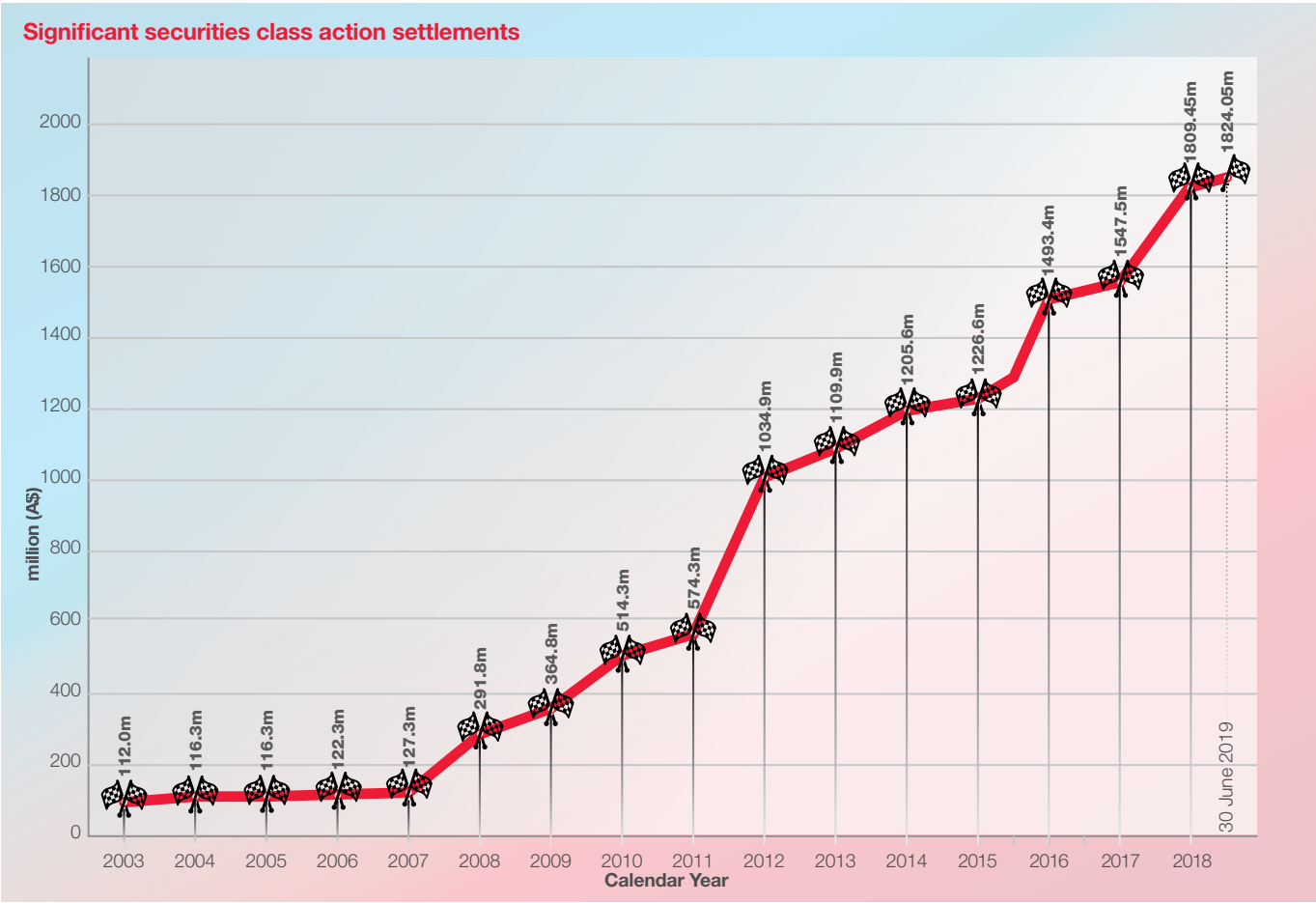
Securities class actions, or shareholder claims, are a common feature of the Australian class action landscape. Securities class actions follow a familiar model.

A publicly listed company releases a seemingly sudden and material performance downgrade. A plaintiff firm and litigation funder then commence a class action on behalf of the shareholders of the company allegedly affected by the downgrade. The lead plaintiff will allege that the company's financial reports or public statements issued prior to the downgrade must have been misleading or deceptive because they were overly positive.[41] Allegations that certain accounting requirements of the Corporations Act 2001 (Cth) have been breached are also common.[42]

Accompanying the allegations for misleading and deceptive conduct are allegations that the company failed to comply with its continuous disclosure obligations.[43] As the performance concerns were allegedly known earlier (or should have been), the downgrade should have been announced earlier.

While there have been at least 60 funded securities class actions filed in Australia, at the time of printing, four have made it through trial and none have made it as far as judgment.[44] As a result, the following unresolved legal issues continue to create fertile ground for disagreement during settlement negotiations and are likely to impact on the final settlement sum.

Significant securities class action settlements



41 Breaches are typically alleged of the Australian Consumer Law s 18, Corporations Act 2001 (Cth) s 1041H, and Australian Securities and Investments Commission Act 2001 (Cth) s 12DA.
42 For example, Corporations Act 2001 (Cth) ss 286, 292, 296, 297, 302, 304, 305.
43 Breaches are typically alleged of the Corporations Act s 674 and of ASX Listing Rule 3.1.
44 *Perera v Getswift Limited* [2018] FCA 732 at [30].

Causation – market causation

Before there was a statutory action for misleading and deceptive conduct, the common law recognised actions for deceit and negligent misrepresentation. Both common law actions required the plaintiff to prove that they directly relied on the relevant deceit or misrepresentation. If the plaintiff would have invested in shares in a company regardless of a deceit or misleading statement (or if the plaintiff simply cannot prove reliance), then the plaintiff's loss was not recognised.

In reality, research shows that few shareholders read or make investment decisions directly relying on a company's financial or public statements. If all the class members in a securities class action were required to establish direct causation/reliance, few would have a viable claim. It would also create a significant burden for plaintiff firms which would need to prove causation for each individual class member. Accordingly, plaintiff law firms and litigation funders have sought to import the presumption from the United States of "fraud-on-the-market" (ie. market causation) for statutory claims. The presumption is that misleading statements will defraud a purchaser of shares even if the purchaser does not rely directly on the misleading statement because, in an open and developed efficient market, the price of a company's shares is determined by the available material information about the company.[45]

So has market causation been accepted in Australia? Yes, but in only one judgment delivered by a single judge. In *Re HIH Insurance Ltd (in liq)*,[58] Brereton J found that plaintiffs who had bought shares in HIH prior to its collapse and following misleading statements about its financial results suffered loss. His Honour justified the existence of market causation on the basis that the statutory provisions for misleading and deceptive conduct do not require direct reliance. The test was "by conduct of another person" and His Honour concluded that it is sufficient that the contravening conduct materially contributed to the loss – it did not need to be the sole cause.[46] He also rejected the application of "fraud-on-the-market" in Australia. His reasoning focused on the statutory test for causation and held that reliance was not a substitute for causation.

As, however, market causation has not been considered by an appeals court or the High Court, the question of whether market causation is sufficient in Australian law remains open to debate. Defendants to a securities class action continue to seek lower settlement sums on the basis that class members may struggle to establish reliance.

The uncertainty over market causation has also been judicially noted as one of the reasons why no funded securities class action has proceeded to judgment in Australia.[47] Presumably, plaintiff law firms (and their funders) are likely concerned that market causation may be rejected and will significantly reduce the number of securities class actions available to them. Whereas defendants (and their insurers) are concerned that market causation will be accepted increasing the number of securities class actions, increasing the size of damages claims, and limiting their ability to negotiate commercial settlements.

Damages – FIFO, LIFO, and offsetting

It is a fundamental principle that, when assessing damages, a person should not receive more than their loss. Accordingly, any benefits received by a plaintiff in a securities class action must be offset against their losses. For some class members in a securities class action, they will have both bought and sold shares during the period within which it is alleged the company's shares were inflated due to an uncorrected misrepresentation(s). Following offsetting, the claims of some class members will reduce and some will fall away because they ultimately benefited (or broke even) from the alleged misrepresentation.

One judge has accepted offsetting in securities class actions.[48] Brereton J held that offsetting should be determined by LIFO ("last in first out") calculations and rejected the approach in the United States of conducting FIFO ("first in first out") calculations.

Both LIFO and FIFO are different methods of parcel (or share) matching. Which method should be used to determine which parcel of shares purchased should be offset against a later parcel of shares sold?

- LIFO accounts for losses and gains which arise during the relevant period affected by the contravention only.
- FIFO can increase the damages calculation by permitting the purchases of shares prior to the relevant period to cancel out sales made during the relevant period. Thus, because the purchases prior to the relevant period were unaffected by the alleged misrepresentation, allowing them to cancel out shares during the relevant

45 *Basic Inc v Levinson* 485 US 224 (1988), 241-2.
46 (2016) 335 ALR 320.
47 *Perera v Getswift Limited* [2018] FCA 732 at [30].
48 *Re HIH Insurance Ltd (in liq)* [2017] NSWSC 380.

period (which are affected by inflation) attributes to the purchases an inflated value they never had. Put another way, FIFO reduces the number of share sales which appear in the calculations thus reducing the possible offsetting effect.[49]

Again however, it remains a single judgment by a single judge and as such, a defendant can anticipate that, for the time being, a lead plaintiff in a securities class action will attempt to seek damages based on FIFO calculations.

Damages – no transaction or alternative transaction

In addition to market causation theories of loss, at least two other types of loss have been argued by plaintiffs in securities class actions.

First, class members may argue a "no transaction" case. That is, if the misrepresentation(s) were not made then the class members would not have entered into the transaction to purchase the shares. Such claims have generally arisen in the context of alleged breaches of prospectus disclosure obligations and/or allegations of misleading conduct: but for the defective disclosure document or alleged contravention, the securities in question would not have been issued and no transaction could have taken place. Therefore, damages should be assessed as the full price of the shares paid and not merely the inflated price.

Second, class members may argue an "alternative transaction" case in which they allege they would have made different, better performing, investments.[50] Such claimants argue that the damages should be assessed against the investments they would have made.

Neither of these arguments has been addressed in a securities class action judgment to date. Outside the class action context, the success of "no transaction" and "alternative transaction" cases have been considered to be dependent on the extent to which a plaintiff is able to demonstrate that no transaction or an alternative transaction would in fact have occurred, but for the contravening conduct.[51] Cases involving "no transaction" claims other than in respect of a class action have also considered proof of reliance to be a requisite element, in rejecting the theory of market causation.[52]

In principle, "no transaction" and "alternative transaction" claims could be made by some class members in some circumstances. However, the benefit of market causation in a securities class action is the reduced evidentiary burden. A "no transaction" case and an "alternative transaction" case will both require greater evidence to convincingly establish what the class member would have done.

Insurance matters

The NSW Court of Appeal has recently delivered an interesting decision on the application of an insurance policy to class action proceedings. Whilst interesting, our view is it is of limited application because it turned very much on its facts and the policy wording.

In *Bank of Queensland v AIG Australia Limited*[53] the Court determined that:

- The class action comprised multiple claims under the policy (192 members fell within the class), as each member of the representative proceeding is to be taken as having brought a "suit or proceeding" by the act of filling out a Class Member Registration Form (Macfarlan JA with whom Bathurst CJ agreed);[54]
- However, the Aggregation Clause applied such the 192 claims were aggregated into a single claim under the Policy. Critically, the "Wrongful Acts" were related – the unifying factor being that the transactions complained about were all transactions "engaged in by BOQ as part of SFP's Ponzi scheme with knowledge of SFP's fraud" (per Macfarlan JA);[55] and
- With the 192 claims having been aggregated, only one retention (of $2M) was payable by the Bank.

Key takeaway

Whilst the Court of Appeal's decision may have brought some relief to the Bank, the decision seems to have ultimately turned on:

- its particular facts and circumstances; and
- the specific wording of the Aggregation Clause.

For these reasons, it is unlikely that this case is one that will see broad application to other matters. Indeed, Bathurst CJ noted (at [9]) in relation to cases considered by the Court that:

> *"cases dealing with different aggregation clauses in different types of policy and for that matter in different factual circumstances, can only provide limited assistance. …".*[56]

Travis Toemoe
Partner, Sydney
travis.toemoe@au.kwm.com

Mandy Tsang
Special Counsel, Sydney
mandy.tsang@au.kwm.com

49 For a detailed explanation of the differences between LIFO and FIFO, see "*Structural and Forensic Developments in Securities Litigation*", speech by Beach J, www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-beach/beach-j-20160629.
50 Eg. Bellamy's class action, Federal Court of Australia (VID163 of 2017) – Statement of Claim filed on 18 December 2017.
51 Eg *Wealthsure Pty Ltd v Selig* [2014] FCAFC 64; *Jamieson v Westpac Banking Corporation* [2014] QSC 32.
52 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets (No 6)* (2007) 63 ACSR 1; *Digi-Tech (Australia) Ltd v Brand* (2004) 62 IPR 184.
53 [2019] NSWCA 190, 6 August 2019.
54 Ibid at [5], [7], [64], [68]. See also [115], [119] cf. [114] per White JA.
55 Ibid at [103].
56 Ibid at [9].

Privacy matters

When Australia's mandatory data breach notification regime was proposed, there was some concern that it may encourage class action litigation against companies that suffer eligible data breaches. However, the regime has now been in effect for 18 months and no privacy class actions were filed in 2018-2019 in the jurisdictions that have formal class action regimes.

This may in large part be because there is no established direct cause of action for breach of privacy in Australia (though that may soon change – more on that below!). There are mechanisms under the Privacy Act for representative complaints to be made to the Information Commissioner – and indeed a couple of representative complaints are currently under investigation by the Commissioner – but it is rare for complaints handled this way to end up in court. Nonetheless, as large-scale privacy breaches continue to attract media attention and consumers become more aware of privacy-related risks, there is still significant potential for data breaches reported under the new mandatory notification regime to lead to class action litigation.

So what data breaches were reported in the first year of the mandatory data breach notification regime? The Information Commissioner released a special report with some interesting statistics and observations about the cause and effect of data breach issues in Australia. According to this report, during the regime's first year:

- **There were 964 reported breaches (up 712% from the last year of the voluntary reporting regime).** This is obviously a very significant increase! What hasn't increased though are the resources available to the Information Commissioner to deal with all of these breach notices. At Senate estimates in 2018, the Commissioner indicated that she had only 5 people working part time on overseeing the mandatory data breach reporting regime. There have been consistent calls for the Commissioner to be provided with more funding in order to add the resources required to cover the full (and ever-expanding!) scope of her role.
- **60% of the reported breaches were due to malicious or criminal attacks (compared with 35% due to human error, and 5% due to system faults).** This particular statistic suggests that we shouldn't be too quick to blame technology for data security issues. In fact, humans – whether through malicious intent or by accident – are the true weak link in the data security chain.
- **The vast majority of cyber incident data breaches were the result of compromised access credentials – 153 of these involved credentials compromised through a phishing attack, 39 involved credentials compromised through a brute-force attack, and 112 involved credentials compromised by an unknown method.** This is an interesting statistic as it again highlights the key role that human fallibility – in this case, the likelihood of human recipients being duped by a phishing email – plays in many data breaches. It provides a useful lesson that any effective data security regime must pay attention to human security issues as technical issues.
- **83% of breaches affected fewer than 1,000 people.** While the larger breaches tend to hog the media headlines, most reportable breaches actually affect a relatively modest number of people. In fact, there were 232 reported breaches that affected no more than one individual. This illustrates the dangers of measuring the significance of a breach incident solely by reference to the number of people involved – any proper assessment must consider the relative impact on the security of those affected as well as the raw numbers.

The ACCC's final report on the Digital Platforms Inquiry recommended that consumers be given a direct right to seek relief in court where there has been an interference with their privacy under the Privacy Act. This recommendation – along with a number of other proposed privacy law reforms – is currently under consideration by the Government, with a formal response expected by the end of the year. If a direct right of action is introduced, then we expect that could well lead to more litigation of privacy complaints, including through class actions, with plaintiffs and litigation funders potentially seeking to by-pass the Information Commissioner altogether by applying directly to the Courts for relief. Deep-pocketed consumer-facing businesses that deal with a lot of sensitive consumer data should be wary of these potential developments when managing any privacy-related incidents.

Michael Swinson
Partner, Melbourne
michael.swinson@au.kwm.com

Government liability

Several class actions decided by the Courts this year gave occasion to scrutinise the overlay between an alleged duty of care and the relevant statutory regime.

The High Court has previously emphasised the importance of coherence between the common law and legislation. The cases discussed below confirm the fundamental importance of this policy consideration in negligence cases involving the exercise of (or failure to exercise) public statutory powers. While government will always be a big target, critical analysis is required at the outset to ensure that the alleged duty of care is consistent with the language and intent of empowering legislation. In three class actions this year, that analysis was flawed and the claims failed:

- In Powercor, Justice Dixon of the Supreme Court of Victoria considered whether an electricity company owed a duty to exercise reasonable care to prevent electricity escaping from its network causing bushfire. The reasonable measures that the plaintiff alleged should have been taken were outside the company's statutory powers.[57]
- A few months later, in Roo Roofing Dixon J also ruled against a class action. Insulation businesses claimed economic losses from the Federal Government said to have been caused by the early termination of the Home Insulation Program (HIP). The claim failed because it was an impermissible challenge to the government's policy-making functions. However, Dixon J also noted that the alleged duty also gave rise to problems of incoherence and inconsistency.[58]
- In Ibrahimi, the NSW Court of Appeal held that the Federal Government was not liable to compensate people affected by the tragedy at Christmas Island in 2010 when a boat carrying asylum seekers was destroyed on rocks. Approximately 50 people died. The claim failed on several fronts, including because the basis upon which the government was said to control the risk was incongruous with the purpose of the empowering legislation.[59]

In a fourth case, a local government was held liable in damages for property loss and personal injury after a fire escaped from a rubbish tip and destroyed homes in a nearby town. In Weber, the NSW Court of Appeal held that the alleged common law duty to avoid risk of personal injury and property loss from fire escaping the tip was consistent with an equivalent statutory duty under the Rural Fires Act 1997 (NSW).[60]

Powercor

The facts

The Gazette bushfire started when a tree in a commercial plantation fell onto a neighbouring powerline conductor discharging electricity that ignited vegetation. The plaintiff sued the electricity distributor in negligence on behalf of people who suffered personal injury, property loss and pure economic loss as a result of the bushfire. The alleged negligence lay in Powercor's failure to remove or prune the tree before the summer period. The case was summarily dismissed.

The claim

Powercor held a statutory licence to supply electricity. Section 98 of the Electrical Safety Act 1998 (Vic) required Powercor to design, construct, operate and maintain an electrical supply network in a way that minimised risk of bushfire danger. The plaintiff claimed that s 98 imposed a statutory duty to minimise the risk of escape of electricity from the supply network. The plaintiff also alleged a common law duty in similar terms.

Powercor was said to have breached its duties by failing to:

- maintain a safe distance between the conductors and the adjacent vegetation;
- have an adequate system for detecting trees at risk of contacting powerlines; and
- trim or remove vegetation at an unsafe distance from the powerline.

Critical to the plaintiff's case theory was that it was reasonably foreseeable to Powercor that a failure to inspect for, identify and manage mature trees within a commercial plantation of trees adjacent to the supply network could result in a tree falling across conductors. The Court held that this argument went beyond what the legislative scheme required Powercor to do.

Inconsistency of law

The legislation and attendant regulations revealed the careful balance that had been struck between (1) removing vegetation to avoid contact with powerlines; and (2) preserving vegetation in the environment. To avoid contact, electricity companies were responsible for clearing trees with structural defects that could fall and impact a powerline, and trees within the minimum clearance space of a powerline. However, companies were not required to clear any tree that might inexplicably fall and contact a powerline. So much was clear from relevant codes of practice that sought to minimise the pruning or removal of trees and associated environment impacts.

The falling tree that triggered the Gazette bushfire was healthy and had no visible

57 *Block v Powercor Australia Ltd* [2019] VSC 15.
58 *Roo Roofing Pty Ltd & Anor v The Commonwealth of Australia* [2019] VSC 331.
59 *Ibrahimi v Commonwealth of Australia* [2018] NSWCA 321.
60 *Weber v Greater Hume Shire Council (No 2)* [2019] NSWCA 108.

structural defect. It was a non-hazardous tree outside the minimum clearance space. Powercor was not obliged, nor empowered, to clear the tree. The reasonable measures that the plaintiff relied upon were not within Powercor's statutory powers. Imposing a duty to clear a 30 metre wide strip of healthy trees alongside the powerline would plainly have distorted the statutory scheme for tree clearance.

Roo Roofing

The facts

The HIP was part of the Federal Government's 2009 economic stimulus package in the wake of the Global Financial Crisis. The HIP saw existing homes retrofitted with ceiling insulation at little or no cost to the owner. It was a wildly popular program and the rapid increase in demand led to an increase in inexperienced installers entering the market. Some businesses invested significantly in resources and infrastructure to take advantage of what was anticipated to be a surge in demand for insulation as a result of the HIP. After the deaths of four installers over a four month period, departmental advice about unacceptable safety risks prompted the early termination of the HIP.

The claim

The insulation businesses that profited from the HIP's rollout later sued the Federal Government for profits and business investments lost because of the early termination of the program. Insulation businesses claimed that the government negligently designed, implemented and administered the HIP, which caused safety risks to crystallise and the HIP to be terminated early.

Inconsistency of law

Dixon J refused to find against the Federal Government for various reasons including inconsistency of law in two regards. Firstly, imposing such a duty would have required the government to take reasonable care in the design of fiscal policy to avoid economic loss to one sector of the community, over the interests of the community as a whole. Secondly, public servants would be constrained by duties owed to innumerable groups and businesses in the community. That was inconsistent with their duties under the Public Service Act 1999 (Cth), to achieve the best result for the Australian community and to provide frank, honest and timely advice to Ministers.

These findings echo the High Court's observations in *Sullivan v Moody*:

> *[I]f a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of … exercising powers, in the public interest, … the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.*[61]

Ibrahimi

The facts

On 15 December 2010, a boat carrying a number of asylum seekers bound for Australia from Indonesia was destroyed on rocks at Christmas Island during a storm. Approximately 50 people died and 41 were rescued.

Operation Resolute was Border Protection Command's operation tasked with patrolling waters around Christmas Island to detect, intercept and escort unauthorised boats to safety. On 15 December 2010, the two naval vessels involved in Operation Resolute were occupied by two unauthorised boats that had arrived in the preceding days. They were not patrolling the waters north of Christmas Island at the time the ill-fated boat arrived.

The claim

The Federal Government was sued by a plaintiff on behalf of survivors, rescuers and onlookers, and estates of the deceased. Compensation was claimed for physical harm, mental harm and lost property. The Commonwealth was said to have breached duties to take reasonable care in deploying resources to conduct Operation Resolute to avoid foreseeable risks of:

- physical injury, death and property damage to passengers of unauthorised boats; and
- mental harm to family members of passengers, rescuers and onlookers.

A range of findings told against imposing the alleged duties. There was no representation upon which asylum seekers could reasonably rely that the government would detect unauthorised boats and ensure the safety of passengers. Passengers were not vulnerable to the government's control of a risk; they could protect themselves by not embarking on the journey. Incoherence was a further problem.

Incoherence of law

Under the Migration Act 1958 (Cth), unauthorised boats were automatically forfeited to the government upon entering territorial waters. The plaintiff argued that forfeiture meant that the government controlled the ill-fated boat such that it also controlled the risk of harm. The NSW Court of Appeal observed that the purpose of statutory forfeiture was to deter unlawful conduct. It would be incongruous to use such forfeiture as a means of erecting a duty of care to passengers onboard boats unlawfully travelling to Australia.

A further aspect of inconsistency was founded in the highly dangerous rescue

61 *Sullivan v Moody* (2001) 207 CLR 562, 582 [60].

activities in which government employees involved in Operation Resolute were required to engage. The Court observed that the plaintiff had not attempted to reconcile either: (1) the performance of those responsibilities; and (2) the government's powers over and obligations to its employees, with the duty to take reasonable care to avoid mental harm to those employees. No final ruling on this point was necessary.

Weber

In another bushfire case, the NSW Court of Appeal found no inconsistency between a local government's public powers and the duty of care alleged by the plaintiff. The plaintiff's claim succeeded.

The facts

A fire started in the Walla Walla Waste Recycling Depot on a summer day in 2009. It crossed the Tip, jumped a firebreak and continued to burn rapidly. It reached the town of Gregory, 11km away, about an hour after first escaping and destroyed the plaintiff's home and possessions. She sued the Greater Hume Shire Council in negligence on behalf of all people who suffered property loss and personal injury due to the fire.

The appeal

At trial, the plaintiff lost. Although the Council was found to owe a duty and to have breached it, causation was not established. It was not shown that had Council adopted the reasonable measures alleged the spread of fire would probably have been avoided. The decision was overturned by the NSW Court of Appeal, which found that steps to impede the progress of the fire were available and reasonable, including slashing long grass and maintaining a clear firebreak. If those steps had been taken, the spread of the fire would have been far slower and fire fighters would probably have arrived in time to contain it within the Tip.

The legislative scheme

In finding against the Council, the Court of Appeal found that there was no inconsistency between the Council's public powers and the duty of care alleged by the plaintiff. The Council owed a duty, under s 63 of the Rural Fires Act 1997 (NSW), to take steps to prevent the occurrence of bushfires on, and to minimise dangers from the spread of a bushfire from, land under its control. The alleged duty owed by Council to the plaintiff and group members was to take reasonable care to avoid risk of personal injury and property loss caused by the escape of the fire from the Tip. This was consistent with the statutory duty under the Rural Fires Act such that inconsistency of law did not present a policy hurdle for the plaintiff to overcome.

Key takeaways

- For government stakeholders, the cases are working examples of policy considerations in negligence cases at play. The High Court insists that the law of negligence develop in a way that ensures consistency between common law and statute. The proper exercise of statutory powers in accordance with the legislative intent will provide a large measure of protection for bodies exercising public powers against class actions in negligence.
- For private sector stakeholders and citizens considering suing the government in negligence, the earliest prospects analysis should focus primarily on the statutory powers exercised. If it is not possible to frame a duty of care that is consistent with those powers, it may be time to wave the chequered flag on the law suit.

Health

There have been a number of interesting developments in class actions in the health sector during the course of the last year. This litigation has generally involved a class of plaintiffs alleging that a particular medical or pharmaceutical product has caused personal injury or harm. As the modern health industry is increasingly dominated by international players and products, foreign jurisdictions, particularly the US, provide a fertile ground for plaintiffs to select actions to run in Australia. While Australia rarely leads the charge in new actions, plaintiffs in Australia have recently been in closer pursuit.

The Cosmetic Institute

The claim brought against The Cosmetic Institute (TCI) in the Supreme Court of NSW in September 2017 on behalf of women who had undergone breast augmentation surgery at various TCI locations continues. The plaintiff alleges that TCI's conduct led to a variety of health complications, including heart issues, seizures and defective surgical results, was negligent and breached the Australian Consumer Law. In early 2018, TCI sought an order to discontinue the class action on the basis that the Court should be satisfied that it is in the interests of justice to do so – including that proceeding as a class action would not be cost efficient. Amongst other matters, the defendants argued that there would likely be significant variation in individual group member claims (particularly concerning limitation issues, causation and assessment of damages) which would necessarily mean that any representative proceedings would inevitably turn into individual proceedings which would need to be determined on their own facts and circumstances.

TCI's application was dismissed. Garling J found that the factual issues as to the relationships between the parties should be resolved in a single judgment, suggesting that the matter should continue as a representative proceeding. The fact that no defences had been filed was also influential, as Courts have traditionally tended against the premature determination of issues when considering disconfirmation of a class action. In May 2019, the Court released a notice to inform members of the public who may fall within the represented class of the existence of the action. The next hearing in the matter is set for September 2019.

Bayer's Essure contraceptive device

Another class action currently underway in Australia is that against Bayer, an international pharmaceutical company and manufacturer of the contraceptive device Essure. This device, which consists of two metal coils that are inserted into fallopian tubes, has allegedly been the source of a host of medical concerns, ranging from autoimmune disorders to unwanted pregnancies. It has been the subject of thousands of lawsuits in the US, Canada and Scotland in recent years, and by July 2018 Bayer had withdrawn the product from the market in all countries.

In June 2019, a class of plaintiffs represented by Slater and Gordon filed a similar class action in the Supreme Court of Victoria, based on allegations that Bayer breached its duty of care to affected patients, as well as Australia's consumer protection laws. Shine Lawyers is also currently investigating the potential for a class action in relation to the device.

Timeline of events

Aug 2017	Australasian Medical and Science Ltd (AMSL), in coordination with Australia's Therapeutic Goods Administration (TGA), issues a "hazard alert" for Essure and device is removed from Australian market
18 Sep 2017	Bayer announces plan to discontinue sales in all countries outside the US
Jul 2018	Nearly 17,000 lawsuits filed against Bayer concerning Essure related injuries in the US
20 Jul 2018	Bayer announces plan to discontinue sales in the US
13 Aug 2018	Slater and Gordon announces it will lead a class action against Bayer representing Australian women who have suffered complications after using the device

Transvaginal mesh devices

With thousands of class actions having been filed in Canada, the US, the UK and Australia, transvaginal mesh is one of the largest and most litigated women's health issues in decades. Introduced in the late 1980s, the device was heralded as a simple surgical means of supporting the pelvic organs and addressing incontinence and pelvic organ prolapse, both being common medical issues for women following childbirth. However, since the introduction of the product, thousands of women have experienced complications, including chronic pain, infections, incontinence, and irreparable damage to the urethra and vaginal wall.

In 2012, over 1,300 women brought an action in the Federal Court of Australia against manufacturers of the device, Johnson & Johnson and Ethicon, seeking

compensation for the complications they have allegedly suffered as a consequence of surgical insertion of the mesh products. The trial was heard in the latter half of 2017 in the Federal Court in Sydney and we expect the judgment will be handed down in late 2019. A second class action, brought by 850 women against American Medical Systems, a manufacturer of a similar product, was also filed in January 2018 in the Federal Court. A hearing date has not yet been set.

No doubt the prospects of settlement in the American Medical Systems proceeding will be heavily influenced by the outcome in the Johnson & Johnson proceedings.

What the future may hold for health-related actions

Roundup

Bayer has also been in the line of fire from class action plaintiffs in relation to another of its products, the widely used glyphosate-containing weed killer 'Roundup'. Three high-profile cases have been running in the US. In each case, the US court has ordered Bayer to pay significant damages to individuals who had developed cancer ostensibly as a result of exposure to glyphosate. The first proceeding was run in San Francisco and in August 2018 the Superior Court of California found that the product had caused the cancer of former school groundskeeper Dewayne Johnson. The jury awarded Johnson the equivalent of AUD $415M in damages, though this was subsequently reduced to approximately AUD $114M in October 2018. Though Bayer has appealed the decision in the California Court of Appeal, this landmark verdict set the stage for thousands of similar claims to be brought against Bayer, both in the US and overseas.

Roundup is also the subject of a class action filed by six plaintiffs in the US District Court for the Western District of Wisconsin. Rather than claiming for personal injury, the plaintiff class is seeking compensation for their expenditure in purchasing the Roundup product, alleging they would not have bought it had Bayer's marketing properly alerted them to the risks.

In June 2019, Michael Ogalirolo, a gardener from Victoria, was the first person to file a similar claim against Bayer in Australia. LHD Lawyers and Maurice Blackburn have also both commenced investigations into potential class actions in relation to the product. Given the widely publicised successes of claimants in the US, the likelihood of a class action in Australian would seem to be high.

An opioid epidemic?

Another major health issue that has resulted in prolific litigation in the US is the opioid epidemic. Claims have been brought against several pharmaceutical companies alleging that their opioid products were marketed in a way that exaggerated their benefits and downplayed the risk of addiction. One of the most high-profile lawsuits to date is that brought by the Attorney General of Oklahoma against Purdue Pharma, Teva Pharmaceuticals and Johnson & Johnson.

The Attorney General secured settlements of AUD $378M and AUD $123M with Purdue Pharma and Teva Pharmaceuticals respectively. Uniquely, the damages claimed were referable to the public cost of dealing with the 'Oklahoma opioid epidemic'. It is expected that a large proportion of the Oklahoma settlement will be put towards a national centre for addiction treatment.

The Cleveland County District Court heard the proceedings against Johnson & Johnson in July 2019 and handed down judgment in August 2019. The judge ordered Johnson & Johnson to pay USD $572M for its role in driving the opioid epidemic in Oklahoma, in large part based on a finding that the company's marketing campaign made false claims about the safety and effectiveness of prescription opioids. Johnson & Johnson has announced its intention to appeal the judgment.

In addition, almost 2,000 cases, brought mostly by state and local governments, have been combined in multi-district litigation to be heard in the US District Court for the Northern District of Ohio. The first bellwether trial is set to be heard in October 2019. The outcome of this trial, as well the Johnson & Johnson proceedings, will determine the likelihood of similar proceedings being commenced in Australia against suppliers of opioids. Potential plaintiffs in the opioid space will however need to carefully consider the differences in the regulatory framework that applies to advertising of therapeutic products in different jurisdictions and, in particular, the prohibition on advertising prescription pharmaceutical products to consumers in Australia.

Conclusion

The commencement of the Essure class action is demonstrative of the attractiveness to plaintiffs of seeking to replicate foreign class actions in Australia. Keeping an eye on the health-related lawsuits playing out internationally, particularly major lawsuits that have commenced in the US, can be a good indication of the issues soon to be tackled at home. With that in mind, it will be interesting to see how these claims develop over the coming year.

Suzy Madar
Partner, Sydney
suzy.madar@au.kwm.com

International developments

USA

Over the last four years, the USA has witnessed a consistent increase in class actions spending, most recently in 2018 to $2.46 billion, accounting for 11.1% of all litigation spending in the USA.[62]

In 2018, most class actions arose in the labour and employment (28.7%), consumer fraud (24%) and product liability (12.5%) areas, with a relatively marked increase from 2017 in labour and employment and consumer fraud cases. Interestingly, an increase was observed in the number of securities class actions. In fact, it was reported that 1 in 10 S&P 500 companies was hit with a securities class action in 2018.[63]

A subset of these securities class actions have arisen as a result of the #metoo movement, which in 2017 gained global momentum. People around the world have since adopted the hashtag, bringing increased awareness to issues of sexual misconduct in the workplace and scrutiny into companies' workplace policies and responses to allegations of sexual misconduct.

Investors too are taking note, specifically where a company's share price suffers as a result of news of cover-ups or other failures to properly manage misconduct / reputational issues. In those instances, shareholder derivative or securities class actions are being launched against companies, sometimes at the same time given the overlapping factual scenarios. Two high-profile cases are briefly set out below to illustrate the trend developing in this area.

CBS Corporation

In late 2018, a class action was brought against CBS Corporation as a result of its alleged coverup of the former CEO's sexual misconduct.[64] The claim alleges that representations were made to investors that CBS maintained the highest of ethical standards including a zero-tolerance policy for sexual harassment, whereas the reality was that there was a company-wide pattern of sexual harassment which created a "culture of fear…diametrically opposed to [CBS's] public statements".

The class action also alleges that 3.4M shares of CBS stock totalling over USD $200M of proceeds were sold by the CEO and other CBS executives before sexual misconduct allegations were revealed to the market. Upon news of an expose by the New Yorker on 27 July 2018, CBS's stock prices fell over 6%, the largest one-day decline since 2011 and continued to fall.

Alphabet Inc.

Following a similar narrative, another example is Alphabet Inc., Google's parent company. In January 2019, the board of directors was sued in a shareholder derivative action brought by two pension funds suing in the name of the company, on the basis that directors had demonstrated a pattern of concealment in covering up a "long-standing pattern of sexual harassment and discrimination by high-powered male executives".[65] The claims are for breach of fiduciary duties, waste of corporate assets and unjust enrichment, resulting in financial and reputational harm to the company.

The complaint filed in the Superior Court of San Francisco asserts that Google persistently discriminates against its female employees.[66] Against this we have seen:

- a New York Times article published on 25 October 2018 exposing the "significant and wasteful exit packages worth millions" which were paid out to high-level male executives who had been credibly accused of sexual harassment; and
- Alphabet's subsequent disclosure that an additional 48 cases of sexual harassment had been reported over the last two years, and the ensuing "walkout" on 1 November 2018 of 20,000 employees in protest of the Alphabet's "generally inadequate approach to sexual harassment and discrimination".

News of the concealment of the data breach led Alphabet's stock price to immediately drop approximately 6%, causing a USD $35M decline in Alphabet's market capitalisation, followed by another immediate decline of 7% in response to the New York Times article which revealed Alphabet's sexual harassment problem.

Where to from here?

In 2018, 15 to 20 other shareholder derivative class actions were filed including against Nike, Wynn Resorts, Liberty Tax, Lululemon Athletica and National Beverage Corp. With the #metoo movement showing little signs of slowing down, the developments highlight a broader need for companies to properly manage allegations and issues which may adversely affect the company's reputation. It remains to be seen whether the above actions may be settled.

62 See the "*2019 Class Action Survey*" by Carlton Fields (https://classactionsurvey.com/).
63 "*From Nuisance to Menace: The Rising Tide of Securities Class Action Litigation*" by Chubb dated June 2019 (https://news.chubb.com/sca-spotlight).
64 *Samit v. CBS Corporation, et al.* (1:18-cv-07796), United States District Court, Southern District of New York.
65 *Northern California Pipe Trades Pension Plan and Teamsters Local 272 Labor Management Pension Fund v. Hennessey, et al.* (19-civ-00149), Superior Court of the State of California, County of San Mateo.
66 *Ellis v Google, LLC* (No. CGC-17-561299), Superior Court of the State of California, County of San Francisco.

Europe

While Europe has been dominated in 2018-19 by Brexit chaos, it has also seen a continuing drive for legislative reform in the area of collective consumer redress, as well as the rise of group actions in the UK.

Reforming collective consumer redress

The harmonisation of systems of consumer group actions has long been on the EU's agenda. Not all EU Member States provide for collective redress,[67] and where the possibility exists, the conditions are generally rigid compared to US and Australian-style class actions.

The European Commission issued a Proposal for a Directive on representative actions for consumers on 11 April 2018.[68] The Proposal passed its first reading in the European Parliament on 26 March 2019, resulting in 45 proposed amendments.[69] These are currently being considered by the European Commission and it may take months or years before the final form of the Directive is settled. As drafted, it is unlikely that the EU collective redress system will go as far as Australian-style class actions. For example, the current Proposal would only allow "qualified representative entities" designated by Member States, such as consumer organisations and public bodies, to bring representative actions on behalf of consumers in respect of infringements of EU consumer law.

In parallel to the EU initiative, a number of Member States have in recent years sought to reform their collective redress regimes to facilitate group actions. In the past year:

- The Dutch Senate approved legislation on 29 January 2019 to allow claims for collective damages. Existing legislation only permitted representative organisations to seek declaratory judgments on liability.
- Prompted by the 'Dieselgate' scandal, new German legislation came into force on 1 November 2018 enabling the courts to grant declaratory judgments on liability in actions brought by consumer protection organisations or qualified institutions. A group member must then initiate proceedings for individual damages. An action has been commenced under the new legislation against Volkswagen over the 'Dieselgate' scandal, with over 400,000 owners joining. Other actions have also been commenced under the new legislation against Volkswagen Bank, Mercedes Benz Bank and a credit rating agency.

The rise of group actions in the UK

The rise of group litigation in the UK is anticipated to further increase following case law developments and the dramatic increase in litigation funders in the market over recent years. The areas of activity include:

- **Environmental and human rights-based claims**. Recent years have shown a trend of claimants bringing claims against UK-domiciled parent companies for acts or omissions of their overseas subsidiaries. To date, claimants have been unsuccessful in jurisdictional challenges in two group actions against Unilever Plc[70] and Royal Dutch Shell Plc.[71] However, in a third group action, the important decision in Vedanta Resources confirmed that a lawsuit by 1,800 Zambian villagers can be heard in England.[72] The Supreme Court made important findings on a UK parent company's duty of care to those affected by its subsidiaries' operations in foreign countries and the jurisdiction of English courts to hear such claims.[73] We expect more mass incident group actions to be brought in the UK targeting large multinationals with global operations.
- **Shareholder claims**. A number of high-profile shareholder actions have made their way through the English courts in recent years, including the RBS Rights Issue Litigation (which settled before trial in 2017) and the Lloyds/HBOS Litigation. Judgment in the latter claim against Lloyds Banking Group and former directors of Lloyds TSB is currently awaited.
- **Competition**. The Court of Appeal delivered its highly anticipated judgment in the largest class action in British history: the £14 billion class action against Mastercard relating to its multilateral interchange fees.[74] This was the first appellate decision of the English courts on the 'opt out' collective action regime introduced in 2015 for competition claims. The decision, which Mastercard intends to appeal to the Supreme Court, overturned the Competition Appeal Tribunal's (CAT) decision refusing to certify the class action, lowers the initial certification hurdle and will be seen to encourage funders and claimant firms. A class action was also filed in the CAT most recently in July 2019 against five banks following the European Commission issuing fines in May 2019 totalling €1.07billion over allegations of rigging the foreign exchange market.
- **Data and privacy**. The Court of Appeal upheld the first successful data leak group action, in which Morrisons Supermarkets Plc was found liable for thousands of its employees' details being posted online.[75]
- **Product liability**. A number of product liability group actions are making their way through the English courts, including actions against the VW Group over 'Dieselgate' and Post Office Limited in respect of allegedly defective software.

67 A form of collective consumer redress is available in Austria, Belgium, Bulgaria, Croatia, Denmark, Finland, France, Germany, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain, Sweden and the UK.
68 Proposal for a Directive of the European Parliament and the Council on representative actions for the protection of the interest of consumers and repealing Directive 2009/22/EC dated 11 April 2018 (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0184&from=EN).
69 Report on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)).
70 *AAA and others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532. Permission to appeal to the Supreme Court has been denied.
71 *Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2018] EWCA Civ 191. This is a claim by 40,000 Nigerian fishermen against Royal Dutch Shell in relation to oil spills in the Niger Delta. In July 2019, permission to appeal to the Supreme Court was granted.
72 *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.
73 See further: www.kwm.com/en/cn/knowledge/insights/parent-company-liability-class-actions-20190419.
74 *Walter Merricks CBE v Mastercard Incorporated & Ors* [2019] EWCA Civ 674.
75 *WM Morrisons Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339. Permission to appeal to the Supreme Court was granted with the hearing to take place in November 2019.

Outlook

What's next for class actions in Australia?

On the radar

A large number of hearings have been set down for the next year, including:

- October 2019: St Patricks Day Fires;
- February 2020: Vocation; Murray Goulburn;
- March 2020: Dick Smith; CIMIC; Scotsburn bushfire;
- April 2020: Add-on car insurance (against Davantage Group);
- May 2020: Crown Resorts; Faulty airbags;
- June 2020: Spotless; Ford; Woolworths; Sydney light rail;
- July 2020: Add-on car insurance (against Swann Insurance);
- August 2020: GetSwift; Bellamy's;
- September 2020: 7-Eleven;
- March 2021: Iluka.

Judgments:
We await judgment on:

- The High Court appeal considering the Courts' powers to make common fund orders (heard August 2019);
- The Queensland floods class action, which should provide further clarity around the liability of public authorities, statutory defences under the Civil Liability Act and causation in mass tort cases;
- Myer, which should provide some further clarification around market-based causation and quantifying securities claims;
- The Live Cattle Export Ban class action;
- The class action against Johnson & Johnson and Ethicon Sarl over alleged faulty mesh implants.

Significant appeals include:

- Crown Resorts in relation to potential witnesses that are subject to confidentiality agreements;
- Bellamy's cost capping (application for leave to appeal dismissed 23 August 2019);
- The High Court appeal in the European River Cruise class action;
- Appeal against the decision to stay the competing AMP actions (heard August 2019).

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 Retail Food Group Limited; against Dixon Advisory;
- **Government and public interest claims**: potential further stolen wages cases against other States and Territories (following the settlement of the claim against the State of Queensland);
- **Employment**: by stonemasons that contracted silicosis from silica dust; consequences of concussion on NRL and AFL players; various alleged underpayment of wage claims;
- **Consumer claims**: against Audi, Skoda and Volkswagen for alleged defective timing chains; against Mitsubishi in relation to Triton fuel consumption; against Allergan Australia relating to breast implants; against Samsung for faulty washing machines;
- **Natural Disasters/Events**: relating to cancer allegedly linked to Roundup/ glyphosate.

Stop press

Just outside the review period we have seen:

- **Class actions commenced (all funded)**: an employment action funded by the CFMEU against labour hire company Workpac; relating to alleged building defects in the Opal Tower; securities class action against Estia Health; a second securities class action against Lendlease; a second class action by local councils in relation to alleged excessive insurance premiums; against Westpac in relation to fees on superannuation products; relating to alleged defective diesel particulate filters in some models of Toyota vehicles.
- **Settlements**: at least 12 settlements have been approved or are awaiting the Court's approval, including a $192M settlement for recovery of stolen wages for indigenous workers (Qld), the Radio Rentals class action and settlement of the Murray Goulburn (action by Slater & Gordon), Sirtex, UGL and Forge securities class actions.
- **Common fund orders:** at least 3 further common fund orders have been granted, one was declined.
- **Consolidations:** of the RCR Tomlinson securities class actions; of the AMP super fees class actions.
- **Judgments:** judgment for the defendant in the Airservices Australia employment class action; various judgments in relation to the disclosure of insurance documents to plaintiffs; and judgment in the 7-Eleven class action as to whether the identity of a witness should be suppressed.

Regime change

Western Australia: On 26 June 2019, the Western Australian State Parliament introduced the *Civil Procedure (Representative Proceedings) Bill 2019* (WA). The proposed WA legislation is substantially modelled on the Federal legislation, with some adjustments to reflect the recommendations made by the Law Reform Commission of Western Australia in 2015.[76]

A strong class actions regime is seen by many, not the least the WA State Government, to be an important move in support of access to justice. Third party litigation funding remains a key ingredient in the ability of persons to enjoy the benefits of such a regime. However, this issue has its own set of challenges and considerations in Western Australia where the torts of maintenance and champerty have not been expressly abolished, and is likely to require further legislative reform by the WA State Government.

Tasmania: On 9 September 2019 a new Part VII - Representative Proceedings was inserted into the *Supreme Court Civil Procedure Act 1932* (Tas). The legislation is substantially modelled on the NSW legislation.

76 See Michael Lundberg and Robert Slattery "Stay classy WA: the proposed changes to representative proceedings in Western Australia" King & Wood Mallesons (18 December 2015).

Contacts

Alex Morris
T +61 2 9296 2495
M +61 412 878 650
alexander.morris@au.kwm.com

Alex Morris specialises in corporate and financial services regulatory inquiries, litigation and commercial disputes.

Moira Saville
T +61 2 9296 2311
M +61 407 241 824
moira.saville@au.kwm.com

Moira Saville specialises in corporate and financial services disputes, including class actions and complex litigation, as well as regulatory investigations.

Peta Stevenson
T +61 2 9296 2492
M +61 438 289 743
peta.stevenson@au.kwm.com

Peta Stevenson specialises in competition litigation, from regulatory investigations and enforcement proceedings and prosecutions through to follow-on damages actions including class actions.

Justin McDonnell
T +61 7 3244 8099
M +61 417 196 858
justin.mcdonnell@au.kwm.com

Justin is an expert in tort litigation and public liability, including class actions with substantial public liability claims.

Emma Costello
T +61 7 3244 8115
M +61 439 190 046
emma.costello@au.kwm.com

Sam Dundas
T +61 8 9269 7097
M +61 411 105 336
sam.dundas@au.kwm.com

Amanda Engels
T +61 2 9296 2450
M +61 408 335 972
amanda.engels@au.kwm.com

Chris Fox
T +61 3 9643 4116
M +61 418 270 408
chris.fox@au.kwm.com

Domenic Gatto
T +61 3 9643 4460
M +61 439 249 987
domenic.gatto@au.kwm.com

Samantha Kinsey
T +61 3 9643 4155
M +61 408 433 554
samantha.kinsey@au.kwm.com

Travis Toemoe
T +61 2 9296 2430
M +61 458 485 105
travis.toemoe@au.kwm.com

James Wang
T +61 8 9269 7215
M +61 427 078 140
james.wang@au.kwm.com

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Contributors: Wilson Antoon, Jasmine Forde, Sarah-Jane Frydman, Madeleine Goodsir, Cathy Graville, Liam Hennessy, Kione Johnson, Sacha Kemp, Pavel Kuryan, Emma Lawrence, Jane Menzies, Nell Morgan, James Nagle, Jaslyn Ng, Shane Ogden, Georgie Parletta, Andrew Parrish, Alexandra Pieniazek, James Russell, Clare Sayers, Emma Sesito, Katya Shliapnikoff, Christopher Stackpoole, Judy Tanti, Yvette Theodorou, Rob Tooth, Claire Viney, Peter Yeldham

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Securities

- **Suncorp:** acting for Suncorp in class action proceedings regarding grandfathering of superannuation commissions.
- **NAB:** acting for NAB in the consumer class action against NAB and former insurance business MLC alleging unconscionable conduct.
- **Westpac:** acting for Westpac in class action proceedings alleging breaches of responsible lending legislation.
- **Woolworths:** acting for Woolworths in class action proceedings brought on behalf of shareholders.
- **Swann:** 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 and 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

- **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 the class action proceedings brought by the residents and business-owners of Oakey (Qld) and residents of Tindal (NT) alleging negligence and nuisance and seeking compensation for alleged property value diminution.
- **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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Media enquiries

Charlotte Geddes
Head of Corporate Affairs
T +61 2 9296 3348
charlotte.geddes@au.kwm.com

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