KING&WOOD MALLESONS
金杜律师事务所

The Power of Together

The Review

Class Actions in Australia

2014/2015

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"Directors need to develop strategies to avoid a class action in the first instance and, second, prepare for a coordinated approach in the event one does emerge"

Australian Institute of Company Directors
Action Plan for Class Actions: ASX Roundtable Summary Paper 2015

Introduction

"A big year for new actions, settlements and development of legal practice"

In this, our fourth annual report on class action developments in Australia, we reflect upon significant judgments, events and issues of note arising between 1 July 2014 and 30 June 2015.

This year, total class action settlements were just shy of $1 billion. This large total was primarily made up of the settlements of the Black Saturday class actions relating to the Kilmore East/Kinglake and the Murrindindi/Marysville bushfires, totalling almost $800 million between them, with the balance from securities class actions.

A number of notable judgments have also been handed down in the past 12 months, including the first judicial consideration of the indirect causation theory of loss in securities class actions, as well as clarification by the High Court on proportionate liability. It was also a year in which two class actions representing largely retail investors or consumers – the actions in relation to Vioxx and Great Southern – produced minimal returns for group members, suggesting that the class action mechanism will not always deliver results.

In the past year, issues relating to the role of lawyers and funders remained centre stage. In this year's report we consider a number of these decisions, the possible introduction of contingency fees by lawyers and look at the status of the Australian third party litigation funding market.

As the report goes to print, at least 33 new class actions have been launched in the 12 months to June 2015, up significantly from previous periods. Securities, financial product and investment claims were just under half of all new class action filings (2013/2014: 52%). While in previous periods we have seen claims against construction companies facing issues in meeting forecasts, as the conditions of the global economy have continued to change, we are now seeing a trend in claims against mining and mining services companies. There has also been a rise in new claims relating to natural disasters, proceedings against government authorities and mass consumer claims.

There are at least 29 other class actions under ongoing consideration. The year 2015/16 looks set to be another eventful year for class actions in Australia.

We hope you find this report informative.

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Headlines

Landmark year for settlements

With almost a billion dollars paid out in Australian class action settlements in the year to 30 June 2015, it is not surprising that class actions are seen as a key risk for Australian directors and boards and that they continue to draw new protagonists to the Australian market. Total settlement payouts in 2014/2015 were approximately $950 million across 12 actions.

Number of new actions filed – a steady rise

In the 12 months to June 2015, at least 33 new class actions were filed in the Federal Court and the Supreme Courts of Victoria and NSW. This represents a huge rise in class actions commenced, as we saw 18 filed in the 12 months to June 2013 and 17 in the 12 months to June 2014 covered by our second and third reports,[1] suggesting that class actions are not only becoming an accepted aspect of commercial litigation in Australia, but are also thriving.

1 King & Wood Mallesons, The Review – Class Actions In Australia 2013/14 (24 July 2014), 6.

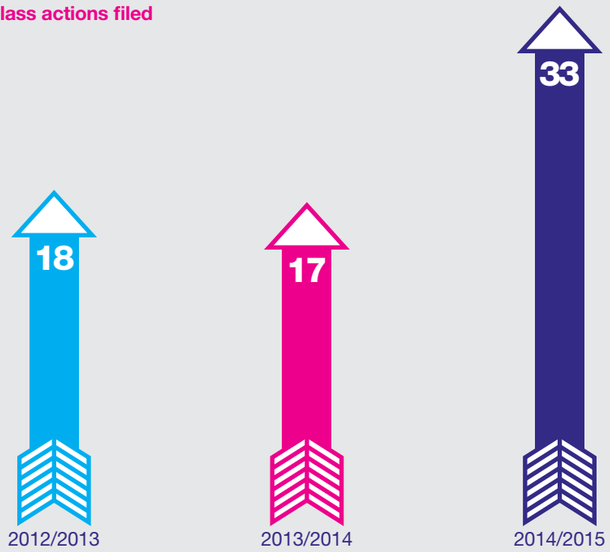
While securities, financial product and investment related class actions collectively constituted just under 50% of all new actions, they continued to dominate the leaderboard, with 16 new actions filed in the 12 months to June 2015:

- **Securities**: ten actions were filed alleging breaches of the continuous disclosure obligations and/or misleading or deceptive conduct (five of which have a common link through class action proponent Mark Elliott), including against Myer (financial results); against Newcrest Mining Ltd (gold production forecast); two actions against Treasury Wine Estates Ltd (**TWE**) (write-downs); two actions against Vocation (disclosure regarding extent of government funding), and a third reportedly being investigated; a claim against WorleyParsons (forecast earnings, discussed further in section three); against UGL Limited (disclosure regarding profits from a joint venture of a power station in the Northern Territory); against traffic forecaster Arup in relation to the failed BrisConnections project; and against Billabong (forecast earnings).
- **Financial products/investments**: six class actions were filed in relation to financial products or investments, with a claim filed against ANZ (collateralised debt obligations); against RBS (warrants); against, amongst others, BankSA (alleged knowing assistance in a Ponzi scheme); against a number of Fitch entities (synthetic collateralised debt obligations); against Australian Executor Trustees (in its role as trustee of Provident Capital); and a second action in respect of Banksia, against its trustee The Trust Company.

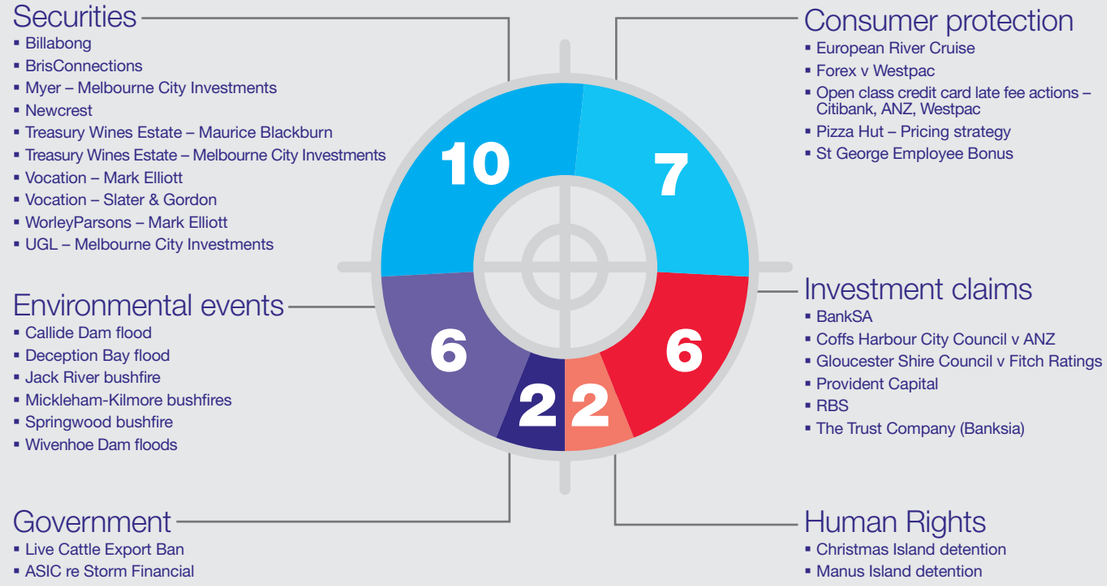
Of the remaining 17 class actions:

- **Natural disasters and events**: six actions related to catastrophic events, of which three are flood-related (the class actions against Seqwater, SunWater and the State of Queensland in relation to the 2011 floods in Queensland (the Wivenhoe Dam proceedings), the class actions issued in the Victorian Supreme Court against Sunwater in relation to the Callide Dam flood of February 2015, and against Thiess in relation to the Deception Bay flood of May 2015) and three relate to major bushfires (the Jack River bushfire, the Mickleham-Kilmore bushfires and the Springwood bushfires).
- **Public interest and human rights**: two actions against the Commonwealth concerning the Christmas Island and Manus Island Detention Centres.

New class actions filed



Types of Claims



- **Consumer claims**: seven consumer class actions were filed, including against tour company, Scenic Tours, in relation to a European river cruise; against Westpac, in relation to alleged unconscionable conduct and breaches of the code of banking practice by not providing international money transfer businesses with reasonable notice before closing their accounts; by former employees of St George bank in relation to an employee bonus scheme; a claim by franchisees against Pizza Hut franchisor Yum! Foods; and "open class" actions against ANZ, Citibank and Westpac (which includes claims against St George and BankSA) in relation to bank fees (these follow on from the "closed class" actions filed in 2010 - see later in this section).
- **Claims against the State**: two class actions were filed against government - a claim against the Commonwealth Government in relation to the 2011 ban on the exportation of live cattle to Indonesia; and against the Australian Securities and Investment Commission (**ASIC**), for alleged negligent conduct and misfeasance in public office by failing to act in a timely manner against Storm Financial. We discuss these actions further in section four.

Who is picking up the tab?

Of the 33 class actions filed in the 12 months to June 2015, publically available information indicates that 13 of these actions had third party litigation funding in their early stages (39.4%) (2013/2014: 25.9%).

The increased rate of funding reflects both the number of claims being pursued and the growth in number of litigation funders active in the Australian market. We consider developments in the past year in relation to litigation funding in section two.

Competing class actions – no resolution

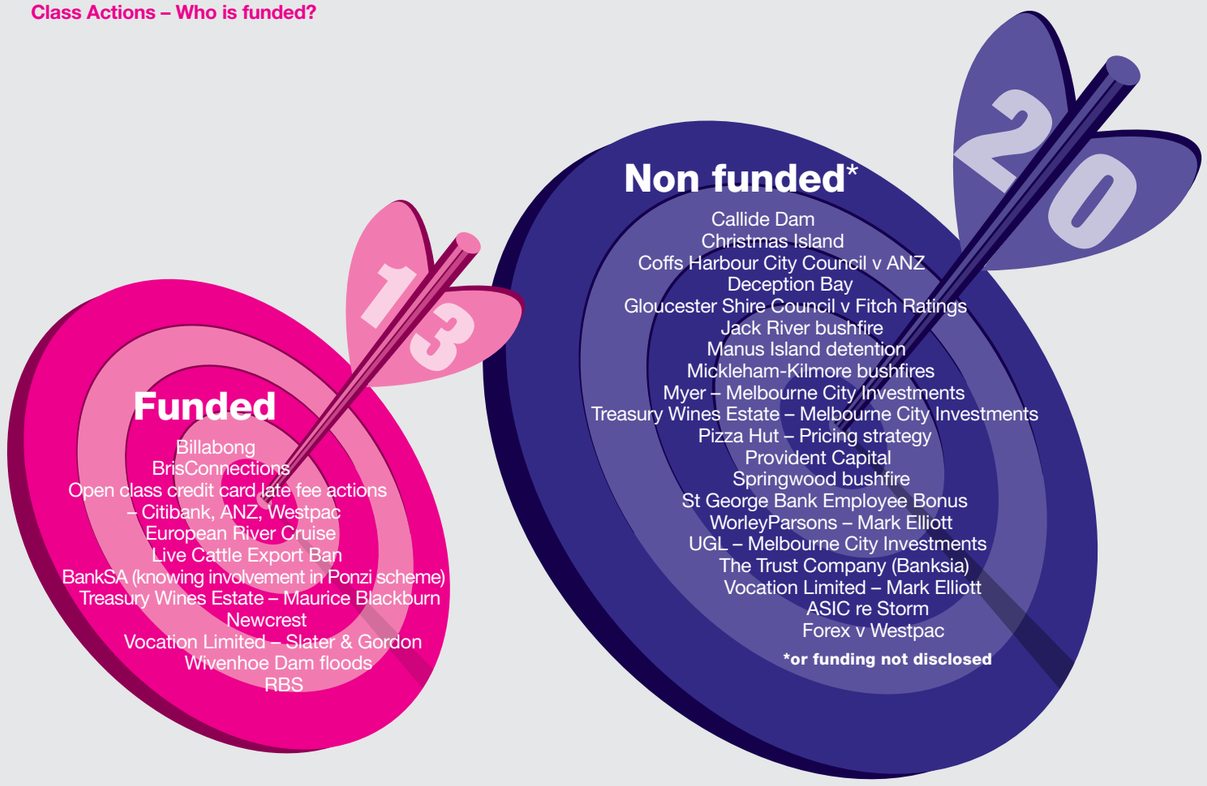
Parallel (or competing) class actions, in which law firms and funders issue proceedings against the same defendant, appear to be on the increase. To date, the courts have allowed such actions to proceed.

In 2013/14 we saw multiple actions proceeding against Treasury Wines Estates and Macmahon Holdings.[2] In the 12 months to 30 June 2015, we have seen competing actions proposed or launched against:

- **Listed education provider, Vocation**: A class action against Vocation was first filed by Mark Elliott in November 2014, alleging continuous disclosure breaches and misleading and deceptive conduct. In February 2015, Slater & Gordon filed a class action claim against Vocation. A third class action, being investigated by Maurice Blackburn, is reportedly close to proceeding. At present, these proceedings are progressing in parallel.

2 King & Wood Mallesons, The Review – Class Actions In Australia 2013/14 (24 July 2014), 7-8.

Class Actions – Who is funded?



- **Treasury Wine Estates**: In November 2013, solicitor Mark Elliott filed a class action against TWE in the name of his investment vehicle, Melbourne City Investments Pty Ltd (**MCI**). In July 2014, Maurice Blackburn filed a closed class claim against TWE in connection with market disclosure prior to the 2013 announcements. While the MCI action was subsequently permanently stayed as an abuse of process, MCI filed a new action in December 2014 (see section three). The two TWE proceedings are currently being heard together.

Table 1 Class action settlements July 2014 – June 2015

Class action	Respondents	Allegations	Settlement sum (damages)	Costs
Bonsoy Soy Milk	Spiral Foods Pty Ltd	Product liability	Settled for $25M (including costs) (approved 7 May 2015)	Approx $7M – to be assessed by costs registrar
Storm Financial	Bank of Queensland	Breach of contract, misrepresentations, unconscionable conduct	$22.1M (approved 16 December 2014)	Undisclosed
Cabaser	Pfizer Australia Pty Ltd	Failure to warn or provide adequate warning	Undisclosed (approved 25 May 2015)	Undisclosed
Great Southern	Great Southern Finance Pty Ltd (in liq)	Misleading or deceptive conduct	$23M (including costs) (approved 11 December 2014)	$20M
Colliers/Hudson	Colliers International Consultancy And Valuation Pty Limited	Misleading or deceptive conduct	Undisclosed (approved 11 December 2014)	Undisclosed
Leighton Holdings	Leighton Holdings Limited	Misleading or deceptive conduct	$69.45M (including costs) (approved 25 August 2014)	$4.15-4.19M
Octaviar/MFS	Andrea Waters as auditor of the Fund's compliance plan under and other partners of KPMG Wellington Investment Management Ltd Octaviar Ltd	Negligence, (breach of duty of care); breach of auditor's obligations, breach of statutory duties of responsible entity	Undisclosed (reportedly settled for > $20M)[3] (approved 8 Dec 2014)	Approx $7.87M
Forex v Westpac	Westpac Banking Corporation	Unconscionable conduct	No financial settlement (approved 5 January 2015)	
Kilmore East/ Kinglake Black Saturday bushfire action	AusNet Electricity Services; UAM; CFA; State of Victoria; Secretary to the Dept of Sustainability & Environment	Breach of statutory duty, negligence, nuisance	$494M (including costs) (approved 23 December 2014)	$60M approved as fair and reasonable
Murrindindi/ Marysville Black Saturday bushfire action	AusNet Electricity Services; UAM; CFA; State of Victoria; Secretary to the Dept of Environment & Primary Industries	Negligence	$300M (including costs) (approved 27 May 2015)	$20.1M approved as fair and reasonable.
Thiess[4]	Australian Security and Investigations Pty Ltd Bruce Townsend Stephen John Conrad	Wrongful acquisition and misuse of confidential information	No financial settlement (approved 10 March 2015)	No order as to costs
Vioxx	Merck Sharp & Dohme (Australia) Pty Ltd, Merck & Co Inc	Negligence, TPA (misleading and deceptive conduct, goods not merchantable quality/fit for purpose)	$497,500 (approved 26 February 2015)	All orders for costs made in the proceeding prior to the date of settlement approval set aside

3 www.propertyobserver.com.au/financing/tax-and-legal/32789-mfs-octaviar-class-action-against-accounting-firm-kpmg-settled
4 Note: proceedings against first respondent Thiess were settled 17 July 2013. The 2015 settlement arose from proceedings against the second, third and fourth respondents.

The big one (billion)

In the 12 months to June 2015, class action settlements nudged the $1 billion mark. This was largely made up of bushfire class actions, with the record $500 million settlement seen in the Black Saturday Kilmore East/Kinglake class action (AusNet and others) and the Black Saturday Murrindindi/Marysville action having settled for $300 million (AusNet and others). These are the largest class action settlements seen in Australia to date, and dwarf the settlements in securities class actions in the same period, which remain well below levels seen between 2008 and 2012 following the global financial crisis (see Table 2 below). In fact there were only two securities class actions settled in the period (Leighton Holdings $69.45 million and Great Southern $23 million). It is worth noting that, while total settlement amounts for 2014/2015 totalled almost $1 billion, it took a period of more than 10 years for the same aggregate amount to be reached in securities class actions.

Notwithstanding the aggregate quantum of the settlements in 2014/2015, the very late settlement of the Great Southern class actions (with settlement notified to the court just before judgment was delivered) has highlighted that significant public and private resources can be expended on a lengthy proceeding and trial in which the plaintiffs risk failing to make out essential elements of their causes of action. This case, and the collapse of the Timbercorp class action in 2014, a similarly substantial failure following a lengthy trial which also failed on appeal,[5] demonstrate that class action litigation can be a high stakes game. Great Southern involved a 90 day trial: not only is that expensive, it locks other litigants out from the court for a substantial period because of judicial resourcing of the proceeding.

If the merits of an action are not there, the class action mechanism will not assist and the fallout will be magnified because of the associated costs. While class actions can generate large settlements and large legal fees, for individual consumers or small retail investors these cases (along with the Vioxx class action and the abalone virus proceedings),[6] provide a reminder of the odds involved in large-scale litigation.

We discuss the Great Southern settlement and other issues in relation to settlements in section five.

5 See further King & Wood Mallesons, The Review – Class Actions In Australia 2013/14 (24 July 2014), 11.

6 These proceedings were dismissed in November 2013, although subject to appeal.

Significant securities class action settlements

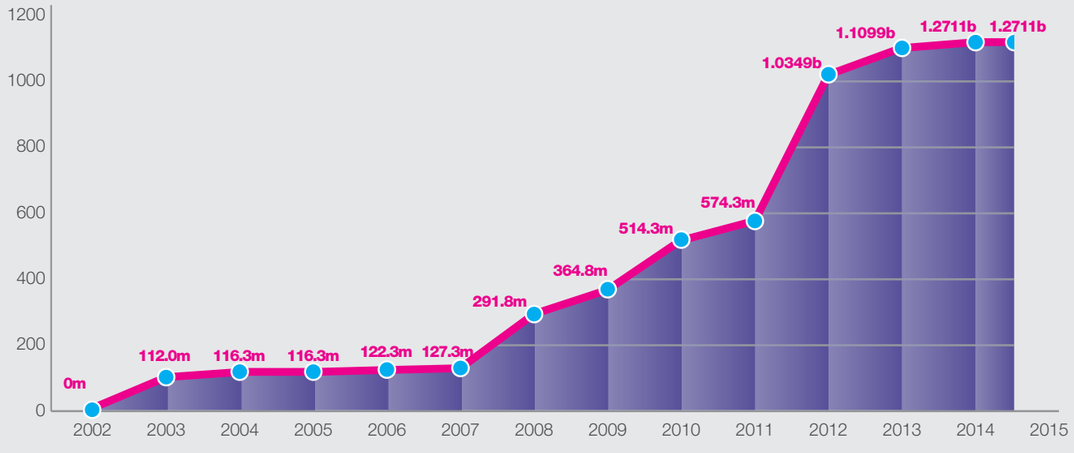


Table 2 Significant securities class action settlements

Company	Nature of allegations	Settlement Date	Settlement Amount
GIO	Misleading representations in takeover, reinsurance losses, business risk	2003	$112M
Tracknet	Misleading statements in prospectus, business risk	2004	$4.3M
Concept Sports	Continuous disclosure, misleading statements in prospectus, forecast	2006	$3M (reported, terms confidential)
Harris Scarfe	Misleading or deceptive conduct, continuous disclosure, corporate collapse	2006	$3M
Telstra	Continuous disclosure, business risk	2007	$5M
Aristocrat	Continuous disclosure, profit downgrade	2008	$144.5M
Downer EDI[7]	Continuous disclosure, profit downgrade	2008	Approx. $20M (confidential)
Village Life (Fig Tree Developments)	Misleading statement in prospectus, continuous disclosure, forecasts	2009	$3M
Sons of Gwalia	Continuous disclosure, misleading or deceptive conduct, corporate collapse	2009	Approx. $70M
AWB	Continuous disclosure, business risk	2010	$39.5M
Multiplex	Continuous disclosure, profit downgrade	2010	$110M
Media World	Continuous disclosure, business risk	2010	$0
OZ Minerals	Continuous disclosure, debt position	2011	$60M
Credit Corp Group	Continuous disclosure, profit downgrade	2012	$6.5M
Centro	Continuous disclosure, debt position	2012	$200M
Nufarm	Continuous disclosure, profit downgrade	2012	$46.6M
NAB	Continuous disclosure, business risk	2012	$115M
Sigma Pharmaceuticals	Continuous disclosure as part of rights issue, profit downgrade	2012	$57.5M
Transpacific Industries Group[8]	Continuous disclosure, profit downgrade	2012	$35M
GPT	Continuous disclosure, profit downgrade	2013	$75M
White Sands Petroleum	Misleading statements in prospectus, continuous disclosure	2014	$3.25M
Great Southern	Misleading or deceptive conduct	2014	$23M
Leighton Holdings	Continuous disclosure, misleading or deceptive conduct	2014	$69.45M
		Total	**$1.2711B**

7 Settled prior to proceedings being commenced.

8 A proposed class action against Transpacific Industries Group for alleged misleading and deceptive conduct was first announced in March 2008. The settlement was significant as it was agreed before proceedings were formally commenced.

Proportionate liability - "Deep pocket" defendants still a key strategic target for plaintiffs

The High Court's recent decision in *Selig v Wealthsure Pty Ltd*[9] will mean that advisers and insured third parties continue to be strategic targets for class action plaintiffs.

While a court may apportion liability for misleading or deceptive conduct between multiple defendants,[10] which limits the exposure of 'deep-pocketed' defendants who may only be responsible for a portion of the plaintiffs' loss, the High Court has clarified that defendants remain exposed to potential liability for 100% of a plaintiff's loss for claims grounded on:

- making false or misleading statements in relation to financial products (Corporations Act, section 1041E);
- inducing persons to deal in financial products (section 1041F); or
- dishonest conduct in the course of carrying on a financial services business (section 1041G).

While this is by no means the end of the ubiquitous misleading or deceptive conduct claim (which is generally easier to prove than those listed above), in future we expect class action claims to be structured to more aggressively focus on non-apportionable claims, effectively circumventing the section 1041L proportionate liability regime, particularly where one or more defendants are insolvent or otherwise unable to pay. Plaintiff firms will proceed safe in the knowledge that statutory apportionment and contributory negligence defences will not "infect" parallel statutory claims, even where the same loss is alleged.

Accordingly, the apportionment and contributory negligence defences will be practically irrelevant unless the plaintiff succeeds only on their misleading or deceptive conduct or common law negligence claim. By analogy, the same trend may emerge in respect of misleading or deceptive conduct claims under other legislation, including the ASIC Act and the Australian Consumer Law.

Who benefits from apportionment?

The ability for a court to apportion liability between defendants usually benefits defendants because, generally, no single defendant is left with 100% of the liability for the plaintiffs' loss. Conversely, plaintiffs tend to benefit where liability is not apportioned as a single defendant with deep pockets can be held liable for 100% of the plaintiff's loss, with that defendant being left to seek contribution from the other defendants (and therefore bear the risk that one or more of them are insolvent).

Non-disclosure class actions will generally 'cover all bases' and bring claims based on a variety of breaches (for example, combining claims for breach of section 674 with claims for statutory misleading or deceptive conduct under section 1041H and, potentially, claims under sections 1041E-G of the Corporations Act). Often, these causes of action arise from the same conduct and relate to the same loss or damage.

Because of *Wealthsure*, the non-apportionable statutory claims may increase in attractiveness in class actions where one or more defendants are insolvent or uninsured.

Why does the proportionate liability regime not extend to other breaches of the Corporations Act?

The rationale behind section 1041H claims being apportionable, and related claims under sections 1041E to 1041G not being apportionable, seems to come down to the fact that claims under sections 1041E to 1041G require a 'fault' element of knowledge or recklessness which is absent from section 1041H. This was noted by the High Court, with the majority noting that sections 1041E-G claims involve a "higher level of moral culpability" than section 1041H claims.

As noted by the High Court, it is clear that the proportionate liability provision, section 1041L, only applies to a claim caused by conduct done in contravention of section 1041H.[11] This position was reached by applying well-settled principles of statutory construction.[12] Justice Gaegler concurred with the majority, adding that while non-section 1041H claims may be based on the same conduct and be part of the same proceeding, they would not be part of the same "claim".[13]

9 [2015] HCA 18, handed down on 13 May 2015.
10 Per Corporations Act 2001 (Cth) (**Corporations Act**) s1041L, in respect of claims based on conduct in breach of section 1041H.
11 *Wealthsure* at [24]
12 *Wealthsure* at [29]
13 *Wealthsure* at [57]

Update on indirect causation

The past year has seen a move towards judicial acceptance of an indirect causation theory of loss that may be applied to securities class actions going forward.

Intended to overcome the need to prove reliance by each and every group member affected by securities misconduct, the theory runs as follows:

- the contravening conduct (for example, the withholding of disclosable information or misleading or deceptive conduct) resulted in the relevant securities trading at a price higher than they otherwise would have if the contravention had not occurred;
- group members who purchased securities during the period of contravention did so at inflated prices; and
- the inflated amount paid represents the loss suffered by group members.

The theory has consistently been challenged by defendants, who have typically argued that some element of reliance on the contravening conduct is necessary to show that such conduct actually caused the loss. Despite these arguments being live for almost a decade, there is yet to be any conclusive judicial statement as to whether such a theory of loss will be accepted, largely because the vast majority of securities class actions settle before judgment.

A recent judgment by Justice Perram represents the first steps towards judicial guidance on the issue.[14] The plaintiffs included 70 or so entities who had purchased shares in Babcock & Brown in 2008, before the shares dropped from $16.76 to $0.33. The proceedings involved claims that Babcock & Brown failed to disclose certain financial information in breach of its continuous disclosure obligations.

The case was decided against the plaintiffs on the basis that there was no non-disclosure of information of economic significance to potential investors. Justice Perram nevertheless addressed market based causation. In obiter dicta, Justice Perram considered "whether plaintiffs could recover when it is alleged they bought shares at an inflated price caused by a listed company's failure to disclose information to the market". His Honour found that they could, indicating that he likely would have agreed with the submissions of the plaintiffs in this regard, noting that whilst "reliance is a sufficient condition for establishing causation it is not a necessary one".

His Honour also found that in misleading or deceptive conduct cases, although a plaintiff generally must show that they would have acted in a particular way but for the conduct alleged, "it is artificial to speak of reliance in non-disclosure cases". On the one hand, this comment suggests the formulation of an additional category of cases (like trade competitor cases) in which proof of reliance is unnecessary. An alternative view may be that this dictum flows from policy considerations that are unique to the statutory obligation of continuous disclosure (namely, the need to ensure that a securities market is properly informed of non-public price sensitive information in a timely way) and which do not necessarily apply to the separate cause of action founded on the statutory prohibition against misleading or deceptive conduct.

Although Justice Perram's comments are obiter and the judgment is subject to appeal,[15] the decision represents an important step in the ongoing debate concerning the basis for liability in complex securities litigation and class actions.

14 *Grant-Taylor v Babcock & Brown Limited (In Liquidation)* [2015] FCA 149. In *Caason Investments Pty Ltd v Cao* [2014] FCA 1410 (December 2014), Justice Farrell considered an application to amend a claim to introduce an indirect causation pleading and permitted the amendment on the basis that it was not unarguable.

15 In a decision just after the end of the review period, Justice Edelman in determining an application for preliminary discovery in relation to a proposed class action stated that he took Justice Perram's statement as "endorsing the efficient market hypothesis as an available mechanism to measure loss." *Bonham v Iluka Resources Limited* [2015] FCA 713 (15 July 2015) at [72]. The Court in Bonham did not have to decide whether a cause of action, in so far as it relies on the fraud on the market doctrine to establish reliance, was so doubtful in law that it could not give rise to a reasonable belief that a plaintiff may be entitled to relief as direct reliance had been pleaded by the representative plaintiff.

Bank Fees – key takeaways

The Full Court decision in the ANZ bank fees class action, handed down in April 2015, represents a major setback for other class actions based on alleged penalties, including those commenced or proposed against other financial institutions, telcos and utilities. The decision provides authoritative guidance on the application of the doctrine of penalties in the context of exception fees and on the types of costs that can be taken into account in determining whether fees are "extravagant or unconscionable". The proceedings also demonstrate how the class action regime can be employed beyond traditional securities or financial product mis-selling claims as a means to test legal rights held by consumers more broadly.

To recap

Since September 2010, law firm Maurice Blackburn has commenced closed class actions against 12 Australian banks for charging "exception fees" to their customers, including over-limit fees, honour and dishonour fees and credit card late payment fees. The total class size of all of the proceedings is approximately 170,000 group members with an estimated $240 million at stake, making it the largest collective legal action in Australia.[16]

In September 2012, the High Court in Andrews v ANZ restated and defined the law of penalties in Australia, holding that relief against penalties is potentially available even if a fee is not payable on breach of contract.

Following the High Court's decision, a new bank fees class action (*Paciocco v ANZ*) was commenced against ANZ to test how the redefined doctrine of penalties would apply to bank exception fees, with judgment handed down by Justice Gordon in February 2014.[17] In this decision, the Court held that: over-limit and honour/dishonour fees charged by ANZ were not penalties (as they were payable in return for further accommodation provided by the bank), but credit card late payment fees charged by ANZ were penalties, as they were payable on breach of contract (or in terrorem of a customer's obligations), and were extravagant or unconscionable having regard to the actual loss suffered by ANZ on the occurrence of those fees.

The Court found that the late payment fees in question (either $35 or $20 depending on the period) were unenforceable to the extent that they exceeded ANZ's actual loss on each event (which was held to comprise only between $0.50 and $5.50). Justice Gordon's decision was appealed to the Full Federal Court by the applicant and was cross-appealed by ANZ.[18]

After the appeals were lodged, in August 2014 Maurice Blackburn commenced additional open class actions against five of the major banks. Potential class actions were also mooted in the media by other law firms against telecommunications and utilities companies in respect of late payment fees, and Slater & Gordon commenced a bank fees case in New Zealand.

Full Court decision

In April 2015, the Full Federal Court handed down its decision in favour of ANZ and dismissed the applicants' appeal. The Full Court upheld Justice Gordon's determination that honour, dishonour and over-limit fees were not penalties. Furthermore, although the Full Court upheld Justice Gordon's determination that credit card late payment fees were payable on breach of contract or in terrorem of an obligation and so were capable of being penalties, it overturned the determination that the quantum of those fees was "extravagant or unconscionable in amount".

In coming to its conclusion, the Full Court held that the correct test for whether a fee was extravagant or unconscionable in amount needed to be assessed as at the date of entry into the contract on a prospective basis, considering the greatest possible loss that could occur from the type of breach, rather than retrospectively, compared to the actual loss incurred. In this respect, the Full Court held that it was permissible to take into account evidence of increase in loss provisioning, regulatory capital and some overhead costs referable to collections. An application for special leave to appeal to the High Court has been filed by the applicants.

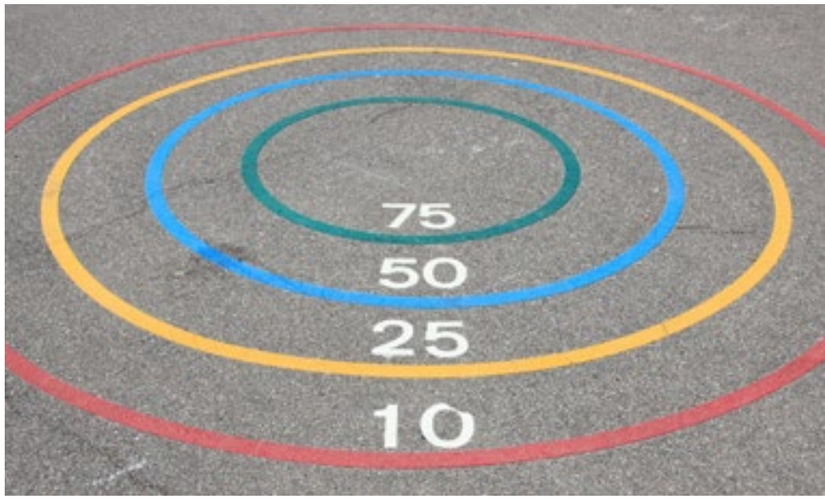
While the latest decision represents a major setback for the other bank fee class actions and the contemplated late payment fee class actions against telcos and utilities, the bank fees proceedings demonstrate how class actions can be used as vehicles for litigating a number of small value claims that would otherwise be uneconomical or cumbersome for applicants to run individually. A credit card late payment fee of $34.50 per event would ordinarily not justify the commencement of proceedings, but could lead to significant damages if multiplied across a class comprising of thousands of claimants. Further, given the relative similarities between the fees charged by the various banks, it is likely that a final determination of the Paciocco proceedings could lead to early settlements in the other bank fees class actions, which may provide a quicker and cheaper resolution of those claims than individual litigation.

16 See www.mauriceblackburn.com.au/areas-of-practice/class-actions/current-class-actions/bank-fees-class-action.aspx. Proceedings against the other banks have been stayed pending the outcome of proceedings against ANZ.
17 *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35.
18 In late 2014 the National Australia Bank publicly indicated its desire to reach a settlement in respect of its class action and agreed to orders enabling affected members to register to participate in any agreed settlement.

Litigation funding

Litigants may benefit from increased competition in the funding of litigation, with developments in relation to both litigation funders and the lifting of restrictions on how lawyers and clients can agree matters will be charged:

- common fund for third party litigation funders
- removal of the NSW prohibition on success fees
- possible introduction of contingency fees.



The "robust litigation funding industry"[19] continued to develop in 2014/2015. Most notably, this year has seen the hearing of the second attempt by Maurice Blackburn/International Litigation Funding Partners Pte Ltd (**ILFP**) at a 'common fund' approach to funding and the release of the Productivity Commission's access to justice recommendations.

The second try for a "common fund" approach

Last year, we reported on a novel application brought in a class action commenced against Leighton Holdings Ltd (Leighton), where Maurice Blackburn sought to have ILFP formally appointed by the Court as the funder of the class action. Under the application,[20] ILFP's right to recover its costs, expenses and remuneration would be approved upfront and enforceable by an order of the Court, rather than under privately agreed contracts. In practical terms, this meant that ILFP would have been able to recover against all group members, irrespective of whether the group member had a funding agreement with ILFP.

The Leighton class action ultimately settled, and Maurice Blackburn and ILFP made a similar application in the class action against Allco Finance Group. The fundamental questions for the Court at the December 2014 hearing were whether its case management powers are broad enough to encompass the making of such an order and whether (assuming it does have power) it should exercise its discretion to grant such an order (which would effectively impose commercial relationships onto parties who may have deliberately elected not to enter into funding agreements):

- On one view, allowing the common fund approach in Australia would facilitate funded class actions, with potentially less 'book building' of class members required before filing. It may also provide a solution to the issue of competing class actions as the financial incentive for a 'copy cat' class action would be removed.
- On the other hand, the common fund approach would likely increase the race to file. This may give rise to less well prepared and pleaded actions, which will result in more resources (by defendants and courts) being expended on refining the case pleaded (and, if necessary, on interlocutory applications).

On 7 August 2015, the Federal Court dismissed the application.[21] While the Court concluded that it had power to make such an order, it declined to exercise its discretion to make such orders on the basis that the proposed orders were neither appropriate nor necessary to ensure that justice was done at this point of the proceeding, and would otherwise be premature and inconsistent with the statutory class action scheme. Justice Wigney did not find that the proposed orders would be beneficial to or in the best interests of the group members as a whole, and indicated that the only clear beneficiaries would be the applicants and ILFP.[22]

19 Clyde Croft, 'On the Brink of Regulation: The Future of Litigation Funding in Class Actions' (2014) 88 *Australian Law Journal* 698, 698.
20 The application was made under sections 23 and 33ZF of the *Federal Court of Australia Act 1974* (Cth) and rule 1.32 of the *Federal Court Rules 2011* (Cth).
21 *Blairgowrie Trading Ltd v Allco Finance Group Ltd* [2015] FCA 811 (**Allco**).
22 Read more in Neal Bedford, Simon Burnett, Moira Saville and Peta Stevenson "Common Fund Found Out – Takeaways from the decision in the Allco class action", King & Wood Mallesons 7 August 2015.

"The "grim reality" is that many modern-day representative proceedings would never be commenced but for the involvement of commercial litigation funders."

Justice Wigney, Allco [225]

Notwithstanding this conclusion, the Court did leave open the possibility that such orders might be made in these proceedings in the future, to ensure that the applicants alone did not bear the burden of meeting costs and expenses, or that such orders could be made at some time in some other matter in the future. His Honour commented that, while there was something to be said for a common fund approach to deal with the "reality of commercial litigation funding" in class actions, it would perhaps be preferable for that to occur as a result of legislative reform rather than piecemeal utilisation by judges of discretionary powers under the *Federal Court Act 1976* (Cth).

The Productivity Commission's access to justice recommendations

On 3 December 2014, the Federal Government released the Productivity Commission's final report on access to justice arrangements in Australia following a 15-month inquiry into Australia's civil dispute resolution system (**PC Report**).

From a class actions perspective, the most relevant of the report's recommendations are to:

1. Remove the existing ban on charging of 'damages-based' or contingency fees by lawyers (other than in relation to criminal and family law matters), subject to the introduction of additional consumer protection measures.
2. Subject lawyers that charge contingency fees to potential adverse costs at the discretion of courts, to facilitate consistent treatment with litigation funders and other third parties.[23]
3. Introduce a licensing system for litigation funders, aimed at ensuring that funders hold adequate capital to manage their financial obligations and meet client disclosure requirements.

In relation to the second recommendation above, IMF Bentham has been a long-term supporter of the further regulation of third party litigation funders in Australia. Other funders operating in the market would also welcome some form of tailored licencing system for third party litigation funding companies, to enable "[a] further strengthening of the industry and providing further protection for the benefit of clients".[24] Others see regulation as restricting options for consumers:

> *"While we can cope easily with regulation, others may struggle and the size of the funding market does not warrant formal regulation - result may be very few funders and lack of options for clients. Australia should follow the UK approach - Association of Litigation Funders, requiring capital adequacy and commitment to [a] code of conduct."*[25]

The Federal Government is yet to respond to the report's recommendations.

Damages-based fee arrangements: an ongoing discussion

As noted in section three, 2014/15 has seen a number of attempts at creative fee structuring by plaintiff firms seeking to circumvent professional restrictions which currently prohibit the charging of 'contingency' or 'damages-based' fees by Australian lawyers.

Litigation funders are not so restricted. Central to their business model is the ability to take a percentage (usually 20-45%) of any class action settlement or damages awarded in a successful action. Clearly, funders have been advantaged by the inability of lawyers to compete in offering fee structures of this kind.

The PC Report has suggested opening the doors to permit contingency fee arrangements by lawyers. Such a change would increase the number of class actions in Australia. By introducing a further form of funding for proceedings, contingency fee arrangements may make lower value claims, that may fall under the radar of a third party litigation funder, viable.[26]

Sliding scale caps

The PC Report recommends that "sliding scale" caps on damages-based billing arrangements be enforced to limit the maximum percentage lawyers may recover from retail clients, with a view to avoiding "excessive remuneration". It does not recommend any equivalent caps in respect of "sophisticated clients". Questions arise as to how "sliding scale" caps would work in the class action context if a class contains both retail and sophisticated clients (such as institutional shareholders).

23 See "Productivity Commission's access to justice recommendations may reshape Australia's litigation funding market" in King & Wood Mallesons *Class Action Update: Q4 2014* for a more detailed analysis of this report.
24 Litigation Lending Services communications with King & Wood Mallesons, 10 June 2015.
25 Harbour Litigation Funding Ltd communications with King & Wood Mallesons, 5 June 2015.
26 For a contrary view see the speech by NSW Supreme Court Chief Justice Tom Bathurst "Buttered parsnips and a damp squib", 6 May 2015 (**Bathurst speech**) at [17] (accessed at www.supremecourt.justice.nsw.gov.au/Documents/Speeches/2015%20Speeches/Bathurst_20150506.pdf, 12 July 2015).

Promoting unmeritorious claims

The PC Report expressed the view that contingency fee arrangements would not increase the number of unmeritorious or speculative claims in the Australian market on the basis that such claims are less likely to succeed (which is an inherent deterrent). While this analysis may apply to small-scale litigation, it does not necessarily hold in relation to large-scale litigation such as class actions, given that the majority of class actions settle prior to trial (although this trend may be shifting). As such, 'speculative' claims might be commenced based on minimal information in the hope of improving the claim at the discovery stage and obtaining an early settlement. It may incentivise plaintiff firms to take on more speculative matters, taking the view that the prospect of substantial fees outweighs the risk of receiving no fee at all, or that having a "book" of actions may mean they can afford to lose some claims.

Liability for costs

The PC Report also recommended that court rules be changed to allow solicitors using contingency fee arrangements to be exposed to adverse costs orders or security for costs orders, so as to level the playing field with litigation funders, who are currently subject to these orders.[27] The risk of costs orders being made might provide some curb to enthusiasm to employ a damages-based fee arrangement and the exposure to costs consequences is likely to be the issue which determines whether it provides a viable business option for plaintiff firms. It also remains to be seen whether, and to what extent, plaintiff firms will be able to reallocate the risk of a potential adverse costs order onto their clients or insurers.

27 This would mark a significant difference from the US position, where lawyers can charge contingency fees but there is no default position by which adverse costs orders are made against unsuccessful parties.

The debate continues

Responses to the PC Report by government and the legal professional bodies have been mixed. While the Law Council of Australia has not formally indicated its position, indicating that it is in consultation with its constituent bodies, Victoria's Attorney-General has recently indicated support for lifting the ban on contingency fees, while NSW's Attorney-General has stated that lifting the ban is not under active consideration in NSW. While Attorney-General Brandis has previously opposed the introduction of contingency fees, the Federal Government's stance is presently unclear.

"Leaving the pros and cons to one side, I'd rather briefly take a look at how the introduction of damage-based-billing in the United Kingdom in 2013 has gone. I say briefly, because as I alluded to earlier, the reform has been less than popular. Some have described it as "a damp squib". Other commentators have also likened the agreements to a yeti, in that they "are believed to exist in practice but hardly any sightings have been made."

Chief Justice Bathurst, NSW Supreme Court[28]

The Uniform Law

On 1 July 2015, the Uniform Law replaced the *Legal Profession Act 2004* (NSW) (**LPA**) and the Legal Profession Act 2004 (Vic). The Uniform Law creates a common legal services market across NSW and Victoria and aims to simplify and standardise regulatory obligations across the legal profession.

One change affecting class actions is the removal of the prohibition on uplift fees in NSW. Previously, section 324(1) of the LPA had prevented a law practice from entering into a conditional cost agreement in relation to a damages claim that provides for the payment of an uplift fee on the successful outcome of the claim to which the fee relates. Under the Uniform Law, however, this limitation is removed (section 182(1)), creating consistency between NSW and Victoria with a 25% cap on uplift fees.

The quantum of the uplift fee will be a relevant factor when a Court is faced with determining whether a proposed settlement is fair and reasonable. In approving the settlement proposal in the Kilmore East/Kinglake bushfire class action,[29] Justice Osborn held that a 25% uplift fee was not unreasonable as the proceeding was not funded by a commercial litigation funder.[30] In his Honour's view, had the proceeding been subject to litigation funding, it is likely that the group members would have been obliged to pay approximately 30% of the settlement amount to the funder.

It is not obvious that permitting uplift fees in NSW will reduce the role of 'traditional' litigation funding, as it does not appear to have reduced the number of funded actions in Victoria. It does, however, offer a different model of funding and may provide another method for entrepreneurial lawyers.[31]

28 Bathurst speech, citing Peysner, 'Impact of the Jackson reforms: Some emerging Themes' (Report prepared for the Civil Justice Council Cost Forum, 21 March 2014), 10.
29 *Matthews v AustNet Electricity Services Pty Ltd* [2014] VSC 663. We have previously reported on this decision: see the King & Wood Mallesons Class Action Update: Q1 2015.
30 Section 182(2)(b) of the *Uniform Law* provides that the uplift fee must not exceed 25% of the legal costs (excluding disbursements) otherwise payable
31 See below.

Spotlight on funders

Litigation funding first entered the class action market in 2006 with the Fostif decision. Over the past decade, Australia has seen an exponential growth in funded class actions and there are now a number of funders operating in this market as well as overseas.

In the past year, we have seen 17 separate companies funding or proposing to fund class actions in Australia.

Litigation funding appears to be a successful and repeatable business model, but there is not a lot of publicly available information. For example:

- only four of these funders had publicly available accounts and financial information; and
- only two funders – BSL Litigation Partners Limited and Hillcrest Litigation Services Limited – have publicly available pro-forma funding agreements on their websites.

The past year has also seen interest from private equity firms in entering the market, including CVC Litigation Funding Pty Ltd, although we are yet to it see fund a class action.

Details of those funders who are or have been involved in funding class actions in Australia are set out below.[34]

"Litigation funders provide an important complement to regulatory activity by enabling aggrieved parties to initiate and maintain claims."[32]

32 PC Report, 624.
33 PC Report, 624.
34 This table is based on publicly available information or information provided by the funder in question.

SECTION TWO

"Overall, litigation funding promotes access to justice, and is particularly important in the context of class actions where, although action could create additional benefits when viewed from a broader or community-wide perspective, (often inexperienced) claimants might not take action given the scale of their personal costs and benefits".[33]

Funder	Listed	Incorporated in Australia	Example(s)	Website	Success fee	Minimum claim size	Longevity
Argentum Investment Management Limited	N	N (UK)	Equine Influenza	N	•	•	•
Bookarelli Pty Limited	N	Y	Babcock & Brown	www.bookarelli.com	•	•	•
BSL Litigation Partners Limited	N	Y	Banksia	www.banksiaclassaction.com.au/author/admin	≤30%	•	1 year
Claims Funding Australia Pty Limited	N	Y	Allco Finance Group	N	•	•	•
Comprehensive Legal Funding LLC	N	N (USA)	Newcrest Billabong	www.gordonlegal.com.au	•	•	•
CVC Litigation Funding Pty Ltd	N	Y	•	N	•	•	•
Harbour Litigation Funding	N	N (UK)	OZ Minerals (Zinifex) Houghton v Saunders Kinross Gold	www.harbourlitigationfunding.com	•	> £10m	8 years
Hillcrest Litigation Services Limited	Y	Y	Initial funding in Great Southern	www.hillcrestlitigation.com.au/profile	30% to 45%	•	22 years
IMF Bentham Limited	Y	Y	RiverCity Bank fees (ANZ) Treasury Wine Estates (Maurice Blackburn)	www.imf.com.au	20% to 45%	> $5 million	~ 14 years
International Justice Fund Limited	N	Y	•	internationaljusticefund.com.au	•	> $5 million	•
International Litigation Funding Partners Pte Limited	N	N (Singapore)	Allco Vocation	•	•	•	9 years
JustKapital Litigation Partners Limited (ACN 088 749 008)	Y	Y	Prospective claim against WorleyParsons (ACA Lawyers)	www.justkapital.com.au	40% plus costs	> $10 million	~1 year
LCM Litigation Fund Pty Limited	N	Y	Prospective claims funded include against Prime Retirement and Aged Care Trust and Vodafone	www.lcmlitigation.com.au	30% to 40%.	$5 - $50 million	17 years
Legal Justice Pty Ltd	N	Y	European River Cruise	•	~ 30%	•	~2 years
Litigation Lending Services Limited	N	Y	WorleyParsons	www.litigationlending.com.au	Up to 40%	> $1 million	16 years
Litman Holdings Pty Limited	N	Y	Sandhurst Trustees	www.litman.com.au	•	•	•
Omni Bridgeway	N	N (Netherlands)	Abalone virus	omnibridgeway.com	10 to 50%	•	30 years

Entrepreneurial lawyering comes under sustained attack

- Dual role as lawyer and representative plaintiff is likely to be disallowed due to the need for impartial advice
- Dual role as lawyer and funder likely to be disallowed if lawyer has high degree of control over funder
- Proceedings commenced with the main purpose of generating legal fees for the lawyer likely to be stayed

Class actions attract greater supervision by the courts, as they bind non-parties (ie class members) to the outcome even though they play no active role in and have no control over the proceeding. By their nature, class actions are lawyer-driven such that even the named plaintiff often plays little role in the conduct of the proceeding. Judges are therefore "effectively discharging a beneficial supervisory jurisdiction".[35] In some recent cases, courts have restrained particular lawyers from acting where they are more involved in the proceedings than the usual lawyer/client relationship.[36]

Melbourne City Investments Pty Ltd and Mark Elliott

The entrepreneurial 'business model' employed by Melbourne solicitor Mark Elliott has been the basis of a number of recent class actions. There are four variations used so far by Mr Elliott (some of which overlap):

- MCI, a company of which he is the sole director and shareholder, being the representative plaintiff in class actions, with Mr Elliott then acting as solicitor on the record;[37]
- MCI as the representative plaintiff, but with solicitors other than Mr Elliott being on the record;[38]
- MCI indemnifying the representative plaintiff and effectively controlling the action, with Mr Elliott as the solicitor on the record;[39] and
- in actions not involving MCI, Mr Elliott being the solicitor on the record and/or the litigation funder being Mr Elliott or companies associated with him.[40]

Following its incorporation, MCI purchased small parcels of shares in 162 ASX listed companies at an average cost of $600 - $900 per company. In a finding upheld by the Victorian Court of Appeal, the Court concluded that MCI was incorporated with the primary objective of providing Mr Elliott with a means of generating legal fees: if breaches of the continuous disclosure regime occurred or could be alleged, MCI would then have an action against those companies and could be the representative plaintiff, and Mr Elliott could be the solicitor on the record.[41]

To date, MCI has launched actions against five companies for alleged breach of continuous disclosure obligations.[42]

Mr Elliott's approach has come under sustained attack from defendants, resulting so far in:

- one proceeding not being permitted to continue while Mr Elliott was both the lawyer on the record and closely connected with the litigation funder;
- two proceedings being stayed as abuses of process; and
- one proceeding being dismissed due to MCI having no standing to bring the action.

No dual role as lawyer and as plaintiff – need for impartial advice

TWE and Leighton each made applications to have MCI's Victorian Supreme Court actions against them permanently stayed on the grounds of abuse of process, or alternatively orders restraining Mr Elliott from continuing to act for the plaintiff or preventing the proceedings from continuing as class actions. Hearing the two applications together, Justice Ferguson decided that while there was no abuse of process, the interests of justice required that orders be made preventing the cases continuing as class actions while both MCI was the named plaintiff and Mr Elliott the solicitor on the record. According to Her Honour, it was contrary to the interests of justice for both to continue: there was a real risk that Mr Elliott could not give detached, independent and impartial advice taking into account not only the interests of MCI, but also the interests of group members. In the end, it was Mr Elliott who gave way: MCI remained the plaintiff and a new solicitor was retained.[43]

35 Perram J in *Mercedes Holdings Pty Ltd v Waters (No 1)* (2010) 77 ACSR 265, 272, [28]. See also Vince Morabito, "Replacing inadequate class representatives in federal class actions: *Quo Vadis?*" (2014) 38(1) *UNSW Law Journal* 146.

36 For example, see *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* (No 3) [2014] VSC 340 (***MCI v TWE (No 3)***).

37 For example, MCI's actions against TWE and Leighton began this way.

38 Following Ferguson J's decision in *MCI v TWE (No 3)*, MCI retained new solicitors to represent it in the TWE, Leighton and WorleyParsons Limited (**WorleyParsons**) actions. MCI's cases against Myer Holdings Ltd and UGL Limited were commenced with solicitors other than Mr Elliott acting for MCI.

39 As in the case of Joanne Walsh's class action against WorleyParsons, where Mr Elliott was initially the solicitor for Ms Walsh.

40 As in the case of Lawrence Bolitho's class action against Banksia Securities Ltd, in its earlier stages. In the case of *Webster v Vocation Limited*, Mr Elliott is the solicitor but the funding arrangements are not publicly known, nor is it known whether any indemnity has been provided to the plaintiff.

41 *Treasury Wine Estates Limited v Melbourne City Investments Pty Ltd* [2014] VSCA 35 1 (**TWE Appeal Decision**).

42 These actions have been against TWE, Leighton, WorleyParsons, Myer Holdings Ltd and UGL Limited.

43 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd (No 3)* [2014] FCA 340.

SECTION THREE

According to the majority, MCI's "sole purpose has only ever been to create for itself – in this case, by acquiring a small parcel of shares – a cause of action of sufficient merit to induce the defendant company to pay Mr Elliott's fees."

Proceeding stayed for abuse of process

TWE appealed this decision to the Victorian Court of Appeal. A majority of the judges on appeal held that the TWE proceedings were an abuse of process and permanently stayed the proceedings. Accepting the trial judge's findings that MCI had commenced the proceeding in order to generate fees for Mr Elliott and that obtaining a favourable costs order was MCI's predominant purpose in commencing litigation (rather than just a by-product of the proceeding), the Court of Appeal reached a different conclusion to the trial judge. According to the majority, MCI's "sole purpose has only ever been to create for itself – in this case, by acquiring a small parcel of shares – a cause of action of sufficient merit to induce the defendant company to pay Mr Elliott's fees." The fact that Mr Elliott was no longer the solicitor on the record by the time the appeal was heard did not affect the outcome.[44] On the same day as the Court of Appeal delivered its judgment, MCI commenced fresh proceedings (which closely resemble the stayed proceeding), with new solicitors in the Victorian Supreme Court, which it subsequently had transferred to the NSW registry of the Federal Court. An application has already been heard in the Federal Court, but not yet decided, for a permanent stay on the basis of the TWE Appeal Decision.[45] MCI's application for special leave to appeal the TWE Appeal Decision to the High Court was heard and refused on 15 May 2015.[46]

After the Court of Appeal permanently stayed the TWE proceeding, Leighton made a fresh interlocutory application for a permanent stay of the proceeding against it. Justice Sifris granted a temporary stay of the Leighton proceeding on the basis that the special leave application in TWE had not yet been determined, indicating that if MCI did not obtain special leave or lost the High Court appeal, then his Honour would grant a permanent stay of the Leighton proceeding.[47]

44 For a more detailed discussion of the TWE v MCI Appeal Decision, see our alert "Lawyer Driven Class Actions - a potential abuse of power", 24 March 2015.

45 *Melbourne City Investments Pty Ltd and Treasury Wines Estate Limited,* Proceeding No. NSD 216/2015.

46 *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2015] HCATrans 116 (15 May 2015).

47 *Melbourne City Investments Pty Ltd v Leighton Holdings Limited* [2015] VSC 119.

Backing an alternative plaintiff

MCI commenced a class action against WorleyParsons in December 2013 alleging breaches of the continuous disclosure laws, with Mr Elliott then being the solicitor on the record.

After a challenge to MCI's standing to bring the action, MCI began the process of identifying a new plaintiff. In June 2014, the Victorian Supreme Court found that MCI had no standing to bring the action, as it did not have a "real interest" in the proceeding[48] and eventually the MCI proceeding was dismissed.

Separate proceedings were later launched with Joanne Walsh as representative plaintiff. Initially Mr Elliott was the solicitor for the new action, but subsequently withdrew. MCI has however indemnified Ms Walsh for all of her legal costs and any adverse costs orders and has agreed to pay her for her time and attention in acting as plaintiff in the proceedings.

WorleyParsons has since applied for orders that the proceeding be struck out as an abuse of process or that it no longer continue as a class action on the basis that Ms Walsh cannot discharge her function as a representative plaintiff. WorleyParsons is arguing that persons or entities other than Ms Walsh have or will have control over the conduct of the proceedings, as the terms of the indemnity effectively give control of the proceeding to others. It also claims that the proceeding is an abuse of process, arguing that MCI has caused it to be commenced and maintained for the predominant purpose of gaining a financial benefit or advantage other than the vindication of legal rights.[49] This application is yet to be determined.

Scenic Tours – an unsightly route

The class action recently launched against tour company, Scenic Tours, for boat cruises which turned into bus trips[50] is in a different category to the MCI class actions. One of the passengers affected (and therefore a potential group member) was Mr Tim Somerville, founding partner of the law firm Somerville Legal retained to represent the representative plaintiff. Mr Somerville is no longer a partner of Somerville Legal, but is employed as a consultant and is a beneficiary of a trust which owns shares in the incorporated legal practice.

Since commencing the proceeding, an amended statement of claim has been filed which amended the group definition to exclude any legal practitioner or funder providing services to the plaintiff and other group members in the proceeding, removing any potential for a 'lawyer as plaintiff' challenge.

No dual role as lawyer and funder

The prospect of lawyers funding litigation is also not a new concept. Lawyers acting on a 'no win, no fee' basis are effectively funding the litigation until and unless a costs order is obtained in favour of their client. Of itself, this has not been seen as giving lawyers a financial stake in the litigation.[51] However, lawyers are prevented by the various professional conduct rules from basing their fees in the litigious context on a percentage of the award or settlement (referred to as contingency fees). This issue, and the prospects of reform, is discussed in section two.[52]

Another means of entrepreneurial lawyering has, however, emerged. In the class action against Banksia Securities Ltd, Mr Elliott represented the representative plaintiff, Mr Bolitho (MCI is not involved). During the course of the proceeding, a company was incorporated and entered into a litigation funding agreement with Mr Bolitho. Mr Elliott was an indirect shareholder and director, and the wife of the senior counsel retained for Mr Bolitho by Mr Elliott was also an indirect shareholder of that company. One of the defendants made an application for orders restraining the plaintiff from continuing

48 *Melbourne City Investments Pty Ltd v WorleyParsons Limited* [2014] VSC 303. See King & Wood Mallesons, The Review – Class Actions In Australia 2013/14 (24 July 2014), 17.

49 *Walsh v WorleyParsons Limited* [2015] VSC 135.

50 Extensive flooding affected 16 cruises organised by Scenic Tours in 2013 involving up to 1,730 passengers, and a large component of the travel ended up being via lengthy bus trips rather than cruises.

51 *Kelly v Willmott Forests Ltd (in liquidation)* [2012] FCA 1446; *Madgwick v Kelly* [2013] FCAFC 61.

52 See our 2013/2014 report for a discussion of the attempt by Claims Funding Australia to co-fund the equine influenza class action run by Maurice Blackburn: The Review – Class Actions In Australia 2013/14 (24 July 2014), 15.

to retain both lawyer and counsel in the proceeding. Justice Ferguson of the Victorian Supreme Court held that both should be restrained, as their indirect financial interest in the proceeding posed a risk to the administration of justice.[53] The funding agreement was described as a means by which lawyers could "skirt around" the prohibition on contingency fees.[54] In a case such as this, her Honour took the view that there was a real risk that Mr Bolitho's lawyers would not be perceived as exercising the requisite levels of objectivity and independence, such that they may be influenced by the substantial financial interest they have that rests on the outcome of the case.[55] Mr Bolitho subsequently retained new solicitors to replace Mr Elliott.

In the Scenic Tours action, the plaintiff retained Somerville Legal and entered into a litigation funding agreement with a company in respect of which Mr Somerville's son is the sole director and shareholder. The defendant sought to restrain Somerville Legal from acting for the plaintiff, in part relying on Bolitho. Justice Garling of the NSW Supreme Court found the circumstances to be different to Bolitho and dismissed the application.[56] Justice Garling held that the defendant had not demonstrated any direct or indirect financial connection between the legal firm and the funder. Further, Mr Somerville played no role in the conduct of the proceedings and Bolitho did not stand for a general "family interest" principle as a distinct principle of law. The judge rejected the submission that, in this case, the litigation funder was a "stalking horse" to allow lawyers to charge contingency fees.[57]

53 *Bolitho v Banksia Securities Ltd* [2014] VSC 582. King & Wood Mallesons acts for the fifth defendant in the Bolitho action, who was the defendant that made this application.
54 *Bolitho v Banksia Securities Ltd* [2014] VSC 582.
55 For a more detailed discussion of this decision, see our alert "Funder and lawyer: is there scope to play both roles in a class action," 24 December 2014.
56 *Moore v Scenic Tours Pty Ltd* [2015] NSWSC 237.
57 *Moore v Scenic Tours Pty Ltd* [2015] NSWSC 237.

Claims against the state

In 2014/2015, we have seen a trend of class actions brought against government entities. While still a small proportion of class actions overall, these claims inevitably attract significant attention. Despite the growth in the number of government focused claims, plaintiffs have faced various impediments, including difficulties proving the existence of a duty of care, defining a sufficiently certain class and establishing causation.

Types of claims

Claims initiated and continued against government defendants in recent years have been diverse. Most significantly, we have seen a number of claims in relation to:

- **Catastrophic events**: the Wivenhoe Dam Flood action against (among others) the State of Queensland, the Equine Influenza action against the Commonwealth, and the abalone virus class action against the State of Victoria, all alleging negligence. State entities had defendant roles in a number of bushfire-related class actions.
- **Misfeasance in public office**: proceedings relating to ASIC's investigation of the Storm Financial collapse and proceedings relating to the Live Cattle Export Ban.

In addition, there have been a number of claims with a public interest element in recent years, including claims regarding the Grand Western Lodge action against the State of NSW (negligence); the Fairbridge Farm School action against the Commonwealth and the State of NSW (breach of statutory and common law duties to children); the Wotton representative action against the State of Queensland and Commissioner of the Police Service (alleging insufficient police response and investigation into deaths); the Workers with Intellectual Disabilities action against the Commonwealth (discrimination); the Christmas Island Detention Centre action against the Commonwealth and Minister (negligence and breach of statutory duties); the Manus Island Detention Centre action against the Commonwealth (negligence); the Christmas Island Sinking of SIEV221 action against the Commonwealth (negligence); and the Heritage Estates Worrowing action against the Commonwealth, the State of NSW and two local government entities (negligent misstatement, misleading and deceptive conduct, acquisition of property other than on just terms and seeking judicial review of an order).

Misfeasance claims

The tort of misfeasance, which requires an intention by a public officer to cause harm, or the public officer knowingly acting in excess of his/her power, is rarely successful. Nonetheless, such claims are on the rise following the settlement of the Pan Pharmaceuticals class action in late 2010 between the Commonwealth and group members alleging misfeasance by the Therapeutic Goods Administration, which saw group members receive $67.5 million (inclusive of costs).

Live Export Ban

The Live Export Ban class action was filed in late 2014 and concerns two consecutive decisions in 2011 by the Federal Government to suspend live cattle exports – first, to particular destinations in Indonesia, and then for all of Indonesia – after footage was broadcast showing images of animal abuse and maltreatment in Indonesian abattoirs. The group consists of exporters, farmers and others in the supply chain. In addition to alleging that the second control order was invalid, the Federal Court claim alleges that the then Minister for Agriculture, Forestry and Fisheries (then Senator Joe Ludwig) committed the tort of misfeasance in public office on the basis that he (and the Commonwealth vicariously) acted with knowing or reckless disregard in making the second control order, for reasons including that he was recklessly indifferent to the loss that was likely to be caused to producers, exporters and service providers.

Critical to the success of this application are arguments that the Minister was informed of particular issues in the live export industry, including that the industry had voluntarily proposed measures to improve animal welfare in the Indonesian export industry and that the five day gap between the two decisions meant that the Minister was informed of the harm that could be caused by the blanket ban.

The Government refused an out-of-court settlement before the claim was filed and we wait to see whether, similar to Pan Pharmaceuticals, out-of-court mediation may occur and lead to settlement, given the difficulties inherent in substantiating claims of malice against the Minister.

ASIC

Regulators can also be the target of misfeasance claims. On 1 December 2014, Levitt Robinson Solicitors filed proceedings against ASIC alleging misfeasance and negligence, on behalf of victims of the collapse in 2009 of Storm Financial Limited (**Storm**), including persons who have already received a settlement from earlier class actions involving Storm.

The claim alleges ASIC knew Storm was operating a business model which posed "substantial risk" to the group members for over a year before ASIC took action to investigate Storm and that ASIC "has a policy of 'improperly' preferring the interests of the Commonwealth Bank …

ahead of consumer interests."[58] ASIC has filed an application to have the proceedings struck out, which will be heard in August 2015.

Separately, the applicants have made a freedom of information request to ASIC to obtain the regulator's internal documents and records, including production of the lists of documents for discovery in ASIC's civil penalty proceedings against former Storm directors.

This is a landmark case as it represents the first class action targeting the adequacy of a regulator's actions and will explore the internal workings and decision making procedures of the regulator. It is novel in seeking to argue a duty of care and, if it were to succeed, would be a fundamental change in the way that regulators have to operate, particularly in light of budgetary and policy considerations that fall solely within Executive discretion.

Abalone Virus case failure a warning against casting the net too wide?

The plaintiffs' loss in the Abalone Virus class action[59] is a warning to plaintiffs to consider carefully whether cases against government entities are maintainable. The claim against the State of Victoria was dismissed by the Victorian Supreme Court on the basis that the plaintiff failed to establish that the State defendants owed any duty of care to protect the class members from economic loss caused by an escape of the virus, as well as failing to prove breach of duty or causation.

58 Federal Court proceedings Lock v Australian Securities and Investment Commission NSW 1307/2015. http://levittrobinson.com/class-action-asic-attracts-media-attention/

59 November 2013, subject to appeal. The full decision is Regent Holdings v State of Victoria [2013] VSC 601.

Vagueness and uncertainty of claims in the political domain

The past year has seen two claims made by asylum seekers against the Commonwealth of Australia. These cases highlight a number of challenges in making claims against government, particularly where the conduct in question has occurred, and group members reside, offshore.

The Christmas Island Detention Centre claim is brought on behalf of all persons who had been detained between 2011 and 2014, who were injured or pregnant during the period and had suffered an injury, or exacerbation of an injury, due to the Minister for Immigration's or the Commonwealth's alleged failure to provide reasonable care. The defendants are alleged to owe a common law duty of care to ensure detention did not cause injury, to provide reasonable health care and exercise due care and skill in providing this care.

In an interlocutory hearing in late 2014, the Minister and Commonwealth contended that the proceeding was not properly constituted as a group proceeding, as the class was so "'vague or uncertain' that potential group members could not reasonably be expected to ascertain, by reference to the pleading, whether they are in fact members of the group"[60] and the amended statement of claim failed to disclose any common question of fact or law. Justice Kaye refused to take a narrow approach to defining groups and noted previous cases allowing group definitions to have reference to the defendant's conduct. His Honour stated that it was too early to determine whether there were sufficiently common questions of fact or law for the case to proceed to trial as a group proceeding, but this would need careful consideration during the course of the interlocutory processes. To date, the action continues as a group proceeding.

60 *A S v Minister for Immigration and Border Protection & Anor* [2014] VSC 593 (28 November 2014) at [42].

The Manus Island Detention Centre claim is brought on behalf of asylum seekers taken from Australia to be detained at Manus Island Regional Processing Centre in Papua New Guinea during 2012 to 2014, who allegedly suffered personal injury as a result of the negligent conduct of the Commonwealth, G4S and/or Transfield Services. It is claimed that the Government had a duty to take reasonable care to avoid foreseeable harm to the detainees in relation to the food, water, accommodation and healthcare services inside the detention centre and security arrangements at the detention centre. In April 2015, Transfield Services sought to strike out large portions of the claim due to vagueness, although the plaintiffs were granted leave to amend their claims.[61]

61 Orders made on 22 April 2015 in *Kamasaee v The Commonwealth*, SCI 2014 06770.

Settlements — the closing act

Two significant issues have been considered by the Court in the past 12 months in relation to the settlement of class actions, which derive from the Court's supervisory and protective role in class actions:

- **The secrecy of terms of settlement** - Parties to class actions have generally proceeded on the basis that at least the settlement sum will likely become public in the course of court approval. While there have been some instances in which settlements have been wholly confidential, this may have been more by accident than design. In the past 12 months, we have seen parties specifically seek to maintain secrecy and – to an extent – courts agree to protect the confidentiality of the commercial bargains struck in settlement discussions.
- **Unsatisfactory settlements** – We have now seen a number of class actions settle on terms that provide minimal compensation to group members. Where the representative plaintiff has agreed to a settlement, and no other group member wants to battle on in the name of the class, courts are faced with a vexing decision when asked to approve a proposed settlement.

Confidentiality – whose settlement is it anyway

Settlements are usually confidential between the parties (unless they choose otherwise), however the court approval process for class action settlements has generally meant that certain aspects of those settlements are not able to be kept confidential. The extent of confidentiality and the dilemma that this poses for the court has been a recurring theme in cases this year.

"The proceedings were most likely to end in a heavy defeat. Far from being not enough, the settlement was as good as it was going to get."[62]

In *Hodges v Waters*, a class action by investors in a property trust against the trust's compliance auditors, KPMG, Justice Perram had to determine whether to approve a settlement in circumstances where confidentiality of the terms of settlement was a condition precedent to the settlement taking place. In such circumstances, His Honour had two options: to decline to approve the settlement, with the proceeding continuing to trial or another non-confidential settlement was entered into; or to approve the settlement despite the confidentiality issues.[63] In that case, each group member had been told their approximate individual settlement sum, but not the global amount to be paid by KPMG, the details of the distribution arrangements, or the amount of the funder's fees to be deducted from the settlement. As His Honour noted, it was "difficult for them to understand precisely how the compensation to be allotted to them has been calculated and more difficult still to put together any argument as to why any such settlement should be refused."[64] Nonetheless, the settlement was approved, Justice Perram taking the view that the claims were weak and so settlement was the best option, in circumstances where the court had been able to scrutinise the terms of settlement, and group members could have access to the settlement terms upon giving a confidentiality undertaking (only one had done so).[65]

62 *Hodges v Waters (No 7)* [2015] FCA 264 [107].
63 *Hodges v Waters (No 7)* [2015] FCA 264 [64].
64 *Hodges v Waters (No 7)* [2015] FCA 264 [65]-[66].
65 *Hodges v Waters (No 7)* [2015] FCA 264 [67].

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In contrast, in Bonsoy the Court took the view that the group members were entitled to know why the case had been resolved and the basis for the approval, and that this meant it was necessary to delve into some typically confidential areas to some extent so as to set out the Court's reasons for approval.[66] In that case, as is more usual, the overall settlement amount ($25 million) was not confidential.

Funders' fees

Justice Perram was willing to maintain secrecy in respect of the litigation funder's fees on the basis that the confidentiality of these fees was part of the settlement terms. Such an approach is not uncommon. According to Justice Perram, the funder's fees consuming just over one third of the settlement amount was "the flipside of the Faustian bargain constituted by the funding arrangements."[67] The fees were substantial but, the Court accepted, reflected the commercial risk the funder was taking with its own money – without the funder running that risk and taking the action, group members would have received nothing.[68]

According to Justice Perram, the funder's fees consuming just over one third of the settlement amount was "the flipside of the Faustian bargain constituted by the funding arrangements."[67]

66 *Downie v Spiral Foods Pty Ltd & Ors* [2015] VSC 190 [37].
67 *Hodges v Waters (No 7)* [2015] FCA 264 [104].
68 *Hodges v Waters (No 7)* [2015] FCA 264 [104].

Lawyers' fees

Courts have not shown a similar willingness to maintain confidentiality in respect of lawyers' fees. Generally, courts have required full disclosure of the quantum of lawyers' fees and how they had been calculated. This is seen as especially important where the costs were to be paid out of the settlement amount (thus potentially affecting the reasonableness of the settlement) and group members lacked detailed information about the costs.[69]

Generally, courts have required reports from costs consultants as to the reasonableness of the costs (which in the Bonsoy class action accounted for almost $7 million of a total settlement sum of $25 million, and in the Kilmore East/Kinglake Bushfires action formed $60 million of a $494 million settlement) or the appointment of a registrar to examine calculations and report to the court on reasonableness. An exception in the past year was the Great Southern proceedings, where Justice Croft refused to subject the costs claimed to any further scrutiny, a decision affected by the particular facts (including that costs were to be paid from a separate fund rather than a deduction from the settlement amount, and were a reimbursement to group members of fees already paid to their lawyers).

Hodges v Waters demonstrates that in some instances, while the terms of settlement will need to be disclosed to the court and aspects of the terms will need to be communicated to class members, it may be possible to keep the terms of settlement confidential so far as the public is concerned.

69 *Downie v Spiral Foods Pty Ltd & Ors* [2015] VSC 190 [35], [178].

"It is …inconceivable that, independently advised, a person [receiving a maximum payout of $4,629.36] would regard that sum as adequate compensation for the loss and damage associated with a heart attack to the occurrence of which Vioxx made a material contribution."

Justice Jessup, Voixx

No effective alternative to an inadequate settlement – what is the court to do?

We reported in our 2013/2014 report that the proposed settlement of the Vioxx class action had been rejected by the Federal Court – principally on the basis that it did not adequately differentiate between the respective strengths of group members' claims.[70] The parties then modified the settlement agreement and made a fresh application for approval. This time, they satisfied Justice Jessup that the settlement sum of $497,500 was fair and reasonable.[71]

70 *Matthews v AusNet Electricity Services Pty Ltd & Ors* [2014] VSC 663. A similar approach to legal costs was taken when approving the *Murrindindi Bushfires* class action: *Rowe v AusNet Electricity Services Pty Ltd & Ors* [2015] VSC 232.
71 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015] FCA 123 [2]-[5].

While the criteria for distributing the settlement amount were fair, it was clear that Justice Jessup remained troubled by the very modest settlement outcomes in this case:

> *"It is … inconceivable that, independently advised, a person [receiving a maximum payout of $4,629.36] would regard that sum as adequate compensation for the loss and damage associated with a heart attack to the occurrence of which Vioxx made a material contribution."*[72]

The judge noted that the representative applicant (who had failed on his own claim) was exposed to a significant costs liability which would likely "dwarf the settlement sum". Compromising the group's claims would therefore have been "irresistible". The judge noted that this meant that "the settlement which the court is now being asked to approve has, to say the least, a certain whiff of expediency about it."[73]

The judge asked the rhetorical question: in circumstances where the representative applicant was hardly likely to continue in the role and no other group member had come forward to replace him, why should he be forced to continue to be exposed to significant obligations and risks "in the interests of others who are content to remain below the parapet"?[74] If the settlement had not been approved and the representative applicant no longer prosecuted the proceeding, it was inevitable that at some it would stage be dismissed – then, group members would receive nothing.[75]

72 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015] FCA 123 [6].
73 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015] FCA 123 [9].
74 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015 FCA 123 [11].
75 *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 7)* [2015 FCA 123 [12].

Settlement of the Great Southern class action proceedings – key takeaways

One of the most publicised class action decisions in 2014/2015 was the Supreme Court of Victoria's decision to approve the settlement of proceedings commenced against Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (In liquidation) (**GSFL**), a subsidiary of Great Southern Limited (**GSL**) and a number of related parties.[76]

The litigation concerned 16 group proceedings and numerous individual actions commenced after companies in the Great Southern group went into administration, on behalf of investors who had acquired interests in GSL's managed investment schemes. The class actions alleged that statements in the relevant product disclosure statements for the schemes were misleading or deceptive. The proceedings were brought against GSFL (whose role was to offer finance to investors in GSL's projects), the responsible entity for the schemes, directors of GSFL, and banks which had financed the investors' investments in the schemes.

Settlement of the proceedings

The proceedings were commenced in 2010, with the trial being heard over 90 sitting days between 29 October 2012 and 24 October 2013. On 23 July 2014, Justice Croft informed the parties that he would hand down judgment and give his reasons for decision (**Trial Reasons**) on 25 July 2014. Later that day, the parties informed his Honour that they had reached a settlement. On 11 December 2014, Justice Croft approved the settlement. The approved settlement provided for insurers to pay $23.8 million, which included costs of $20 million. After costs, it was estimated that the settlement would equate to an estimated return to each group member of $16.79 for every $10,000 invested.[77]

Timing of the settlement

The case illustrates that settlement remains open to parties up until the time judgment is delivered – but there are implications for such a late settlement. Justice Croft held that considerations of transparency and the broader public interest meant that the Trial Reasons would be published when delivering a judgment on the settlement approval application.

Who should hear an application for the approval of a settlement after trial?

In most instances, if settlement is not approved, the proceedings would continue and it is generally undesirable for the judge who has been privy to proposed terms of settlement to take the matter to verdict. Consistent with this procedure, the settlement approval application was not initially allocated to Justice Croft. After an initial hearing before Justice Judd, it was decided that Justice Croft would determine the settlement application, the parties having acknowledged and accepted that, should his Honour decline to approve the settlement, the judge would proceed to deliver judgment and publish the Trial Reasons, or publish them to inform the approval process.[78] In circumstances where judgment was ready to be delivered, there does not appear to be a substantive reason why the trial judge should not hear the application, and indeed is an efficient use of resources.

Prospects of success where judgment prepared

Here, the Court was in the unique position of holding the most informed view on the respective strengths and weaknesses of the parties' positions in the litigation. As such, the usual process of the court receiving confidential submissions on the prospects of success by counsel for the parties was not as important. As Justice Croft noted, his reasons for judgment following the conclusion of the trial were "the most accurate 'prediction' as to the trial outcome".[79]

Although a court is not to substitute its own view for that of counsel in circumstances where the court is not fully cognisant of all the issues,[80] one of the primary bases for Justice Croft approving the settlement was the conclusion that all the group members were in a better position by means of the settlement than if judgment had been delivered on the basis of the Trial Reasons. They received something via the settlement but would have failed completely had it gone to judgment.[81]

As Justice Croft noted, his reasons for judgment following the conclusion of the trial were "the most accurate 'prediction' as to the trial outcome".[79]

Release of the Trial Reasons

There had been no objection to the publication of the Trial Reasons; the only dispute was as to the timing of the release (ie before or after determining whether to approve the settlement).

One factor behind the release of the Trial Reasons was the broader public interest in the settlement process. With a large number of individuals represented in the proceedings and after the significant investment of court resources, there are strong arguments for the release of the Trial Reasons, so that parties and the public can have an indication of how complex issues raised in the case were likely to be decided.

Implications for companies settling class actions

The public nature of class actions means that a company's response to the claim will always be scrutinised. From a defendant's perspective, settling a class action removes the risk of an adverse judgment, reduces legal fees and minimises the diversion of company resources. By settling the proceedings at such a late stage, however, the outcome of litigation is no longer hypothetical in that a party's decision to settle can be compared to the draft reasons for decision (if published). Class action parties should therefore be aware that settlement at such a late stage may result in the judgment being published and thus be exposed to comparisons to the outcome in the judgment.

76 *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) & Ors* [2014] VSC 516 (**Great Southern**).
77 *Great Southern* at [71]
78 *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569 at [7].
79 *Clarke (as trustee of the Clarke Family Trust) & Ors v Great Southern Finance Pty Ltd (receivers and managers appointed) (in liquidation) (Ruling No. 3)* [2014] VSC 584.
80 *Darwalla Milling Co Pty Ltd v F Hoffman La Roche Limited (No 2)* (2006) 236 ALR 322 at 332 [30].
81 *Great Southern* at [148].

Class action procedure — key developments

The past twelve months have seen a number of subtle but important procedural developments which will affect the way class actions are run, including:

- continued freedom on the part of plaintiff lawyers to pick the representative plaintiff that best suits them;
- confirmation that a class action can be run against numerous defendants without each group member needing to have a claim against each defendant; and
- greater opportunity to join a closed-class action after it is commenced.

Reflecting the maturity of Australia's class action regime, these developments have been incremental rather than revolutionary, but will impact the tactics used by plaintiff and defendant lawyers in seeking to gain a forensic advantage and settlement leverage in the course of a class action.

Defining the claim

The way in which proceedings are defined is a key battleground in most class actions because the breadth of the case defines the size of the defendant's risk and likelihood that a plaintiff will be able to prove its case. A number of significant Federal Court decisions over the past twelve months have broadened the potential scope of class action proceedings and confirmed the flexibility of the mechanisms which courts can use in shaping and managing a claim.

Cherry picking applicants

In a decision which is likely to benefit plaintiffs, the Court in the action against Newcrest endorsed a long-standing practice of cherry picking applicants in security-holder class actions. In such claims, it has been common for the class to be comprised largely of institutional investors. Funders and plaintiff lawyers target institutional investors because their large shareholdings and small numbers make it easier to build an economically viable claim. However, notwithstanding the fact that claims are conducted for the benefit of institutional investors, they are invariably fronted by retail investors, who are more likely to have been affected by misleading statements and may make more compelling applicants.

The applicant in Newcrest is the trustee of a self-managed super fund and a family trust which acquired a small number of shares just prior to the allegedly misleading disclosure being corrected, although 80%

of the shares during the relevant time were held by institutional investors.[82] Newcrest applied to the court for an order that the individual claims of two institutional investors be determined first, before the claims of other class members (including the applicant). This was on the basis that the number of institutional shareholders meant that the case of the lead applicant and the evidence of its director had limited applicability to the circumstances of the class members behind the claim. In particular, Newcrest argued that the applicant's case was a poor vehicle for facilitating an adjudication of the issues in the proceeding as it was not in a position to lead evidence relevant to the manner in which investment decisions were made by institutional group members, who, it was argued, were likely to have made investment decisions employing a methodology quite different to that of the applicant.

The Court rejected this argument, holding that applicant was entitled to frame its action as it saw fit and that the court would only intervene to make orders for advance determination of particular claims to avoid injustice. It was not persuaded that such injustice would arise in light of the degree of commonality between the cases of institutional and non-institutional investors, the absence of a relevant impact on settlement and the absence of prejudice to the defendant.[83] The decision, which could be expected to apply a large number of securities claims, confirms that plaintiff lawyers have significant latitude in choosing the representative plaintiff, even where they do not reflect the circumstances of the class as a whole.

82 The applicant has previously been the named plaintiff in class action proceedings run by Slater & Gordon (also the lawyers in the Newcrest action) against Sigma Pharmaceuticals Ltd.

83 *Earglow Pty Limited v Newcrest Mining Limited* [2015] FCA 328.

Claims against multiple defendants

In a case which confirms the flexibility of class actions in dealing with multiple respondents, the Full Federal Court decided it is not necessary for all group members to have claims against each and every respondent in a proceeding.

In the Cash Converters proceedings (now settled), the classes consisted of people who paid fees under credit contracts with Cash Converters, its franchisees and another company. The applicant had claims against each of the respondents, but not all members of the class had entered into an agreement with each of the respondents. The respondents argued that this was insufficient and that the case could not proceed against all of the respondents, in light of the decision in Philip Morris.[84]

The Full Court held that it is sufficient if the applicant has a claim against each respondent and there are at least six or more other people within the class who have claims against each respondent.[85] As a result, a respondent can be joined to a class action even if a number of group members do not have a claim against it. The case has significant consequences for contract and consumer protection cases where there are similar factual circumstances but multiple contracting parties, or where unrelated parties engage in conduct which is factually similar and affects overlapping classes of consumers. It has the potential to lead to larger and more factually complex class actions.

Adding group members to a closed class claim

Finally, the Federal Court has confirmed that group members can be added to a closed class claim after it has commenced. While this represents only a slight shift from the position understood in Multiplex, (which had set the limits of group definition by reference to funding agreements/solicitors' retainers entered into at the commencement of proceedings),[86] it has the potential to be a powerful tool for plaintiffs if the circumstances can be replicated.

In the *Standard & Poor's* class action, the Federal Court considered an application to amend the group definition to include further class members who had entered into a litigation funding agreement after the commencement of proceedings. The Court allowed the amendment, focussing on the difference in the mechanism used — the Court held that a class definition which expressly allowed for opting in after commencement (impermissible) was different to an extension of the class to additional group members by amendment (permissible).[87] Based on this decision, it is possible for a group definition to be amended post-commencement to include people who have signed funding agreements after that time. Justice Rares stated:

> *the only sensible operation that can be given to s 33K(1) and (4) is that those provisions permit an amendment such as that sought here to be made, provided that the amendment operates forthwith and, by doing so, closes the newly described class or identifies an already closed class in the same way as occurs when proceedings under Pt IVA initially are commenced.*

84 *Philip Morris (Australia) Ltd v Nixon* [2000] FCA 229; (2000) 170 ALR 487.

85 *Cash Converters International Ltd v Gray* [2014] FCAFC 111.

86 *Multiplex Ltd v P Dawson Nominees Pty Ltd* [2007] FCFCA 200 (in which case the decision necessitated the commencement of a further class action). In Multiplex, the group was defined (inter alia) as those who had entered into a litigation funding agreement as at the commencement of proceedings, with the group becoming fixed at commencement. This was distinguished from the situation in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 1483, in which Justice Stone held that a definition of group membership that was triggered by the signing of a funding agreement and retaining particular solicitors was inconsistent with the opt-out nature of Part IVA (the group continuing to float after commencement).

87 *City of Swan & Anor v McGraw-Hill Companies Inc & Ors* (2014) 223 FCR 328.

As a result of this decision, funders and plaintiff lawyers will be able to file closed class proceedings at an earlier stage, in the knowledge that they can continue to build their book after filing and seek an amendment, provided the group definiton does not allow people to come progressively within an ambulatory class definition. It also means that defendants may have to wait longer in closed class cases to get a firm picture of the extent of their potential liability.

Pre-action discovery

Potential plaintiffs are also making increasing use of pre-action (or preliminary) discovery to obtain documents from potential targets to build their case. In the proposed Wickham Securities class action, the applicants used preliminary discovery to assess the strength of their claim.

Wickham had appointed Sandhurst Trustees to hold various rights for investors as part of an ill-fated note offering. Following Wickham's collapse, prospective applicants sought preliminary discovery of 39 categories of documents from Sandhurst to enable them to determine whether to commence proceedings. Sandhurst argued against production on the basis that the claim was futile. The Court rejected this argument, holding that the prospective applicants had met the low threshold for preliminary discovery, which requires a reasonable belief that relief may be available, reasonable inquiries resulting in insufficient information and a belief that the respondent is likely to have documents which would assist. This outcome was upheld on appeal to the Full Court in February.[88]

The case is significant for two reasons:

- consistent with the low threshold for granting preliminary discovery, the Court ordered production of a large amount of material, which will assist the applicants in framing their claim.
- the Federal Court delivered a detailed 44 page judgment, and the Full Court produced a similarly detailed 35 page judgment on appeal, which both addressed (on a preliminary basis) the strength of the applicants' claim.

88 *Sandhurst Trustees Limited v Clarke* [2015] FCAFC 21. See also *Erutuf Pty Limited v Westpac Banking Corporation Limited* [2014] NSWSC 1679, in which orders for preliminary discovery were granted by the NSW Supreme Court in proceedings relating to loans used for the allegedly unregistered Famularo managed investment scheme.

The case shows that preliminary discovery can be a powerful tool for plaintiff lawyers — not only were the applicants in the Wickham case able to obtain a large amount of information before filing their case, they were able to obtain a preliminary endorsement of aspects of their claim at an early stage before they had incurred significant costs, with proceedings subsequently commenced on 15 July 2015.

Not so lucky were potential plaintiffs in the class action proposed against Iluka Resources. Just prior to publication of this report, the Federal Court rejected an application for preliminary discovery on the basis that:

- the Court was not satisfied that there was a reasonable basis for the proposed representative plaintiff to reasonably believe that the representations on which he relied were misleading or deceptive or that Iluka failed to make a subsequently required disclosure, noting that "a cable of belief cannot be woven exclusively from threads of mere speculation or conjecture, nor do unfocussed feeble rays add up to illumination"; and
- the application would have been refused in any event in the exercise of the Court's discretion, as there was evidence that a decision to commence proceedings had already been made (with particular reference to publications by the prospective plaintiff's lawyers).[89]

89 *Bonham v Iluka Resources Ltd* [2015] FCA 713.

Fixing the number of group members

In every opt out class action there comes a point when class members have to take a positive step and identify themselves as someone who has an interest in a judgment or settlement. If a class member fails to opt out of the class and fails to register they are bound by the decision or settlement but are not entitled to any of the rewards. In most class actions, class closure typically takes place at a late stage in the proceedings or as a component of the judgment or settlement orders and, once it happens, it tends to be final. This year a number of cases tested the boundaries of when class closure orders are appropriate.

Closing the class early

Defendants often seek to close the class early, so they can determine the number of group members and likely exposure for the purpose of settlement. This year, the Supreme Court of Victoria in the Downer EDI class action endorsed leaving the class open until a relatively advanced stage in proceedings. It followed a growing body of case law which has rejected an argument commonly advanced by defendants that class closure should be ordered to facilitate settlement. The Court held that it was inappropriate to close the class before pleadings had closed and that the settlement of a parallel class action was not a sufficient reason to require the group members to identify themselves.[90]

By contrast, in a class action conducted in the NSW Supreme Court against Rolls Royce over an engine failure which forced the return of a flight to Singapore, Justice Beech-Jones went the other way and ordered class closure in advance of discovery and further proposed mediation.[91] The case provides an important example as to when the 'necessary for settlement' argument might succeed. In Rolls Royce, the Court considered the decisive consideration to be that there was a prospect of significantly disproportionate costs being incurred, as the plaintiff was seeking to run a large and complicated case for what might ultimately prove to be small number of group members. In the Court's view, those costs could be avoided by orders for class closure at an early stage on the basis that it would substantially advance settlement discussions, notwithstanding the relatively early stage of the proceeding.

These cases suggest that the decision whether to permit early class closure so as to promote early settlement is heavily case-dependent.

Opening the class after settlement

At the other end of the spectrum, the Supreme Court of Victoria rejected an application to re-open the class after settlement in the Great Southern claim so as to allow unhappy group members to opt out. Apart from the modest settlement amount, the settlement also acknowledged the validity and enforceability of the plaintiffs' loans, which were at issue in the proceedings.

90 *Camping Warehouse Australia Pty Ltd v Downer EDI Limited* [2015] VSC 122.
91 *Lam v Rolls Royce PLC (No 3)* [2015] NSWSC 83.

After the settlement was reached but before the approval hearing, two groups of class members objected to the settlement and sought to opt out, on the basis that it would bind them to repay loans and they would not be able to raise individual defences to enforcement. They argued the settlement was beyond the scope of the proceedings in which they had decided to participate. The Court held the group members were not entitled to opt out in response to the settlement, because the provisions about the validity of the loan agreements should not have come as a surprise, they were given an opportunity to opt out earlier in the proceedings and they had an opportunity to object to the approval of the settlement.[92] The settlement was ultimately approved over their objections on the basis that their claims would have failed at trial.

92 *Clarke v Great Southern Finance Pty Ltd (in liquidation)* [2014] VSC 569.

Facing the final curtain

In the past 12 months, we have seen at least two class actions fail in their entirety.

- In the claim by landowners in the Heritage Estates Worrowing, the claims were dismissed on the basis that no cause of action was established against the Commonwealth. The Court held that there was no acquisition of the land held by them in the Heritage Estates nor was there any sterilisation of their interests in that land in contravention or impairment of the Constitutional guarantee provided to the group members by s 51(xxxi) of *The Constitution*.[93]
- In a case brought by Israeli academics allegedly affected by the implementation of a boycott, divestments and sanctions campaign, the court ordered by consent that the proceedings be dismissed for lack of standing as against the remaining applicant.[94]

93 *Esposito v Commonwealth of Australia* [2014] FCA 1440
94 *Shurat HaDin, Israel Law Center v Lynch,* NSD2235/2013, orders 16 July 2015.

Global developments

Trends in class action-type public interest litigation in China

The framework for class actions, known as "joint litigation" in the People's Republic of China, has been in place since the initial promulgation of the *Civil Procedure Law of the P.R.C.* (**CPL**) in 1991. Recent amendments to the CPL provide for joint litigation in areas of public interest related to "pollution to the environment" and "damage [to the] legitimate rights and interests of consumers at large", with certain "designated institutions" given the authority to institute proceedings.[95]

Recent promulgations have provided much needed clarity and guidance on the basis for standing and the evidence needed to meet the threshold for case acceptance,[96] and as a result the past year has seen an increase in accepted cases of public interest litigation related to environmental protection in particular.

Companies doing business in China should be aware that:

- the designated authority is bringing actions for a variety of environmental-related claims and, given the environmental challenges facing China and increasing public awareness, it may be expected that growth in such environmental public interest joint litigation will continue upward.

- there is a growing number of cases being brought by individual plaintiffs against companies/retailers under the recently amended recent amendment to the *Consumer Rights Protection Law* (**CRPL**) in respect of consumer products. As such, it may simply be a matter of time before the designated authority – possibly with the support and expertise of the "class action" litigation bar in China – increases the number of cases filed.

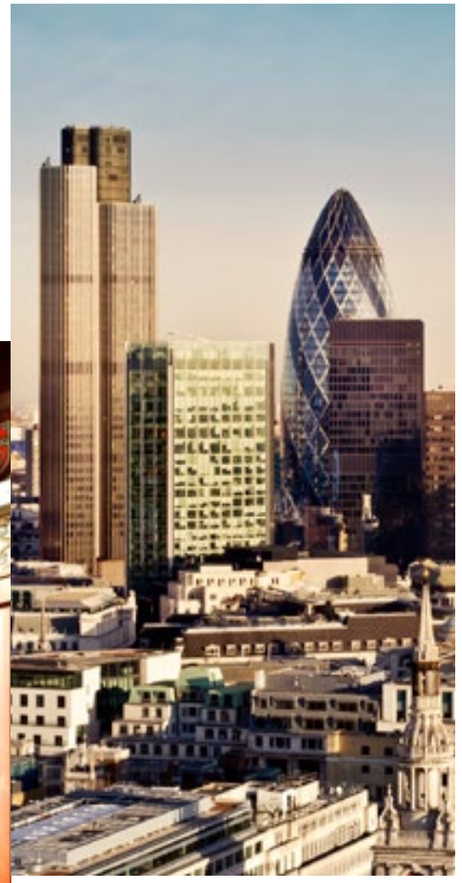
With the additional guidance provided by the recent promulgations, as well as growing demands for protection of the environment and for the interests of consumers, it appears likely that we will see a rise in public interest class action-type joint litigations in China in 2015 and in the future.

95 National People's Congress of the People's Republic of China, *Civil Procedure Law of the P.R.C.*, adopted 9 April 1991, last amended 31 August 2012, effective 1 January 2013, Art. 55.

96 National People's Congress of the People's Republic of China, *Consumer Rights Protection Law of the People's Republic of China,* last amended on 25 October 2013, effective 15 March 2014, Art. 47; Supreme People's Court of the People's Republic of China, *Interpretations of the Supreme People's Court on the Application of the "Civil Procedure Law of the People's Republic of China"*, as promulgated on 30 January 2015, effective 4 February, Art. 284; Supreme People's Court of the People's Republic of China, *Interpretations of the Supreme People's Court on Issues Pertaining to Application of Laws in the Trial of Civil Cases Regarding Environmental Public Interest Litigation*, promulgated on 6 January 2015, effective 7 January 2015, Articles 1 and 18; and National People's Congress of the People's Republic of *China, Environmental Protection Law of the People's Republic of China*, last amended on 24 April 2014, effective 1 January 2015, Art. 58 (**EPL**).

UK developments

As we noted in last year's report, the UK now has both opt-in and opt-out collective actions for competition damages claims. From October 2015, the Competition Appeal Tribunal (**CAT**) will be able to certify claims as eligible for inclusion in collective proceedings if it considers that they "raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings." Factors it will consider in determining which claims are suitable to be brought in collective proceedings include whether it is possible to determine for any person whether they are or are not a member of the class, the size and nature of the class and whether the claims are suitable for an aggregate award of damages. The draft Competition Appeal Tribunal Rules, which will flesh out the bones of the statutory regime, also specifically envisage "sub-classes" within a class.



In relation to damages, there are two innovations of particular significance:

- the CAT will have the power to "make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person." Such assessments of individual losses are proving a significant burden and hurdle in the ongoing Emerald air cargo litigation and this amendment is likely to significantly facilitate the bringing of claims.
- in an opt-out proceeding where not all of the damages awarded have been claimed by the represented persons, the CAT "may order ... that all or part of any damages not claimed .... is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings". With that one amendment, the legislature has facilitated opt-out actions in the UK to be realised.

The French connection

In October 2014, the "loi Hamon" bill came into force and France became the ninth European Union Member State to introduce a form of class actions, a new regime known as "action de groupe".

The "action de groupe" regime applies only in the field of consumer and competition law, is a purely opt-in regime, and damages are only available for financial loss. Similar to other French actions, the statute of limitations is five years from the date of harm suffered or discovered. Only individual consumers may be group members, not corporations (including foreign entities), and only authorised consumer associations (there are 16 at present) are authorised to bring class actions on behalf of individual group members. The law also enables authorized consumer associations to initiate a mediation procedure.

To date, five actions have been brought under the "action de groupe" regime. The first case was determined on 19 May 2015, with Paris Habitat and SLC – CSF signing a settlement under which Paris Habitat will compensate 100,000 tenants and change its behaviour.

The possibility of extending the current French class action system to environmental claims or health-related claims is due to be reviewed in September 2016. A draft law relating to the modernization of the healthcare system in France, which aims to extend the class action system to health-related claims, was passed by the French Parliament on 14 April 2015 and is now before the French Senate.

Update from Germany

While the German legal regime traditionally does not provide for class actions, a specific type of mass action has arisen in German competition litigation in which companies are assigning their claims for damages allegedly suffered from cartel activity to a special purpose claims vehicle which bundles the claim together with those of others and sues the cartelist(s) in combined proceedings for the total damages incurred by the assignors. While this practice has been subject to some criticism, a recent judgment confirms that claim vehicles have standing in German courts.

Despite the absence of a specific class action regime, Germany continues to be considered an attractive place for claimants to bring cartel damages actions. Cartelists are jointly and severally liable for damages (as in Australia); cost risks for claimants are limited as statutory refunds are available; claimants can benefit from the binding effect of decisions of competition authorities across the EU (along with final appeal decisions); the defendant has the burden of proving the passing-on-defence; indirect purchasers have standing if they can establish they have suffered damage (requiring a passing-on scenario on the part of the direct purchasers); and a relatively high rate of interest can be claimed from the date of the first occurrence of the damage.

United States – "no injury" class actions?

An eagerly awaited Supreme Court decision has the potential to either exponentially increase, or effectively limit, the ability of class actions to be filed relating to the breach of federal statutes.

As we discussed last year, while Australian class actions merely require the existence of one common issue of fact or law, under the 'predominance test' US courts must be satisfied that common questions of law or fact predominate over individual class member questions.[97] However, Article III of the US Constitution establishes the basic requirement for any claim, being that plaintiffs must have suffered an "injury-in-fact" for standing to be established.

In early 2015, the Supreme Court of the United States granted certiorari in the case of *Spokeo, Inc v Robins No. 13-1339*, which will decide whether a Court can confer what is known as "Article III standing" where there has been a mere violation of a federal statute, without any concrete harm suffered by a plaintiff.

The decision of the Supreme Court to hear the case follows the Ninth Circuit's decision in February 2014 that the plaintiff had established standing under the Fair Credit Reporting Act (**FCR Act**) without any more than a speculative injury. Robins initiated a class action against Spokeo for violating the FCR Act (which regulates the collection, dissemination and reporting of US consumer information), alleging that Spokeo posted false information about Robins which would negatively affect, among other things, his credit and insurance. The Ninth Circuit court did not find that Robins had suffered actual damage but held that Spokeo's violation of the Act was adequate for Robins to establish standing.

This decision almost single-handedly sparked the filing of multiple class actions based on the FCR Act, with reports of 29 FCR Act class actions being filed in the first fourth months of 2014 alone.[98] Multiple statutes authorise private rights of action, and this decision opened the flood gates of class actions relating to breaches of federal statute despite no concrete damage having been suffered by plaintiffs. Interestingly, the United States (by way of its Solicitor General) put forward an amicus curiae brief with the view that the petition for a writ of certiorari be denied, citing its belief that concrete harm had indeed been suffered by the public dissemination of inaccurate personal information. However, the extensive ramifications of this case for multiple parties subject to federal statutes led major companies such as Facebook, Google, and Yahoo to put forward amici curiae briefs in support of Spokeo's petition that the writ of certiorari be granted.

The case is likely to be heard later this year. We wait to see whether the US courts will put a stop to parties initiating class actions involving allegations of statutory violations where these breaches have not caused the plaintiffs any concrete harm.

97 *Comcast Corp v Behrend,* 569 US _, 133 S Ct 1426 (2013) at 6.

98 See Petition for a writ of certiorari by Spokeo Inc at page 12. sblog.s3.amazonaws.com/wp-content/uploads/2014/05/13-1339-Spokeo-v-Robins-Cert-Petition-for-filing.pdf

New Zealand class action developments

Despite repeated calls for the introduction of a new legislative model, the New Zealand Parliament has stalled in passing a specific procedural regime for class actions. At present, litigants seeking to institute group proceedings must bring their claim by way of representative action, provided for by the High Court Rules which require either the consent of each person in the same interest or specific court direction.

While New Zealand courts have been willing to set the 'same interest' threshold relatively low, a number of limitations have prevented an influx of class actions including:

- the fact that costs follow the event,
- the continuing existence of the torts of maintenance and champerty, hampering the growth of a litigation funding market,[99] and
- uncertainty about the use of opt-in and opt-out mechanisms.[100]

Class actions proposed to date

Despite these limitations, the number of representative actions in New Zealand has been on the rise, including the Feltex litigation (allegations of a misleading prospectus, funded by Harbour Litigation Funding), a proposed claim against South Canterbury Finance concerning the LDC Finance collapse (breach of continual disclosure obligations), the 'Fair Play on Fees' litigation over alleged penalty fees charged by banks, action against Southern Response insurers for alleged delays in the processing of Christchurch Earthquake claims and a case brought by the Service and Foodworkers Union on behalf of 25,000 caregivers in relation to wage discrimination. Also underway is preparation for the 'leaky homes' lawsuit against James Hardie and other cladding manufacturers, while kiwifruit growers have made a negligence claim against the Minister for Primary Industries as a result of devastation from spread of the Psa bacteria.

99 By recognising the fundamentality of access to justice, the Court has concluded that litigation funding will not be caught by maintenance or champerty if the court is satisfied that there is an arguable case for rights warranting vindication, that there is no abuse of process and that the funding proposal is approved by the court: *Saunders v Houghton (No 1)* [2010] 3 NZLR 331. However, many unresolved questions remain including the degree of control a funder may exercise over the litigation, whether a funder may terminate funding at its discretion and whether the court should be able to regulate the amount a litigation funder receives, with the source of the court's power to control proceedings still in controversy.

100 *Saunders v Houghton (No 1)* [2010] 3 NZLR 331; *Credit Suisse Private Equity LLC v Houghton* [2014] 1 NZLR 541. In addition, while personal injury claims have often been the trailblazer in other jurisdictions for establishing the class action model, in New Zealand proceedings for personal injury are barred by accident compensation legislation.

Outlook

On the radar

Key upcoming events include:

- **Significant appeals**: application for special leave to appeal to the High Court in respect of the Bank Fees class action against ANZ. The Abalone Virus class action appeal is expected to be heard by the Victorian Court of Appeal in 2016, following the 2014 dismissal of the claim against the Victorian Government alleging a failure to require appropriate biosecurity.
- **Hearings**: the class action by residents of Palm Island against the State of Queensland and the Police Commissioner alleging racial discrimination in relation to conduct in investigating a deadly riot in 2004 regarding events on Palm Island in 2011 (from 7 September 2015); the action against McGraw-Hill in relation to the ratings given by Standard & Poor's to Lehman-issued CDO products (October 2015); the Banksia class action, brought on behalf of holders of debentures (likely to be in 2016); hearing of the class actions against traffic forecaster AECOM in the RiverCity motorway class action (29 August 2016); Newcrest (February 2016); the trial of the Springwood bush fire class action is listed for 15 February 2016; Provident Capital (commencing 7 March 2016); Scenic Tours (April 2016); Mickleham-Kilmore bushfires (expected to commence May 2016); the TWE action run by Maurice Blackburn is listed to commence 5 September 2016, with the TWE class action filed by MCI expected to be heard at the same time if it is permitted to run; Equine Influenza (June 2016); and the Wivenhoe Dam class action (commencing 18 July 2016).
- **Judgments**: judgment is reserved in the De Puy hip implant class action, where hearings commenced on 2 March 2015 and ran for 16 weeks.
- **Settlements**: the approval hearing for the proposed settlement of the Fairbridge Farm proceedings ($24 million), is set for hearing on 21 August 2015, the approval hearing of the proposed $1.85 million settlement of the wrongfully imprisoned children class action against NSW Police, the approval hearing of Cash Converters in relation to allegations that it charged high interest rates to vulnerable customers (to be heard 12 October 2015, proposed settlement of $20 million plus $3 million in costs), and the approval hearing of Willmott Forests (proposed settlement of $3.1 million in relation to costs only, heard on 23 July 2015).

Since the review period closed on 30 June 2015, we have already seen the settlement in the CBA/Storm class action approved, with claimants receiving a gross settlement of $33.68 million, representing approximately 55% of the loss of the group member calculated under the ASIC Compensation Model and attributed to CBA, less a pro rata amount in respect of the applicants' costs of the proceeding;[101] the approval of the settlement of the BrisConnections class action against traffic forecaster Arup[102], and the approval of the settlement in the action against CBA in relation to investments in synthetic collateralised debt obligations, reportedly returning 32.5% of the $140 million in losses, plus costs.

101 *Sherwood v Commonwealth Bank of Australia (No 5)* [2015] FCA 688.
102 *Bulense Holdings Pty Ltd v Arup Pty Ltd* [2015] FCA 726.

Proposed class actions

A large number of matters are currently stated to be under investigation by plaintiff law firms, or reported in the media as potential class actions. While much of this is necessarily speculative, in the next 12 months we anticipate seeing a number of new securities class actions filed, as well as further actions issued as a result of catastrophic events and against government organisations. Announcements have included:

- **Securities**: actions against the Forge Group, Macmahon Holdings Limited, Iluka Resources Ltd and QBE.
- **Other investment claims**: by investors against Macquarie Investment Management Limited (on behalf of investors in van Eyk Blueprint Series funds); and Westpac (in relation to loans used for the allegedly unregistered Famularo managed investment scheme).
- **Government organisations and public interest claims**: by Nexus Energy shareholders against ASIC, among others, for an alleged breach of duties to shareholders in allowing Seven Group Holdings to proceed with its takeover of the company; against the Western Australian Government by traditional owners regarding multiple de-registrations of cultural sites; a class action brought by the Tasmanian Sexual Assault Support Service against a convicted paedophile; against the Federal Government by about 50 councils across Australia alleging unconstitutionality of GST being imposed on local councils on the basis that they should be considered part of the state; and a claim of negligence by homeowners in the Adelaide Hills regarding a flood prevention scheme.
- **Natural disasters/events**: a class action on behalf of Indonesian fishermen and seaweed farmers following a leak in the Montara oil field off the coast of Western Australia in 2009; and in relation to the Hazelwood Coal Mine fire in February 2014.
- **Consumer claims**: against builders and others involved in the development of the Docklands Lacrosse Building following a fire which spread rapidly in the building in November 2014; against Pasminco by Boolaroo property owners for damages allegedly caused by the town's former lead smelter; against Samsung in relation to washing machine house fires; ongoing investigations and assistance regarding financial advice given by NAB, ANZ, CBA and Macquarie Private Wealth; and by consumers who have contracted Hepatitis A after eating frozen berry products. A number of claims announced against telecommunications and utility companies and against HSBC and GE regarding late fees appear to be on hold pending the High Court's decision in the latest bank fees case.

In the month since the review period closed, we have already seen class actions filed by investors against Sandhurst Trustees (which oversaw the failed investment fund Wickham Securities), in relation to a 2013 bushfire in Snake Valley, near Ballarat, in relation to the destructive bushfire in Perth's hills in January 2014, a second class action regarding side effects from the use of prolapse mesh, this time against American Medical Systems, and a fresh class action against Cash Converters alleging that it circumvented interest rate caps on consumer credit by charging hefty brokerage fees.

New class action regimes – we wait

In 2014, the Queensland Government sought to introduce a class action statutory regime, largely based on the Federal Court model. However, whilst the Justice and Other Legislation Amendment Bill 2014 made it to the Parliamentary Committee, due to a change in government the Bill lapsed in January 2015. While the 2014 Bill was shelved, the new Government had previously given bi-partisan support to the legislation and it is likely to re-appear later this year.

Despite the Western Australian Law Reform Commission stating in its 2013/2014 annual report that its final report on representative proceedings would be provided to the Attorney General to table to State parliament at the end of 2014, the Commission has not yet released the report. Most stakeholders, including the Law Society of Western Australia, expect that the Commission will suggest the enactment of a legislative regime that is substantially similar to the Federal Court regime.[103] It remains to be seen whether a class action regime will be recommended and if so, when it will be implemented in WA.

103 Martin del Gallego and Alastair McLachlan "Representative proceedings reform in Western Australia", King & Wood Mallesons, June 2013.

The Harper Review – how class actions may benefit

The competition policy review undertaken by the Harper Panel has loomed large on corporate agendas over the past 12 months, with the business community awaiting the Government's response to the panel's 56 recommendations.

One recommendation could change the climate for competition and consumer related class actions. The Panel has recommended that, contrary to the current position, when proceedings brought by the ACCC are settled and declarations of contravention and other orders made on the basis of a statement of agreed facts, such facts should be prima facie evidence capable of use in later proceedings, including private actions. Presently, section 83 of the Competition and Consumer Act 2010 (Cth) has been interpreted such that only those findings of facts derived from contested hearings are capable of having such effect.

This recommendation, if adopted by the Government, has potential implications for class actions. It will make it easier for prospective class action plaintiffs to bring proceedings for damages that follow regulatory enforcement action by the ACCC, removing the need to prove the same facts again. As well as reducing cost, such a change could also increase plaintiffs' bargaining power in negotiating settlements in competition and consumer related class actions.

It is not clear whether the Government will accept the recommendation. The ACCC initially expressed concerns that extending the effect of section 83 in this way may reduce incentives both for parties to report contraventions under the ACCC's immunity policy and for parties to settle investigations once commenced due to the use that could be made of agreed facts. However, the ACCC has since signalled support for the recommendation, deciding that it could "facilitate greater access to justice, particularly for businesses that have been impacted by anti-competitive conduct".[104] The Government's response is expected this quarter.

104 Marcus Bezzi, 'Balancing public and private interests – The ACCC perspective on the Harper Committee Reforms' (Paper presented at the 2015 Competition Law Conference, Sydney, 30 May 2015). See ACCC, *Immunity and Cooperation Policy* (10 September 2014, see www.accc.gov.au/publications/accc-immunity-cooperation-policy-for-cartel-conduct)

Profiles

"Would easily recommend to others if they had a potential class action"
Client quote, 2014

"We know you'll identify the issues and nail them for us"
Client quote, 2014

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- **Australian bank** – Defending a class action brought by customers affected by the collapse of Storm Financial.
- **Global bank** – Defending a class action relating to warrants.
- **PricewaterhouseCoopers** – Acting in Centro securities class actions in the Federal Court involving allegations of failures to disclose information concerning Centro's debt position. Class actions comprised 6,000 group members and claims of $1 billion.
- **Brookfield Multiplex** – Securities class action concerning the Wembley National Stadium project. Successfully challenged the plaintiff's litigation funding arrangements as an unregistered managed investment scheme.

Antitrust

- **British Airways** – Defending a class action alleging global cartel conduct in the air cargo industry, following our role as Asia-Pacific counsel in respect of investigations and prosecutions by competition regulators in the region.
- **Chemtura** – Acting in a class action in the Federal Court of Australia alleging a price fixing cartel in relation to rubber chemicals. The action was settled by agreement between the parties, which was approved by the Court.

Infrastructure

- **Seqwater** – Acting on the class action arising out of the 2010/2011 Queensland floods.
- **Gladstone Port** – Successful strike out of a class action claim alleging damage to marine life from dredging in the Port for LNG facilities on Curtis Island.

Product liability

- **Aspen** – Defending class action proceedings in the Federal Court alleging negligence and misleading and deceptive conduct regarding the sale of a pharmaceutical product.
- **Bristol-Myers Squibb** – Acting in a product liability class action in the Federal Court and Supreme Court relating to silicone breast implants.

Other

- **Alleasing** – Acting for a national rental company in class action proceedings in the Federal Court alleging misleading and deceptive conduct and exclusive dealing in relation to leasing contracts. Proceedings settled on a "walk away" basis.
- **Travel agents** – Acting for British Airways in relation to a class action commenced by travel agents against a number of airlines over their entitlement to commission payable under standard industry contracts.

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