# THE CLASS ACTIONS LAW REVIEW

SEVENTH EDITION

**Editors**
Camilla Sanger and Peter Wickham

THE LAWREVIEWS

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# PREFACE

Class actions and major group litigation can be seismic events, not only for the parties involved but also for whole industries and parts of society. That potential impact means they are one of the few types of claim that have become truly global in both importance and scope, and this is reflected in this seventh edition of *The Class Actions Law Review*.

There are also a whole host of factors currently coalescing to increase the likelihood and magnitude of such actions. These factors include continuing geopolitical developments, particularly in Europe and North America, with moves towards protectionism and greater regulatory oversight. At the same time, further advances in (as well as greater recognition and experience of the limitations of) technology is giving rise to ever more stringent standards, with the potential for significant liability for those who fail to adhere to these protections. Finally, ever-growing consumer markets of increasing sophistication in Asia and Africa add to the expanding pool of potential claimants.

It should, therefore, come as no surprise that claimant law firms and third-party funders around the world are becoming ever more creative and active in promoting and pursuing class actions, and local laws are being updated to facilitate such actions before the courts.

As with previous editions of this *Law Review*, this updated publication aims to provide practitioners and clients with a single handbook to which they can turn for an overview of the key procedures, developments and factors in play in this area of law in a number of the world's most important jurisdictions.

**Camilla Sanger and Peter Wickham**
Slaughter and May
London
March 2023

**Chapter 1**

# AUSTRALIA

*Robert Johnston, Felicity Karageorge, Rena Solomonidis, Nicholas Briggs and Sara Gaertner*[1]

## I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

The relatively well-settled class action landscape in Australia, which has been around for nearly 30 years, saw further significant changes in 2022 with the change in government in May 2022 and the unwinding of the restrictive litigation funding scheme regulations introduced by the former conservative government, and with a number of key judgments concerning contingency fees (first introduced in 2020) and funder remuneration.

Class action regimes were implemented in the Federal Court of Australia in 1992 and have been adopted at the state or province level in the Supreme Courts of Victoria, New South Wales and Queensland.[2] In September 2022, Western Australia joined this group and introduced its own regime.[3] Each jurisdiction has adopted the broad opt-out model.

A feature of the Australian class action regime is that until recently, Australian lawyers have not been permitted to charge contingency fees, that is, a fee based on a percentage of the amount recovered. This has seen a very sophisticated and significant third-party litigation funding market develop in Australia, and this has attracted significant capital and driven up the number of class actions filed. However, Victoria passed legislation in late 2020 allowing lawyers to charge contingency fees in class actions commenced in the Victorian Supreme Court. This was a game changer.

Class actions in Australia are easily commenced on behalf of all class members, usually by a single representative who becomes the named applicant. There are really no limits on the nature of the applicant as is seen in some other jurisdictions (e.g., trade groups or other representative or public bodies or consumer organisations). The key threshold requirements are:

*a* at least seven people have claims against the same person;

*b* the claims arise out of the same, similar or related circumstances; and

*c* the claims give rise to substantial common issues of law or fact.[4]

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1 Robert Johnston, Felicity Karageorge and Rena Solomonidis are partners, Nicholas Briggs is a special counsel and Sara Gaertner is a senior associate at Johnson Winter Slattery.

2 See discussion at Section III.

3 Civil Procedure (Representative Proceedings) Bill 2019 (WA).

4 Section 33C(1) of the Federal Court of Australia Act 1976 (Cth) (the FCA Act), Section 33C(1) of the Supreme Court Act 1986 (Vic) (the SC Vic Act), Section 157(1) of the Civil Procedure Act 2005 (NSW) (CPA NSW) and Section 103(B)(1) of the Civil Proceedings Act 2011 (QLD) (CPA QLD).

The applicant may bring proceedings against several respondents even if not all class members have a claim against all respondents.[5]

An important differentiator for Australia's class action framework is that there is no 'class certification' process. The lack of a threshold of this kind has given rise to a number of competing class actions being filed in relation to the same wrongdoing, leading to skirmishes known as 'beauty parades' or 'carriage motions' to determine which action should proceed.

Australia's class action regimes operate on an opt-out basis. As Justice Jessup of the Federal Court explained, 'an applicant will define on whose behalf the proceeding is brought and, unless they opt out, all persons who fit within the relevant definition will be part of the class, and bound by any result' whether they consent to that or even know about the action.[6] This is a point of distinction between Australia and some other jurisdictions that oblige class members to take the active step of opting in to a class action. However, an applicant may also commence a closed class action, which usually comprises requiring a group member to sign up to litigation funding or a retainer with the applicant's firm to join the class. Although this appears to be inconsistent with the 'open-class' and opt-out model in the legislation, in 2007, the Full Court of the Federal Court held that a closed-group or limited-group class action is permissible.[7]

Among other key differentiators, all jurisdictions have a loser-pays costs regime; no cases are heard before juries, just judges; there are generally no punitive or exemplary damages permitted; many misrepresentation laws do not require *scienter* or knowledge (so almost akin to strict liability); and, apart from one jurisdiction now, there are no damages-based contingency fees permitted to be charged or recovered by lawyers, just their time costs.

Class actions commenced cover a wide variety of areas, including mass torts (such as defective pelvic mesh implants), damage from extreme weather events (such as bushfires and floods and failing buildings), shareholder claims and cartel cases, the Volkswagen 'Dieselgate' emissions scandal, responsible lending obligation cases, employment underpayment cases and human rights cases (such as stolen wages from Aboriginal and Torres Strait Islanders). We are also starting to see the emergence of class actions in the climate change and environmental, social and corporate governance space, and several privacy class actions following significant cyberattacks on a number of leading corporates, including medical insurers and telcos. These actions are expected develop new jurisprudence on losses for invasion of privacy and breach of confidentiality.

## II THE YEAR IN REVIEW

### i Contingency fees – an established framework in Victoria

In June 2020, the Victorian government introduced group costs orders (GCOs), which enabled the law firm representing the plaintiff and group members to receive, for their legal costs payable, a percentage of any award or settlement recovered.[8] GCOs are conditional on the law practice agreeing to become liable to pay any costs order made against the plaintiff and group members and provide any security for costs of the defendant that the court orders. The court must first approve any group cost order.

5 *Cash Converters International Limited v. Gray* (2014) 223 FCR 139.

6 *Madgwick v. Kelly* (2013) 212 FCR 1 at [151].

7 *Multiplex Funds Management Ltd v. P Dawson Nominees Pty Ltd* (2007) 164 FCR 275.

8 Supreme Court Act 1986 (Vic) Section 33ZDA.

Prior to introduction, lawyers in Australia were prohibited from charging contingency fees. Unsurprisingly, this change saw numerous class actions filed in the Supreme Court of Victoria (the only court where GCO orders can be made) in 2020 and 2021, and applications brought in existing proceedings, seeking GCOs.

Many of the applications were heard and determined in late 2021 and throughout 2022. In the early applications, the Court would appoint a 'contradictor' to advocate for group members, noting a GCO would affect group member recoveries and assist the Court to interpret the statutory provisions. At that time, there was uncertainty given that the first application was unsuccessful.[9]

Nevertheless, by end of 2022, the regime was well established, with much judicial guidance. Notably, in 2022 the Court granted at least seven group costs orders with the percentages fixed for lawyers between 22 per cent and 40 per cent of any award or settlement recovered (including one proceeding where the percentage could be ratcheted down to 16.5 per cent if the award or settlement exceeded a certain amount).[10] These orders were made in a variety of circumstances, including where a law firm was self-funded, when a law firm was funded or borrowing funds from a litigation funder and where multiple law firms were acting jointly with differing funding arrangements.

The ultimate question is whether the group costs order is appropriate or necessary to ensure that justice is done in the proceeding, which sees the Court undertaking a 'broad evaluative assessment'[11] guided by principles including: (1) group members' interests are a primary consideration;[12] (2) certainty to group members is important;[13] (3) an outcomes-based approach may be relevant but is founded on predictive modelling and subject to significant uncertainty;[14] (4) the application of investment evaluation principles may provide a rational and principled basis to evaluate a reasonable and proportionate return to the law firm;[15] (5) the group costs order permits the law firm to benefit from an upside in recovery but mitigates the risk of disproportionate erosion of group members' compensation by legal costs;[16] and (6) the Court has power to amend the percentage at any time, which is a safeguard to ensure it remains appropriate.[17]

The new regime attracted much controversy, but its proponents say it promotes access to justice by providing another mechanism for funding notoriously lengthy and expensive

9 *Fox v. Westpac Banking Corporation; Crawford v. Australia and New Zealand Banking Group Limited* [2021] VSC 573 (*Fox*).

10 Group costs orders were granted in *Allen v. G8 Education Ltd* [2022] VSC 32 (*Allen*) at 27.5 per cent; *Bogan v. Estate of Peter John Smedley* [2022] VSC 201 (*Bogan*) at 40 per cent; *Nelson v. Beach Energy; Sanders v. Beach Energy* [2022] VSC 424 (*Beach*) at 24.5 per cent; *Gehrke v. Noumi Ltd* [2022] VSC 672 (*Noumi*) at 22 per cent; *Mumford v. EML Payments Ltd* [2022] VSC 750 at 24.5 per cent; *Lieberman v. Crown Resorts Ltd* [2022] VSC 787 (*Crown Resorts*) at a starting rate of 27.5 per cent, which could be ratcheted down to either 22 per cent or 16.5 per cent; and the proceeding *Tracy-Ann Fuller & Anor v. Allianz Australia Insurance Limited & Anor* (S ECI 2020 02853) at 25 per cent.

11 *Allen* at [20]; *Crown Resorts* at [20].

12 *Allen* at [21], citing *Fox* at [34]; *Crown Resorts* at [21(b)].

13 *Allen* at [33]–[36]; *Beach* at [22]–[23]; *Crown Resorts* at [31(a)].

14 *Allen* at [26], citing *Fox* at [22]; *Bogan* at [12(h)]; *Beach* at [39]; *Crown Resorts* at [21(f)].

15 *Bogan* at [15]–[16]; *Beach* at [47].

16 *Allen* at [33]; *Beach* at [22]; *Noumi* at [30].

17 *Fox* at [148]; *Allen* at [30]; *Noumi* at [53(e)]; *Crown Resorts* at [21(i)].

class action proceedings. There do, however, remain unanswered questions for the Court to resolve. These questions include how a percentage may be reviewed upon resolution and how costs orders made against a defendant will be assessed.

It remains unclear whether other jurisdictions will follow Victoria and introduce contingency fees for class actions. Now that there is an established framework, there is potential for contingency fees to be introduced in the Federal Court of Australia, Australia's most commonly used forum for class action proceedings as well as other state courts.

### ii Scrutiny of litigation funding

After efforts by Australia's conservative government over a number of years to introduce more regulations around litigation funding and class actions, 2022 saw a new government and staged removal of those regulations, with supervision reverting to the courts with far lower levels of oversight by the regulator, the Australian Securities and Investments Commission (ASIC).

In late 2020, over a lot of opposition, the then coalition government introduced new regulations for litigation funders, which required funders to hold an Australian Financial Services Licence and to comply with additional disclosure and conduct obligations in order to conduct funding of a class action as a managed investment 'scheme', which requires the funder to appoint a responsible entity (similar to a trustee) to oversee the scheme for the benefit of scheme members, to issue a product disclosure statement (similar to an IPO document) and be subject to anti-hawking provisions.

Most commentators, even on the defendant's side, as well as ASIC, said these regulations were inappropriate for the litigation funding market. Most commentators also generally favoured the court overseeing aspects of funding on a case-by-case basis.

Since the Managed Investment Scheme regulations require significant upfront costs and the navigation of complex financial disclosures prior to establishing the scheme and commencing a class action, there was initially a marked slowdown in the filing of new proceedings in 2020, 2021 and the beginning of 2022 as funders waited to receive their licences and began to absorb the regulatory changes into their business models.

The then conservative government made a further attempt to bolster these laws in late 2021 in the Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021, whereby it sought to introduce, among other things, a return to book building as a means of generating a funder's return with express group member consent,[18] and a rebuttable presumption against more than 30 per cent of claim proceeds being returned to a funder.[19] At the time, many commentators were of the view that the Bill was designed to stifle class actions and litigation funding.

However, the Bill ultimately did not pass ahead of the May 2022 federal election.

In May 2022, the conservative government was replaced by an Australian Labor Party majority government, which signalled it would reverse a number of the regulations and review and adopt many of the 2019 Australian Law Reform Commission's recommendations coming out of its review of class actions and litigation funding (ALRC2019) (which had laid dormant and not acted upon by the conservative government).

18 Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Cth) Sch 1, item 7 (s601LG(3)).

19 Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Cth) Sch 1, item 7 (s601LG(5)).

In the meantime, a challenge was heard by the Full Court of the Federal Court to the regulations seeking to restrict litigation funders and requiring them to comply with onerous managed investment scheme obligations.[20] The appeal, brought by the applicant's litigation funder, LCM Funding, was ultimately successful with the Court determining that the managed investment scheme regulations could not be applied to the funding of a class action, thus removing a core piece of the 2020 regulations. In his judgment, Lee J held that:

> *[t]he characterisation of litigation funding arrangements as managed investment schemes is a case of placing a square peg into a round hole. It can only be done if one adopts an approach to statutory construction which atomises s 9 of the Corporations Act 2001 (Cth) (Act) into component parts, and then individually parses each component literally, while paying insufficient attention to both context and purpose.*[21]

Following *Stanwell*, the Labor government repealed a number of the other regulations in December 2022,[22] which is expected to lead to the introduction of new and overseas funders into the Australian market, and also puts supervision for these arrangements back with the courts. We note for completeness that ASIC requires all funders to take certain steps to manage and advise claimants of conflicts of interest[23] but is otherwise no longer concerned with the business activities of litigation funders.

### iii Risks around common fund orders on settlement subsided

It is worth highlighting that, leaving aside the Bill mentioned above, there has also been uncertainty for funders around their remuneration or commission arrangements in class actions, including around the availability of what are called 'common fund'-type orders (where all group members pay a portion of the funder's commission and costs even if they have not signed any agreement with the funder). Instead of book building and seeking to individually sign up thousands of group members, funders sought common fund orders (CFOs) from the court. Some were sought at the outset or early in the litigation rather than at the end, so that the funder knew in advance what its likely returns would be. The validity of early CFOs was questioned by the High Court of Australia in *Lenthall*,[24] which outlawed the making of early CFOs.

While there have been a number of single judges awarding CFOs upon settlement, there have still been some judges who do not agree that the court has power to make such awards so this remains uncertain. Several cases have been emphatic in permitting CFOs on settlement, including in the *Swann Insurance*[25] and *Davantage*[26] class actions, among others.

In April 2022, a significant judgment potentially involving over a billion dollars was made in favour of the applicant in a defective car class action against Toyota. The funder in that case intends to seek a common fund order as part of any regime to distribute damages

20 *LCM Funding Pty Ltd v. Stanwell Corporation Limited* [2022] FCAFC 103.

21 *LCM Funding Pty Ltd v. Stanwell Corporation Limited* [2022] FCAFC 103 [7].

22 Corporations Amendment (Litigation Funding) Regulations 2022 (Cth).

23 See *ASIC Regulatory Guide* RG 248.

24 *BMW Australia Ltd v. Brewster*; *Westpac Banking Corporation v. Lenthall* [2019] HCA 45.

25 *Asirifi-Otchere v. Swann Insurance (Aust) Pty Ltd (No. 3)* [2020] FCA 1885.

26 *Evans v. Davantage Group Pty Ltd (No. 3)* [2021] FCA 70.

to group members, which is the first CFO judgment application in Australia. At the time of writing, the case is on appeal, and the common fund order aspects are likely to be revisited if the appeal is successful.

In February 2023, another single judge judgment was handed down that refused a CFO on settlement, which has meant for the funder a difference between a claimed commission of about A$25 million and an awarded commission of about A$12 million. This is likely to be appealed, and so the issue should be resolved, at least at the first appellate level, before 2024.

### iv Shareholder class actions: softening decline

Securities class actions have for many years been a dominant feature of the Australian class-action landscape. This was in particular a product of Australia's plaintiff-friendly class action framework, a very strict continuous disclosure regime, as well as a tendency for corporate defendants to settle before trial.

However, in recent years, shareholder class actions have been on the decline in Australia. This trend was most likely the result of a number of headwinds. First, Australia's continuous disclosure regime was amended in 2020. Claimants, for the first time, were now required to prove fault for private and regulatory actions involving allegations of continuous disclosure contraventions, a change that made securities actions more difficult to successfully mount.[27] Second, there was a string of judgments in favour of corporate defendants in securities class actions[28] together with what appeared to be a growing willingness of corporate defendants and their insurers to run matters to hearing, whereas the previous tendency was to settle.[29]

Added to the above was the ongoing issue of competing class actions, which has particularly plagued securities class actions in recent years. The issue arises where multiple class actions are filed against the same respondent for the same or similar alleged wrongdoing. This has commonly occurred after high-profile corporate misconduct or 'stock drops'.

After a significant period of uncertainty, the High Court clarified in March 2021 the principles to be applied in determining carriage motions in *Wigmans*,[30] which made clear that there is no presumption that a class action commenced first in time shall prevail and that in competing class actions, where the interests of the defendant are not differentially affected, it is necessary for the court to determine which action going ahead would be in the best interests of group members.

In any event, in 2022, Australia saw a mild reversal of the decline of shareholder class actions with an increase in filings relative to the previous year, although arguably not sufficient to signal a reversal of the more long-term downward shift. That suggests litigation funders remain wary of the costly and risky process of competing in beauty parades, and a shift in the culture of corporate defendants towards defending matters to hearing.

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27 Those changes were initially introduced as a temporary measure in response to the COVID-19 pandemic but were subsequently made permanent. See: Corporations (Coronavirus Economic Response) Determination (No. 2) 2020; Treasury Laws Amendment (2021 Measures No. 1) Act 2021.

28 See for example, *Bonham as Trustee for the Aucham Super Fund v. Iluka Resources Ltd* [2022] FCA 71; *TPT Patrol Pty Ltd v. Myer Holdings Limited* [2019] FCA 1747; *TPT Patrol Pty Ltd v. Myer Holdings Limited* [2019] FCA 1747 and *Crawley v. Worley* [2020] FCA1522 but overturned on appeal on 11 March 2022 [2022] FCAFC 33.

29 Largely because the matters tended to settle, Australia did not have any superior judgments in a shareholder class action until 2019.

30 *Wigmans v. AMP Limited* [2021] HCA 7.

### v Rising prominence of alternative forms of class actions

As the growth of shareholder class actions has slowed in Australia, other forms of class actions have risen in prominence. In particular, Australia has seen a substantial increase in the number of consumer, government and employment-related class actions.[31]

The rise in consumer class actions follows a public inquiry in 2018 into the Australian banking, superannuation and financial services industry, which has given rise to a raft of class actions seeking recovery for bank customers and superannuation clients. Aside from banks, insurers and superannuation firms, car manufacturers continue to be a particular target of consumer class actions arising from safety and other manufacturing defects. The growth in these 'retail' claims follows a greater willingness by litigation funders to fund these smaller claims, which individually have a smaller value but, in the aggregate, see huge losses.

Claims against the government have also been on the increase, including a number of novel claims arising from climate change risks. This includes, for example, a claim against the federal government for failing to disclose climate change risks to investors in sovereign bonds,[32] an action on behalf of indigenous people in connection with the impact of climate change, including damage to sacred sites,[33] and another class action opposing the granting of a coal mining licence on the grounds of an asserted duty of care to protect Australian children from the effects of climate change.[34]

Employment-related class actions have been fuelled by developments in recent years in Australian employment law regarding, in particular, the test to determine whether an independent contractor is an employee, the characterisation of casuals and sham contracting. There has also been a surge of systematic underpayment claims involving large and established corporate defendants, including for example, McDonald's[35] and the Commonwealth Bank of Australia.[36] However, the High Court has delivered a number of important decisions recently that have clarified the legal tests for independent contractors and casual employees and that have placed primary importance on the formal written terms agreed between the parties and not on the substance of the working relationship, which can be very different.[37] It is that category of employment class actions will subside.

31 See *The Review*, Class Actions in Australia, King & Wood Mallesons.

32 *O'Donnell v. Commonwealth of Australia* (Federal Court of Australia Proceedings VID482/2020).

33 *Pabai Pabai & Anor v. Commonwealth of Australia* (Federal Court of Australia Proceedings VID622/2021).

34 *Sharma & Ors v. Minister for the Environment* (Cth) (Federal Court of Australia Proceedings VID607/2020).

35 *Elliot-Cardee& Anor v. McDonald's Australia Limited* (Federal Court of Australia Proceedings VID762/2019).

36 *Finance Sector Union of Australia v. CBA* (Federal Court of Australia Proceedings NSD39/2022).

37 See *Workpac v. Rossato* [2021] HCA 23 (in relation to casual employment); and *ZG Operations Australia Pty Ltd v. Jamsek* [2022] HCA 2 (in relation to independent contractors).

## III PROCEDURE

Australia's federal class action regime commenced in March 1992 with the introduction of Part IVA of the Federal Court of Australia Act 1976 (Cth) (the FCA Act). Some, but not all, Australian states have since followed with regimes that mirror their federal counterpart.[38]

### i Types of action available

The Australian class action regimes do not impose limits upon the causes of action that are permitted to found a class action. As long as the criteria for commencing a class action is met (discussed below), then a group of claims may form a class action. There are no limitations as seen in some other jurisdictions where only registered consumer groups or the like are permitted to bring claims.

That said, shareholder actions have dominated the Australian class action landscape for some time, although the trend is easing in more recent times in favour of consumer class actions. Shareholder claims have historically been attractive to litigation funders because of Australia's strict continuous disclosure regime and because group member losses are usually relatively easy to quantify. With all that said, certain developments in recent years may have taken some of the gloss off shareholder class actions for litigation funders. First, Australia's strict continuous disclosure laws were relaxed during covid-19, and those changes were made permanent – setting the bar higher for establishing wrongdoing. It remains to be seen if the May 2022 change in federal government will see these changes repealed in a similar vein to the unwinding of litigation funding regulations. Further, the funded shareholder class action space is becoming ever more competitive, exerting downward pressure on funding commissions and increasing risk.

Further, the types of class actions being brought (aside from shareholder claims) are becoming more diverse. Other actions include claims relating to product liability, consumer protection claims, employment, construction, mass tort claims, human rights violation claims. climate change-related claims and covid-19 claims. Most recently there have been announcements of investigations into privacy and data breach class actions following a number of high-profile data breaches in Australia in 2022.

### ii Commencing proceedings

Class actions (referred to as 'representative proceedings' in Australian legislation) can be commenced where relatively straightforward criteria are met, as follows:

*a* at least seven people must have claims against the same person;

*b* the claims must arise out of the same, similar or related circumstances; and

*c* the claims must give rise to substantial common issues of law or fact.[39]

38 As noted above, there are there are regimes for class actions in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales, Queensland. Legislation to introduce a new class action regime for Western Australia was passed in September 2022 (Civil Procedure (Representative Proceedings) Act 2022 (WA)) but at the time of writing has not come into operation.

39 Section 33C of the FCA Act, Section 33C(1) of the SC Vic Act, Section 157(1) of the CPA NSW and Section 103(B)(1) of the CPA QLD.

Assuming that these criteria are met, any person (a lead applicant) may commence a class action on his or her own behalf and on behalf of those whose claims arise out of the same or similar or related circumstances and give rise to substantial common issues of law or fact.

The choice of lead applicant is an important feature of a class action, because the trial will generally be a trial of the lead applicant's case only, along with issues of fact and law common to the group members. That said, there are no criteria or limits as to which member of a class may act as lead applicant, although once proceedings are under way the court may remove a lead applicant that it believes is not able to adequately represent the interests of group members.[40] There may also be subgroups within a class action, representing particular groups with particular common characteristics within the larger group.

Notably, reflecting a deliberate choice by legislators, the Australian class action regimes have no requirement for US-style class certification at the time of filing.

In any event, the threat of unsuitable class actions is addressed under the Australian regimes, in part, by the power of the court on application, or of its own motion, to order that proceedings no longer continue as a class action if it is satisfied that it is in the interests of justice to do so.[41] However, this system arguably shifts the burden from the plaintiff having to prove that a class action is suitable to the defendant having to prove that the class action it faces is unsuitable.

Persons upon whose behalf claims are commenced (termed 'class members' or 'group members') are not parties to the proceedings. They do not need to be named or specified at the time of filing.[42] Nor is the plaintiff (or lead applicant) required to seek the consent of a person before making that person a group member.[43] Frequently, a group member will have no legal representation in respect of the matter and may be entirely oblivious to their status as a group member.

### *The opt-out nature of the Australian class action system*

The class action regimes in Australia operate on an opt-out basis – meaning that all persons who fall within a pleaded class definition are members of the class and bound by any result unless they opt out. Group members who opt out of a class action cease to be bound by the outcome of the action but also become ineligible to receive any proceeds from it.

The opportunity to opt out is generally facilitated by the distribution of an opt-out notice to all group members, at an appropriate time after the proceedings have commenced.[44] These notices typically provide group members with an explanation of the nature of the claims and class action processes generally. The notices also explain the effect of opting out and how to opt out (by filing a prescribed notice with the court). Notably, opt-out rates are generally quite low and are usually only approximately 10 to 20 per cent of the total group at most.

40 See, for example, Section 33T of the FCA Act.

41 Section 33N of the FCA Act, Section 166 of the CPA NSW, Section 33N of the SC Vic Act and Section 103K of the CPA QLD.

42 Section 33H of the FCA Act.

43 With limited exceptions: see Section 33E of the FCA Act.

44 Section 33X of the FCA Act.

***Limitation periods***

Upon the commencement of a class action, the running of any limitation period that applies to the claim of group members is suspended (or 'tolled'). The limitation period does not begin to run again unless either the group member opts out or the proceedings, and any appeals arising from the proceedings, are determined without finally disposing of the group member's claim.[45]

### iii Procedural rules

The courts have been granted extensive case management powers in relation to the conduct of class action proceedings and the courts almost have a supervisory or guardian type role to play in ensuring group members' interests are protected.[46]

Not surprisingly, the key procedural differences between conventional litigation and class action litigation involve protecting the interests of group members or facilitating their rights. Those differences (some of which are discussed further below) include:

*a* an opt-out process to give notice to group members of their status as group members and their right to opt out of the proceedings; and

*b* a settlement approval process, in which a judge reviews a prospective settlement to ensure it is fair and reasonable and in the interests of group members. As part of that process, group members are given notice of the settlement and the opportunity to object and appear before the judge at the settlement approval hearing, if they wish to do so.

The hearing of a class action generally involves the trial of common questions of fact and law as part of the trial of the lead applicant's claim. Following a successful initial trial, a process or mechanism to resolve the individual claims of group members is developed. This might take the form of a series of mini trials, or a 'claims resolution process', whereby an independent adjudicator (who, depending on the nature of the dispute, might be a lawyer or barrister, or an accountant) is appointed to review and determine group member claims with the benefit of the findings from the initial trial and usually in the most cost-effective and efficient manner. However, once the initial trial is successful, there is usually a streamlined, cost effective claims resolution process agreed by the defendant.

### iv Damages and costs

The costs regime in Australia has a number of significant differences from those in other jurisdictions. First, Australia has a loser-pays or adverse costs system, meaning the unsuccessful litigant is generally ordered to pay the majority of the legal costs of the successful litigant. Group members, but not the lead applicant, are generally immune from adverse costs orders.[47] This difference operates as an obvious disincentive to be the lead applicant,

45 Section 33ZE of the FCA Act.

46 For example, the Federal Court of Australia has broad powers to discontinue representative proceedings; the power to substitute a lead applicant who is not adequately representing the interests of group members; the power to order that notice of 'any matter' be given to group members; the ability to decline or approve settlements; and the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding: See D Grave et al., Class Actions in Australia (2nd Edition) at 384.

47 See, for example, Section 43(1)(a) of the FCA Act, Section 33ZD of the SC Vic Act and Section 181 of the CPA NSW.

given that it carries serious financial risk of adverse costs liability, which in large class actions is generally in the millions of dollars, although it has been somewhat ameliorated by the proliferation of litigation funding in Australia.

Plaintiffs must also usually contend with an application that they give security for the defendant's costs, frequently worth millions of dollars over the litigation. Traditionally this was required to be by way of money paid into court or a bank guarantee, but an alternative form of security is now common whereby a large insurer provides an indemnity directly to the defendant for any adverse costs orders made against the lead plaintiff in favour of the defendant.[48]

The growth in litigation funding in Australia has coincided with increased debate as to the traditional doctrines of maintenance and champerty. In 2020, Victoria became the first Australian jurisdiction to permit lawyers to charge contingency fees in Victorian class actions. We referred to above the cost and security for costs differences under this regime.

Generally in class actions in Australia, there are no exemplary or punitive or multiples of damages awarded and damages are assessed on actual losses suffered by the group members.

### v Settlement

The large majority of class actions in Australia settle before trial. The settlement of any class action must be approved by the court. The settlement process under the Australian class action regimes is relatively involved, because the settlement binds group members who may have had little or no involvement in the matter up to that point. The regime has, therefore, been designed to help ensure their interests are adequately protected. The settlement process usually involves:

*a* giving notice to group members of the settlement (this may give information such as the settlement amount or give an indication of the expected returns to group members);[49]

*b* giving group members the opportunity to make an objection to the settlement if they consider it not in their interests; and

*c* having the court review the proposed settlement to ensure it is fair and reasonable and in the interests of group members.[50]

Senior counsel for the plaintiff will generally provide a confidential opinion to the court as to the reasonableness of the settlement given prospects of success, litigation and recovery risks, and the lead applicant's solicitors will generally lead evidence as to how much of the settlement sum will go towards the payment of legal costs and litigation funder commissions (if involved), the costs of any claims resolution administration process and how much will be paid to group members.

The court has the power to reject settlements outright, and has done so.[51] In the alternative, the court may adjust features of a settlement to make it fairer and more reasonable to group members, including to ensure a higher proportion of the settlement fund is paid to

48 See, for example, *DIF III Global Co-Investment Fund, LP & Anor v. BBLP LLC & Ors* [2016] VSC 401.

49 See Section 33X of the FCA Act.

50 See Section 33V of the FCA Act.

51 See, for example, *ASIC v. Richards* [2013] FCAFC 89 (12 August 2013) and *Peterson v. Merck Sharp & Dohme (Aust) Pty Ltd (No. 6)* [2013] FCA 447.

group members.[52] This approach reflects concerns as to the proportion of settlement sums generally being paid to lawyers and litigation funders, in comparison to the sums received by lead applicants and group members.

What has also become more common is the appointment of an independent lawyer to be a contradictor and provide their independent views about the settlement for the benefit of the court.

It has also been common for the lawyers who acted for the lead applicants to be appointed by the court as settlement administrators, to adjudicate on group member claims and finalise the distribution of the settlement funds. In recent years, however, it has become more common for accountants, particularly with insolvency experience, to take on the role of settlement administrator and, in early 2023, Justice Lee of the Federal Court of Australia ordered that a settlement administration process be advertised for a competitive tender process to ensure that the administration is cost-effective and best serves the interests of group members.[53] A tender process for settlement administration was recommended in ALRC 2019, so this may well become the new normal.

***The class closure process – scaled back in 2020 but developments likely in 2022***

One difficulty with the opt-out system is that having an open-ended class of group members who fall within pleaded class criteria but may or may not be contactable or willing to engage with the class action process can make settlement difficult. The need to identify a finite group eligible to share in any settlement has given rise to what is referred to as a 'registration' or 'class closure' process.

Registration processes were not contemplated by the legislation but arose as a matter of practice. This process also developed so that defendants had a better idea of the universe of persons who will be bound by any settlement, the value of their claims and those who will not be bound. Class closure processes were generally (but not always) ordered in advance of a mediation and required group members who wished to be eligible to share in the proceeds of any settlement to take a positive step and register – usually by completing and submitting a paper or online form with registration details.

There has, however, been a growing sense of judicial uneasiness with class closure orders made in advance of mediation. Courts have been critical of the arguably harsh outcome of shutting out group members who failed to register, which was said to be at odds with the open class action model prescribed by the Australian legislation.

It was in that context that a series of decisions in the Supreme Court of New South Wales and in the Full Court of the Federal Court of Australia were handed down in 2020 and 2021 rejecting this registration or class closure process in advance of any settlement as going outside the relevant intent of the class action legislation and the court's powers.[54]

However, in 2022, the Full Court made orders permitting a notice to be sent to group members notifying them that if the parties reach an in-principle settlement, orders would

52 *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)* [2018] FCA 1842 (23 November 2018).

53 *Kathryn Gill & Ors v. Ethicon Sarl & Ors* (NSD 1590/2012); *Lisa Talbot v. Ethicon Sarl & Ors* (NSD 310/2021).

54 *Hadelhurst v. Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2020] NSWCA 66; *Owners – Strata Plan No. 87231 v. 3A Composites GmbH (No. 3)* [2020] FCA 748; *Furnell v. Shahin Enterprises Pty Ltd* [2021] FCA 73.

be sought binding all group members to the outcome and precluding unregistered group members from participation. In doing so, the Full Court rejected the reasoning of the Supreme Court of New South Wales in *Wigmans v. AMP*[55] as 'plainly wrong'.

Presently, therefore, a rift appears to have opened between the Full Court of the Federal Court of Australia and the Supreme Court of New South Wales as to the permissibility of a class closure process in advance of settlement, which can only be resolved by our High Court.

## IV CROSS-BORDER ISSUES

As with conventional commercial litigation, class actions frequently involve cross-border issues. Defendants outside Australia may be, and have been, prosecuted, although court approval is necessary to effect service on overseas defendants.

Australian courts have the power to decline to exercise jurisdiction when an alternative forum is 'more convenient' to hear the claim. However, that power is exercised with 'extreme caution' and only if it can be demonstrated that the local forum is 'clearly inappropriate' for the determination of the claim.[56]

There are numerous instances where class actions in international jurisdictions have led to or influenced the commencement of class actions in Australia and vice versa. For example, the class actions in the United States against chemical manufacturers 3M, DowDuPont, Chemours and others in relation to allegedly toxic polyfluoroalkyl firefighting foam (or PFAS) have resulted in the institution of similar class actions in Australia against the Australian Department of Defence in relation to its use of the same foam.

There were a number of very significant jurisdictional-style challenges brought in 2022 around whether overseas persons can be part of a class action proceeding before an Australian court, whether an Australian Court can hear and determine breaches of foreign laws for the benefit of foreign group members and whether defendants can restrict non-residents from participating in Australian class actions.

In a shareholder class action against mining giant BHP Billiton, there was a challenge to the ability for group members who reside outside Australia, which includes a significant number of institutional investors, to be part of a class action within Australia. BHP submitted, among other matters, that Part IVA of the FCA Act does not apply extraterritorially and has not been drafted to apply extraterritorially. BHP was concerned that overseas group members once compensated in Australian proceedings may also then seek to bring a separate claim in another jurisdiction seeking further compensation. These arguments were rejected at first instance,[57] by the Full Court of the Federal Court of Australia,[58] and most recently, in October 2022, by the High Court of Australia.[59] The High Court confirmed that, unlike some other jurisdictions, all persons, including Australian non-residents, can participate as group members in Australian class actions.

In the *Ruby Princess* class action, Carnival Cruises as the respondent challenged the status of non-resident group members who had signed contracts governed by the laws of the United Kingdom and the United States (with the latter also having a class action waiver

55 *Wigmans v. AMP Limited* [2021] HCA 7.

56 *Oceanic Sun Line Special Shipping Co Inc v. Fay* [1988] HCA 32; (1988) 165 CLR 197, 241.

57 *Impiombato v. BHP Group Limited (No. 2)* [2020] FCA 1720.

58 *BHP Group Limited v. Impiombato* [2021] FCAFC 93.

59 *BHP Group Ltd v. Impiombato* [2022] HCA 33.

clause) restricting their ability to participate or join Australian class actions. The Federal Court at first instance rejected the respondents' argument about the fairness of the terms within those agreements and alternatively held that the claims under the Australian Consumer Law were valid in that there was a substantial connection to NSW and the non-residents could participate in the Australian class action.[60] The Full Court of the Federal Court of Australia, however, threw out the non-resident group members and held by a majority, that neither an exclusive jurisdiction clause nor a class action waiver clause were unfair within the meaning of Section 23 of the Australian Consumer Law and were otherwise valid and enforceable.[61] The Court also rejected the applicant's argument that the class action waiver clause was contrary to the class action regime provided for in Part IVA of the Federal Court of Australia Act. The matter is currently the subject of an application for special leave to the High Court.

In the a2 Milk class action brought against The a2 Milk Company Ltd (a2 Milk), whose shares are listed on both the Australian Securities Exchange and the New Zealand Stock Exchange, the Victorian Supreme Court was asked whether it could hear claims that a2 Milk engaged in misleading or deceptive conduct and failed to comply with its continuous disclosure obligations under both Australian and New Zealand (NZ) law in relation to its future trade plans and profit guidance in 2020 and 2021. The Court determined that it did have jurisdiction, finding that it had unlimited jurisdiction, including to determine claims under NZ statute; that there was no policy reason why it should not enforce the NZ laws, which it was found did not confer exclusive jurisdiction on the NZ courts; and that it had power to award compensation and it was appropriate for it to do so (as part of the substantive NZ law) if the contraventions of the NZ statutes are established.

This is a very significant case that could open the way for truly global class actions to be commenced in state courts in Australia for the benefit of non-resident group members for breaches of foreign laws.

## V OUTLOOK AND CONCLUSIONS

The past year in the Australian class action specialist area has brought much needed resolution to various uncertainties that were plaguing the class action landscape, including the May 2022 change in federal government leadership resulting in the winding back of litigation funding regulations, more guidance on group costs orders arising from decision made in the Supreme Court of Victoria and a judgment from the High Court in the *BHP* appeal. Still, 2022 continued the trend of rapid evolution and growth in the Australian class action space, and there remain a number of matters of importance to the industry that have yet to be resolved.

Developments to watch in 2023 include:

*a* the effect there will be on the bringing of shareholder class actions with anticipated further changes to the law around the continuous disclosure obligations of companies;

*b* the question whether group costs orders at settlement or the conclusion of cases will be permitted by the High Court or whether federal legislation is required;

60 *Karpik v. Carnival plc (The Ruby Princess) (Stay Application)* [2021] FCA 1082.

61 It should be noted, however, that the validity of the class action waiver clause appears to have turned very much on the circumstances of that particular case, and the decision arguably does not green-light class action waiver clauses in Australia generally.

*c* the outcome of the special leave application to the High Court in the *Ruby Princess* class action to determine the validity of class action waiver clauses and so whether non-residents can be barred from participating in Australian class actions; and

*d* the issue as to whether there will be a move towards truly global class actions in Australian state courts following recent decisions that not only allowed non-residents to be described as group members (without needing to opt in) but also permitted claims to be made of breaches of foreign laws and damages to be awarded to non-residents for breaches of their laws.

**Appendix 1**

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