THE CLASS ACTIONS LAW REVIEW

FIFTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

THE CLASS ACTIONS LAW REVIEW

FIFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2021
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Camilla Sanger

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gracie Ford

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Anne Borthwick

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-764-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ARENDT & MEDERNACH

ARNTZEN DE BESCHE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

GORRISSEN FEDERSPIEL

HENGELER MUELLER

JOHNSON WINTER & SLATTERY

KACHWAHA & PARTNERS

KENNEDYS

LOYENS & LOEFF

NAGASHIMA OHNO & TSUNEMATSU

PINHEIRO NETO ADVOGADOS

RONEN ADINI & CO

SIM CHONG LLC

SLAUGHTER AND MAY

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ

CONTENTS

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, as reflected in this fifth 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 technology, as well as greater recognition and experience of its limitations, is giving rise to ever more stringent standards, offering 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 sophisticated and active in promoting and pursuing such claims, and local laws are being updated to facilitate such actions before the courts.

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

Camilla Sanger
Slaughter and May
London
March 2021

Chapter 1

AUSTRALIA

Robert Johnston, Nicholas Briggs and Sara Gaertner[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

The class action landscape in Australia has seen significant changes in the past few years, and 2020 was no exception both with significant judgments being handed down and with new regulations impacting funders – and this was despite the global pandemic caused by covid-19. Notwithstanding these changes, Australia's class actions framework has continued to function well, balancing the desire for better consumer protection and access to justice with the need for certainty and a measured, appropriate regime for defendants and the corporate world, that is, one that is not overly 'plaintiff friendly'. There are regimes for class actions in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales and Queensland.[2] They have all adopted the broad 'opt out' model. Western Australia is in the process of introducing a class action regime; however, the 2019 Bill has still yet to be passed.[3] The Federal Court regime was the first class action regime to be introduced in Australia over 25 years ago now in 1992, and although there are some differences (particularly with the Supreme Court of Victoria), the state regimes are broadly similar to the Federal Court.

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, which has attracted significant capital and driven up the number of class actions filed. However, recently one state, Victoria, passed legislation in late 2020 allowing lawyers to charge contingency fees in class actions in its courts, but exactly how that will operate is currently playing itself out with the first of these cases making their way through the courts now.

Class actions in Australia are easily commenced on behalf of all class members by a representative who becomes the named applicant. The 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]

---

1 Robert Johnston is a partner and Nicholas Briggs and Sara Gaertner are senior associates at Johnson Winter & Slattery.

2 See discussion at Section III.

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

4 Section 33C of the Federal Court of Australia Act 1976 (Cth) (the FCA Act), Section 33C of the Supreme Court Act 1986 (Vic) (the SC Vic Act), Section 157 of the Civil Procedure Act 2005 (NSW) (CPA NSW) and Section 103(B) 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. As long as seven or more persons have claims against the same respondent, an applicant can join other respondents against whom some class members have claims, but some do not.[5]

An important differentiator for Australia's class action framework is that there is no 'class certification' process. The lack of such a threshold has given rise to a number of competing class actions being filed in relation to the same wrongdoing, and that has led to skirmishes known as 'beauty parades' to determine which one or more of the overlapping class actions 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 opt in to a class action.

As a consequence of the applicant's ability to define the class in the pleading commencing a class action, a common practice has been to commence class actions on a 'closed-class' basis. In these instances, the class definition usually comprises those persons who have entered into a funding agreement with a third-party litigation funder, effectively requiring potential class members to opt in by taking the positive step of executing a funding agreement. Although this appears to be inconsistent with the 'open-class' and opt-out model in the legislation, in 2007, the Full Federal Court held that a closed- or limited-group class action is permissible.[7] It is generally accepted that this model has contributed to funders' preparedness to fund class actions, and therefore to an overall increase in their number.

Class actions commenced since 1992 cover a variety of areas, including mass torts such as defective pelvic mesh implants, damage from extreme weather events such as bushfires and floods, failing buildings, the Volkswagen diesel emissions scandal, responsible lending obligations, employment-related cases and human rights cases such as stolen wages from Aboriginal and Torres Strait Islanders. The recent trend in the Australian class action space has continued with a greater number of claims by investors seen in the securities or shareholder class actions space[8] and consumer claims concerning financial products or services. We are also starting to see the emergence of class actions in the climate change and corporate social responsibility space.

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 In the 2018–2019 financial year, 37.5 per cent of funded class actions were brought on behalf of shareholders: see Vince Morabito and Michael Duffy, 'An Australian Perspective on the Involvement of Commercial Litigation Funders in Class Actions' (2020) 3 *New Zealand Law Review* 377, 389.

II THE YEAR IN REVIEW

i Evolution of power to make 'common fund' orders

October 2016 was a significant milestone for class actions in Australia, with the Full Federal Court approving at an early stage of a case an application for an order known as a 'common fund' order in *Money Max*.[9] In *Money Max*, the Court very early on in the case accepted that all class members must contribute to the litigation funder a percentage of any monies they receive as a result of the proceeding, irrespective of whether they have entered into a funding agreement with the litigation funder. This of course provided greater certainty for funders and removed risk as they knew at an early stage what returns they would be guaranteed if successful. This decision has been seen as encouraging litigation funders to fund more open class actions, as they could safely presume that they would be able to recover monies from all class members, including those who did not execute a funding agreement.[10]

From December 2019, a period of uncertainty began, with the High Court delivering a judgment in *Lenthall*,[11] finding that the courts were not empowered to make common fund orders in class actions at an early stage of the proceedings. This has had a significant impact on the class action space, with potential implications for consumers and funders alike. There were concerns that there would be fewer cases filed or only filed on a closed-class basis and a reduced appetite for certain types of class actions, such as consumer-focused actions with high numbers of group members but low-value claims. There was a concern about a return to the time-consuming and prohibitively expensive book-building era.

Many commentators and judges had their own views about the interpretation of the High Court's decision, and whether it closed off common fund orders for good, or simply confirmed the lack of power to make them at an early stage of class action proceedings, as opposed to making orders in the nature of a common fund order at the end of proceedings either for the purposes of the settlement of a class action (a 'settlement CFO') or following judgment on a class action (a 'judgment CFO'). More recently, the NSW Court of Appeal and Full Court of the Federal Court gave positive indications about the ability of the courts to make common fund orders at a later stage of proceedings; however, those judgments[12] were not decisive because the issues in those cases did not go beyond hypothetical postulation.

This uncertainty has, for the time being, been resolved since Justice Lee's approval in December 2020 of a settlement CFO in *Swann*[13] pursuant to Section 33V(1) of the FCA Act, although his Honour expressed that he would have made the order in any event relying on Section 33V(2) or in equity. Similarly, in February 2021 Justice Beach approved a settlement CFO in *Davantage*.[14] Time will tell whether the question about the power of the Court to make CFOs at the end of proceedings makes its way to the High Court and if so what they will say. The upshot is that this key area still has high risks for funders because of this uncertainty.

9 *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited* [2016] FCAFC 148 (26 October 2016).

10 On this point see Section V, 'Outlook and conclusions'.

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

12 *Brewster v. BMW Australia Ltd* [2020] NSWCA 272; *Davaria Pty Limited v. 7-Eleven Stores Pty Ltd* [2020] FCAFC 183.

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

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

ii Scrutiny of litigation funding and contingency fees

The intense scrutiny of litigation funding in Australia continued throughout 2020.

In May 2020, the Australian federal government announced a fourth inquiry into litigation funding and the regulation of the class action industry. This followed the Productivity Commission's 2014 report on Access to Justice Arrangements, the Victorian Law Reform Commission's 2018 report on Access to Justice: Litigation Funding and Group Proceedings, and the Australian Law Reform Commission's 2019 report on Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders. It is fair to say that all these reports broadly supported the current class action regimes in Australia although recommending various minor amendments here and there. Interestingly, all inquiries also supported the introduction of contingency fees for lawyers. Largely however, governments did not act on the vast majority of the recommendations made (apart from Victoria introducing contingency fees for lawyers in class actions).

Notwithstanding the commencement of this fourth inquiry and before it reported back to the Parliament, on 22 May 2020 the Australian federal government announced sweeping new changes to the regulation of litigation funders in Australia. These controversial changes, effective from August 2020, require litigation funders operating in Australia to have a financial services licence, and to comply with the Managed Investment Scheme rules and regulations. There are onerous obligations around, and also a number of unanswered questions about, compliance with and the operation of these regulations. This uncertainty and the largely 'red tape' nature of the regulations have put a brake on the activities of litigation funders as they work through all the implications.

The fourth recent inquiry generated significant interest and resulted in a report released on 21 December 2020 by the Parliamentary Joint Committee on Corporations and Financial Services (the Parliamentary Joint Committee Report). The Parliamentary Joint Committee Report proposed 31 recommendations, including (inter alia) increased disclosure requirements concerning conflicts of interest, changes to continuous disclosure laws, requirements for litigation funding agreements to be approved by the Court to be enforceable, the introduction of express powers for the Court to resolve competing class actions, to make class closure orders, to reject, vary or amend the terms of any litigation funding agreement and to make costs orders against litigation funders. The Parliamentary Joint Committee Report also expressed support for the changes to the regulation of litigation funders in Australia, but recommended legislating a fit-for-purpose MIS regime tailored for litigation funders. All eyes are now on exactly what legislation will be formulated and introduced to give effect to these recommendations.

Contingency fees also continued to attract attention in 2020, with the Victorian Labor government passing legislation[15] effective from 30 June 2020 that permits lawyers to charge contingency fees in Victorian class actions, which is a first for Australia. These will be called group costs orders (GCOs) and must be approved by the Court. In return for allowing lawyers to charge a contingency fee, GCOs will require the lawyers to provide security for costs and to take on adverse costs liability.

The Parliamentary Joint Committee Report, recognising the risk of forum shopping given this change to the class action framework in Victoria, has recommended that the Federal Court be conferred exclusive jurisdiction with respect to civil class actions arising under the

15 Justice Legislation Miscellaneous Amendments Act 2020 (Vic).

Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth). This would mean no such actions could be commenced in Victoria and so no contingency fees charged in shareholder class actions.

So far, there have only been one or two class action cases filed in Victoria where GCOs have been sought, but no case has yet come before a judge for approval of the GCO. This will be one of the most interesting developments in Australia this year to watch.

iii Competing class actions

The lack of a North American-style process of certification of class actions at a pre-commencement hearing for class actions in Australia has contributed to a rise of competing class actions.[16] Most commonly occurring after high-profile corporate misconduct or 'stock drops', multiple, separate class actions are commenced against the same defendant in respect of the same conduct generally alleging the same wrongdoing.

Australian courts have had to contend for some time now with how to best manage these competing class actions, including considerations about which action ought to proceed and which actions ought to be stayed, and which principles should be applied in coming to that decision – similar to the 'carriage motions' in Canada, but more commonly known in Australia as 'beauty parades'. Without clarification around the principles that will be applied to determine a 'winner', the outcome of these beauty parades has been highly uncertain and has acted to dissuade investment by litigation in funders in class actions where there is a reasonable chance their proceeding may be stayed.

Protocols were agreed between the Federal Court and the Supreme Courts of New South Wales[17] and Victoria[18] for dealing with similar situations across different courts in the future, but the issue of the principles to be applied in determining a 'winner' have now been resolved by the recent decision of the High Court in *Wigmans v AMP Ltd & Ors*.[19]

A majority of the High Court in *Wigmans* 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. The majority declined to list exhaustively the factors relevant to determining which action would be in the best interests of group members, observing that a court should determine the question 'by reference to all relevant considerations'. That said, the majority noted that the likely success of an action or quantum of recovery would be relevant matters in determining the question.

16 See Vince Morabito, 'Competing class actions and comparative perspectives on the volume of class actions litigation in Australia', *An Evidence-Based Approach to Class Actions Reform in Australia* (Monash Business School, 6th ed, 11 July 2018).

17 Protocol for Communication and Cooperation between Supreme Court of New South Wales and Federal Court of Australia in Class Action Proceedings (November 2018).

18 Protocol for Communication and Cooperation between Supreme Court of Victoria and Federal Court of Australia in Class Action Proceedings (June 2019).

19 *Wigmans v. AMP Limited & Ors* [2021] HCA 7.

iv Shareholder class actions

Australia's class action framework is comparatively favourable to shareholder claims in particular because generally there is no requirement for intent or 'scienter' and this has attracted significant attention in the four industry reviews conducted to date. Submissions from stakeholders have expressed concerns about shareholder class actions not being in the public interest, being economically inefficient, and driving undesirable economic outcomes such as upward pressure on D&O insurance, the unwillingness of directors to take on roles on Australian boards, and creating a risk-averse decision-making environment within companies.[20]

As part of its response to the covid-19 pandemic, in 2020 the Australian government took action by making amendments to Australia's continuous disclosure regime.[21] These amendments, recognising the challenges for companies to release reliable forward-looking guidance to the market during the pandemic, introduced temporary changes requiring claimants to prove fault for private and regulatory actions involving allegations of continuous disclosure contraventions. These changes have been welcomed by corporate Australia, and the Parliamentary Joint Committee Report recommended that the Australian government permanently legislate these changes. At the time of writing, the government just announced it would make these changes permanent for shareholder class actions. This will have a negative effect on the bringing of some class actions.

III PROCEDURE

Australia's federal class action regime commenced in March 1992 with the introduction of Part IVA of the FCA Act. Some, but not all, Australian states have since followed with regimes that mirror their federal counterpart.[22]

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 Accordingly, class actions encompass a wide variety of claims across a broad range of industries and walks of life.

That said, and as noted above, shareholder actions have been a dominant feature of the recent Australian class action landscape. This might be explained by the ongoing volatility in equity markets, together with sustained emergence of litigation funders. Shareholder claims have 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 of that said, certain developments in 2020 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 at the time of writing the government has just announced those

20 Parliamentary Joint Committee Report, chapter 17.

21 Corporations (Coronavirus Economic Response) Determination (No. 2) 2020.

22 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 and Queensland.

changes will be permanent – setting the bar higher for establishing wrongdoing. Further, the funded shareholder class action space has become a crowded marketplace, resulting in competition between funders and law firms for the right to take high-profile or large actions forward (discussed above). That competition exerts downward pressure on funding commissions and generally increases funders' financial risks because substantial funds may be invested in actions that never go forward, or where a large proportion of group members sign up with other funders thereby making an action less profitable. Notably, there was also, in October 2020, the first successful defence at trial of a shareholder class action when the Honourable Justice Gleeson found that ASX-listed Worley Limited had not engaged in wrongdoing when it issued overly optimistic earnings guidance for the 2014 financial year.[23]

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 and climate change-related claims. There has already been a number of covid-19 class actions filed – for example, an action has been filed against the Victorian government on behalf of businesses that have suffered losses to the Victorian government's alleged mishandling of hotel quarantine arrangements for persons coming from overseas, which resulted in an outbreak of the virus and widespread shutdowns.

ii Commencing proceedings

Class actions (referred to as 'representative proceedings' in the 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.[24]

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, 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.[25] There may also be subgroups within a class action, representing particular groups with particular common characteristics within the larger group.

Notably, the Australian class action regimes have no requirement for US-style certification at the time of filing. This was a deliberate choice by legislators, who followed a view by the Australian Law Reform Commission at the time the first class action legislation was being contemplated by legislators that a certification procedure would impose an additional costly procedure 'with a strong risk of appeals involving further delay and expense'.[26] Some

23 *Crowley v. Worley Limited* [2020] FCA 1522.

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

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

26 Australian Law Reform Commission Report Grouped Proceedings in the Federal Court No. 46 (1988).

commentators believe, however, that the absence of certification criteria has in reality led to high levels of protracted interlocutory disputes after proceedings have commenced.[27] The government is currently looking at whether there should be any legislative changes in this area.

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 if it is satisfied that it is in the interests of justice to do so.[28] 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.[29] Nor is the plaintiff (or lead applicant) required to seek the consent of a person before making that person a group member.[30] Frequently, a group member will have no retainer with solicitors acting for the plaintiff, nor any legal representation at all in respect of the matter. Indeed, a group member may be oblivious to the fact that he or she is a group member for a considerable period after proceedings have commenced (in cases where they are not contactable – they may never know).

The opt-out nature of the Australian class action system

As outlined above, 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. This is a point of distinction between Australia and some other jurisdictions that oblige class members to take a positive step and opt in to a class action. 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.[31] These notices generally 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. In the experience of the authors, opt-out rates of approximately 10–20 per cent are common, although they can be much lower.

An ongoing concern is the ability of group members to read and properly understand opt-out notices, and other notices provided to them at the direction of the court in the course of a class action, given their lack of prior involvement in the proceedings and frequent lack of familiarity with litigation and legal language. It is plausible that a reasonable proportion of opt-outs arise from a lack of understanding of the effect of opting out or misplaced concerns as to the risk of becoming liable for legal costs.

27 See D Grave et al., *Class Actions in Australia* (2nd Edition) at 131.

28 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.

29 Section 33H of the FCA Act.

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

31 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 proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.[32]

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 role to play in ensuring group members' interests are protected. For example, the Federal Court of Australia has:

a broad powers to discontinue representative proceedings;
b the power to substitute a lead applicant who is not adequately representing the interests of group members;
c the power to order that notice of 'any matter' be given to group members;
d the ability to decline or approve settlements; and
e the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.[33]

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 the 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.

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.

32 Section 33ZE of the FCA Act.
33 See D Grave et al., *Class Actions in Australia* (2nd Edition) at 384.

Group members, but not the lead applicant, are generally immune from adverse costs orders.[34] This difference operates as an obvious disincentive to be the lead applicant, given that it carries serious financial risk of adverse costs liability, which in large class actions is generally in the millions of dollars. This disincentive, which has been somewhat ameliorated by the proliferation of litigation funding in Australia, and difficulty in finding parties willing to act as lead applicants has not, as far as the authors are aware, substantially impeded the growth of class actions.

Plaintiffs must also usually contend with an application that they give security for the defendant's costs. Frequently, the plaintiff in a large class action will be ordered to put up security worth millions of dollars over the course of the litigation, which the defendant may call upon in the event that the plaintiff is ordered to pay the defendant's costs. Such security was traditionally given by way of money paid into court or a bank guarantee from an Australian trading bank. An alternative form of security has arisen whereby a large insurer provides an indemnity directly to the defendant for any adverse costs orders made against the plaintiff in favour of the defendant.[35]

The expense of litigation, the adverse costs risk and the burden of putting up security for the defendant's costs have resulted in the widespread involvement of litigation funding in class actions in Australia. Litigation funders generally contract with the lead applicant to finance the proceedings and take responsibility for putting up security for costs and paying any adverse costs orders in return for a share of the proceeds of any settlement or judgment. The rise of litigation funding has been somewhat controversial in Australia and has resulted in the inquiries into litigation funding outlined above.

The growth in litigation funding has coincided with increased debate as to the traditional doctrines of maintenance and champerty. As noted above, in 2020, Victoria became the first Australian jurisdiction to permit lawyers to charge contingency fees in Victorian class actions. It seems reasonably likely that other jurisdictions will follow, otherwise Victoria may become the epicentre for class actions. The introduction of contingency fees is intended to increase access to justice by allowing plaintiff law firms to compete with third-party litigation funders, which typically fund class actions on the basis that they will receive a percentage of any amounts recovered in the proceeding.

v Settlement

The large majority of class actions 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);[36]

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

34 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.

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

36 See Section 33X of the FCA Act.

c having the court review the proposed settlement to ensure it is fair and reasonable and in the interests of group members.[37] 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), and how much will be paid to group members.

The court has the power to reject settlements outright, and has done so,[38] although it is relatively rare. In the alternative, the court may adjust features of a settlement to make it fairer and more reasonable to group members. For example, in *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)*,[39] the Federal Court approved a settlement between the plaintiffs and the defendants but substantially reduced the entitlement to costs of the lawyers for the plaintiffs and the commission of the litigation funders to be paid out of the settlement proceeds, so that a higher proportion was paid to group members. 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. In that respect, the new Federal Court of Australia Practice Note dated 20 December 2019 warns that:

> *the parties, class members, litigation funders and lawyers may expect that . . . the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, among all persons who have benefited from the action.*

The class closure process – scaled back in 2020

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 have arisen as a matter of practice. This process also developed so that defendants have 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. They were generally (but not always) ordered in advance of a mediation and required group members who wish 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. Those who registered were eligible to receive a share of any settlement reached at mediation or within a fixed period following mediation, often referred to as the 'settlement period'. Those who did not register (and had opted out)

37 See Section 33V of the FCA Act.

38 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.

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

were not eligible to receive a share of any settlement reached at mediation. However, if the matter did not settle at mediation or during the settlement period, the registration process usually ceased to have effect, meaning those who did not register become once again eligible to receive a share in any settlement.

However, decisions in the Supreme Court of New South Wales and in the Full Court of the Federal Court of Australia in 2020[40] have rejected 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. In particular, the Courts were critical of the 'harsh and draconian' 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. However it is likely that class closure orders can still be made after settlement or judgment, but not in advance of a mediation or otherwise in order to facilitate a potential settlement.

Still, there seems a reasonable prospect that legislation may be enacted that reinstates the power to make registration and class closure orders prior to settlement. The Joint Committee Report recommended as much, given the benefits that flow from class closure including the facilitation of settlements and the promotion of the finality of disputes.

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. For example, in *Caason Investments Pty Limited v. Cao*,[41] a shareholder class action, the court approved the service of court documents on three former company directors in the United States and one former director in Hong Kong under the Hague Service Convention.[42] Group members may be overseas residents, although in Victoria the court can exclude class members who do not have a sufficient connection to Australia.

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.[43]

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) has resulted in the institution of similar class action proceedings in Australia against the Australian Department of Defence in relation to its use of the same foam. In other examples, in 2015, class actions in Australia were launched against Volkswagen (and other defendants) following the exposure of the global diesel emissions issue and after a similar class

40 *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.

41 *Caason Investments Pty Limited v. Cao* [2012] FCA 1502.

42 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

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

action was launched against Volkswagen in the United States, and class action proceedings are currently under way against Johnson & Johnson in Australia in relation to deficient pelvic mesh products.

V OUTLOOK AND CONCLUSIONS

The past year in the class action space in Australia has seen some uncertainty resolved, particularly in the context of common fund orders, but many other uncertainties have arisen to take their place, ensuring that the Australian class action landscape remains as dynamic as ever. The new uncertainties including around licensing of litigation funders have seen a slowdown in the number of class actions filed in the past six months. Covid-19 has also no doubt played a role in that trend. Also, the certainty given by a number of judgments last year generally favoured defendants. Defendants were also successful in pressing for regulatory reform, which is currently being considered.

Developments to watch in 2021 include:

a seeing when and on what terms the first Group Costs Order (contingency fee) is made in Victoria, and whether there will be any legislative response on contingency fees from the federal and other state governments;

b whether there are any legislative or case management changes following the High Court's decision in *Wigmans* concerning competing class actions;

c seeing what effect there will be on the bringing of shareholder class actions with the making permanent of the changes to the law around the continuous disclosure obligations of companies and effectively requiring proof of intent now;

d whether the recommendations of the Parliamentary Joint Committee Report concerning express powers to reject, vary or amend the terms of any litigation funding agreement are legislated; and

e whether the power of the Court to make settlement CFOs will be appealed to the High Court.

Appendix 1

ABOUT THE AUTHORS

ROBERT JOHNSTON

Johnson Winter & Slattery

Robert Johnston is one of Australia's leading commercial litigation lawyers, specialising in large-scale, complex disputes and class actions.

Robert has been involved in some of Australia's leading commercial disputes, including shareholder class actions, directors' and officers' liability, auditor and other professional indemnity claims, regulatory proceedings and insolvency matters.

Robert is also a recognised insurance expert, advising on policy wordings and recoveries.

With over 25 years' experience, Robert has dealt extensively with regulators, including ASIC, APRA, the ACCC and the ASX, and has represented clients in Royal Commissions and other major inquiries.

Robert has regularly been recognised as a leading expert in the areas of dispute resolution, class actions, insurance and reinsurance and professional negligence by *Chambers Global*, *The Legal 500: Asia Pacific*, *Who's Who Legal*, Euromoney Legal Media Group's *Expert Guides*, *Doyle's Guide* and *Best Lawyers*. He is regarded as 'strategic and approachable', a lawyer who 'really looks after his clients' with an 'outstanding level of personal service'. He is known for providing early, practical assessments in cases and for his strategic and commercial advice.

NICHOLAS BRIGGS

Johnson Winter & Slattery

Nicholas Briggs is a senior associate in the dispute resolution practice group of Johnson Winter & Slattery with extensive experience in financial services, shareholder and consumer class actions.

SARA GAERTNER

Johnson Winter & Slattery

Sara Gaertner is a senior associate in the dispute resolution practice group of Johnson Winter & Slattery with extensive experience in financial services, shareholder and consumer class actions.

JOHNSON WINTER & SLATTERY

Level 25, 20 Bond Street
Sydney NSW 2000
Australia
Tel: +61 2 8274 9555
Fax: +61 2 8274 9500
robert.johnston@jws.com.au
nicholas.briggs@jws.com.au
sara.gaertner@jws.com.au
www.jws.com.au

an LBR business

ISBN 978-1-83862-764-5