THE REVIEW

CLASS ACTIONS IN AUSTRALIA 2022/2023

KING&WOOD MALLESONS
金杜律师事务所

THIS YEAR WE HAVE SEEN

AN INFLUX OF **DATA BREACH** RELATED FILINGS

PLAINTIFF LAWYERS COMPETING TO RUN OVERLAPPING CLASS ACTIONS

REPRESENTATIVE PROCEEDINGS **FILED IN NON-TRADITIONAL JURISDICTIONS**

MORE THAN **$1B** IN SETTLEMENTS APPROVED

THE AVAILABILITY OF **COMMON FUND ORDERS** ONCE AGAIN IN THE SPOTLIGHT

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INTRODUCTION

Welcome to The Review – Class Actions in Australia 2022/2023, in which we consider significant judgments, events and developments between 1 July 2022 and 30 June 2023.

The review period has seen:

- an influx of data breach filings:
  - consumer claims seeking damages resulting from alleged privacy breaches, and
  - securities claim alleging breaches of disclosure obligations in relation to cyber-attacks.
- group costs orders driving filings in the Victorian Supreme Court.
- consumer and securities claims headlining new filings.
- more than $1B in settlements approved, and
- the Federal Court scrutinising the proposed distribution of settlements, to plaintiff lawyers and funders.

We hope you find this report informative.

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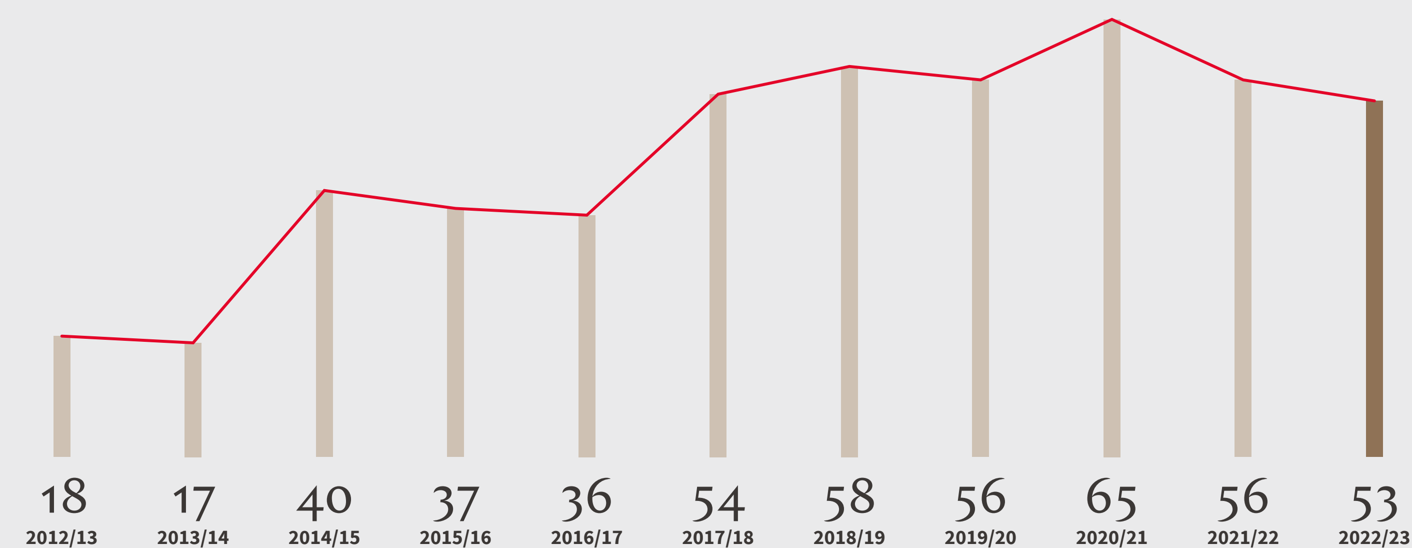
WHAT'S NEW?

The year to 30 June 2023 saw **at least 53 new class actions filed**, the lowest total since 2016/2017.

Class actions filed



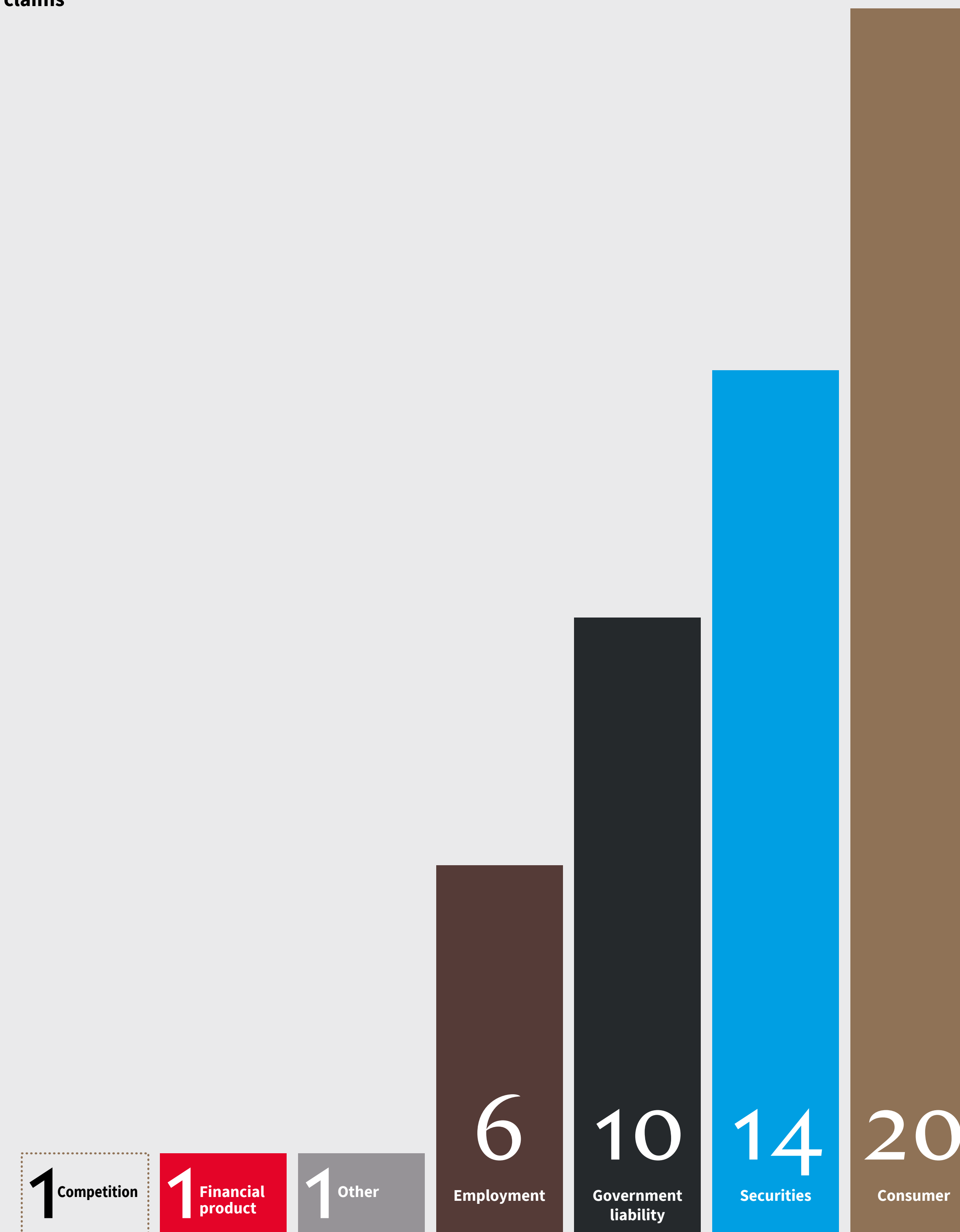
TYPES OF CLAIMS

In the review period, there was an uptick in product liability class actions, while the number of securities claims remained fairly constant and the number of employment class actions declined.

Class actions filed in the review period included the following claim types:

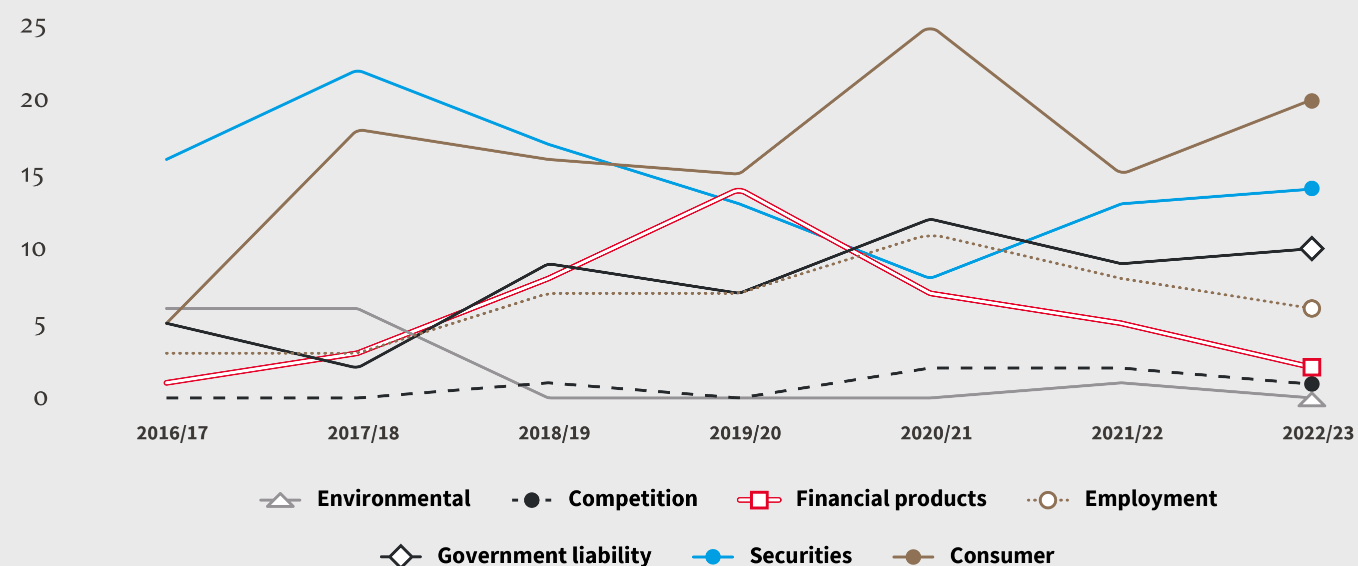
- **Consumer:** data breaches; cruise ships; motor vehicle performance; building materials.
- **Against the State:** COVID-19 vaccination; public housing in remote Aboriginal communities; youth detention; police use of strip searches and capsicum spray.
- **Employment:** doctors' working hours; staff underpayments; concussion in sport.
- **Securities:** Blue Sky Alternative Investments; Downer EDI; Fletcher Building; Insurance Australia Group; James Hardie Industries; Medibank Private; The Star Entertainment Group.
- **Financial products/investments:** IG Markets.
- **Competition:** AGL Energy.

Types of claims

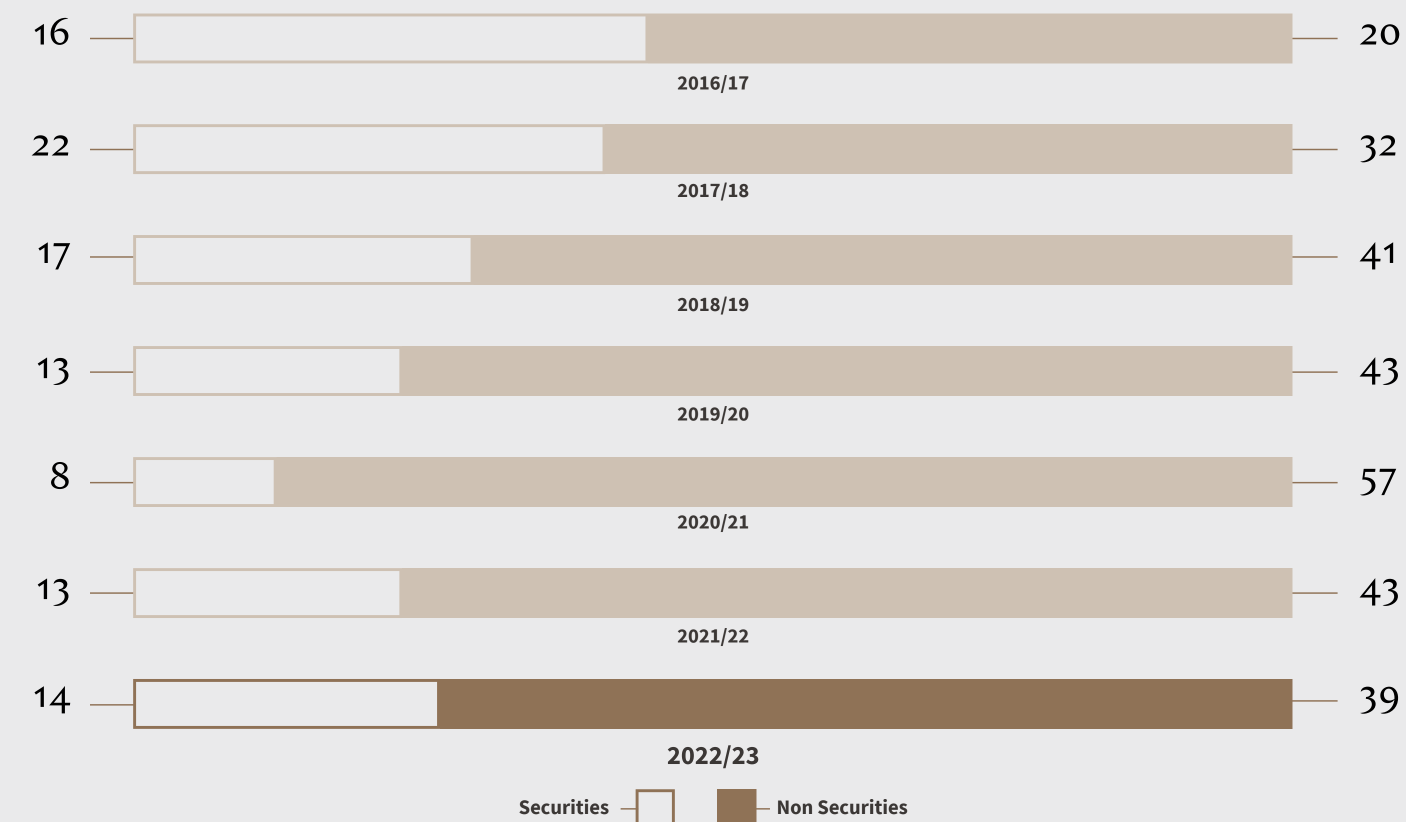


Consumer and securities actions continued to be the leading categories of class actions.

Types of claims - trend



Securities v non-securities



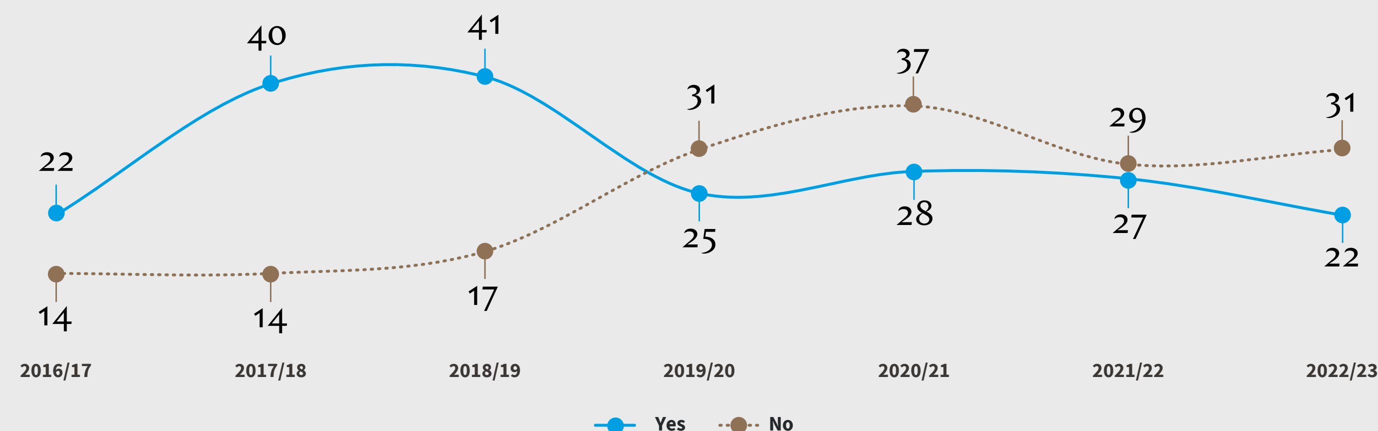
THE PLAYERS

Seven firms filed at least three new actions each in 2022/2023, representing over 50% of the total actions filed (27/53): Maurice Blackburn (6), Phi Finney McDonald (4), Piper Alderman (4), Shine (4), Levitt Robinson (3), Quinn Emanuel (3) and Slater & Gordon (3).

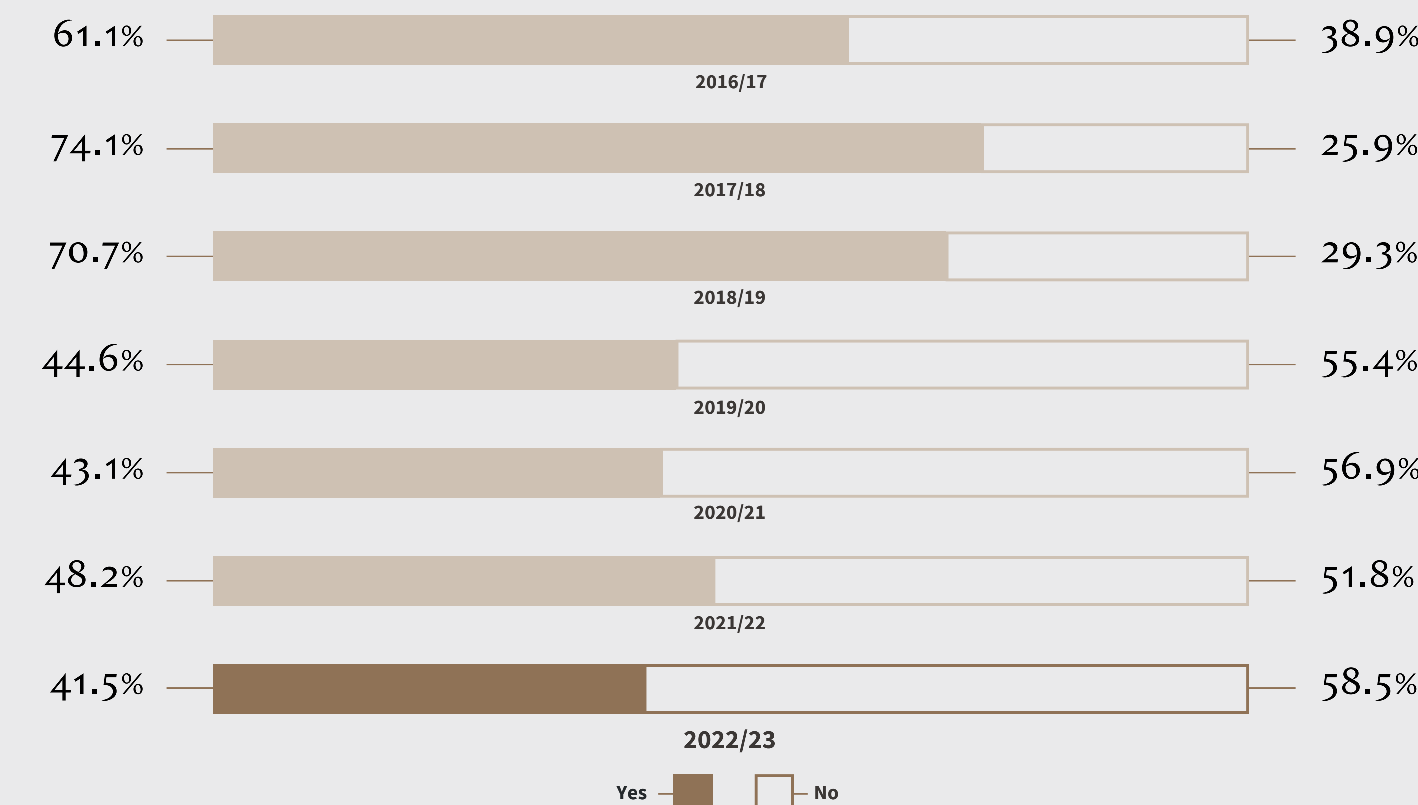
Funders included Omni Bridgeway (5) and Woodsford Litigation Funding (4).

The number (22) and proportion (41.5%) of new actions involving a litigation funder sits at similar levels to the past three years, which has seen funded actions remain below 50%.[1]

Funded class actions - by number



Funded class actions - by %



1 For the funding statistics in The Review:
- YES refers to publicly available records indicating third-party funding of group member(s)
- NO includes actions conducted on a no win no fee basis, and actions where a group costs order is sought (or has been obtained) where there is no funding agreement between group member(s) and a third-party funder.

JURISDICTIONAL PREFERENCES

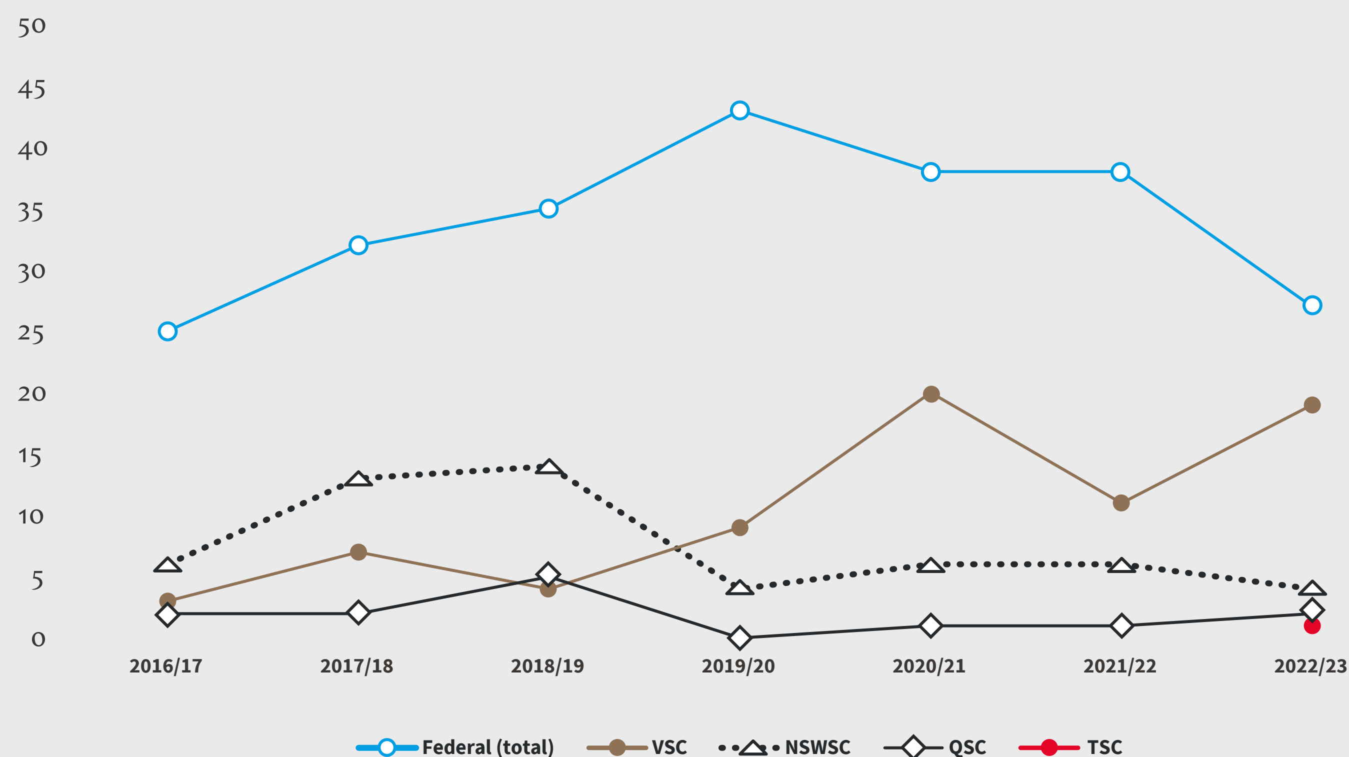
Although just over half of class action activity remains in the Federal Court (27/53), Victoria remains the dominant place to file:

- Nineteen class actions were filed in the Victorian Supreme Court, representing a record 36% of all new actions filed. The Victorian Supreme Court continues to receive the bulk of all new securities class actions: 64%, or 9 of 14 securities class actions (consistent with 62% the year before).
- The Victorian Registry of the Federal Court dropped to eight new actions (down from 22 in 2021/22) and no securities actions (down from three), while the NSW Registry remained steady at 14 (12 in 2021/2022) with five securities actions (up from two).

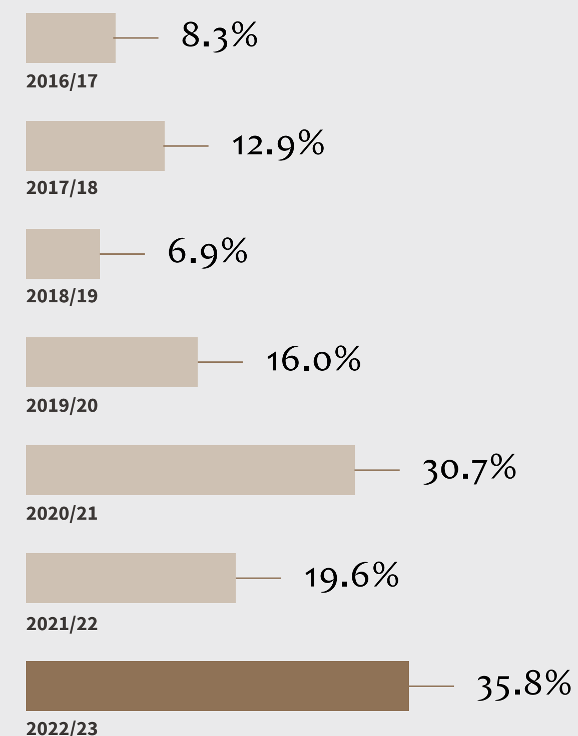
The review period also saw:

- the commencement of the legislative representative proceedings regime in the Western Australian Supreme Court,[2] and
- the first representative proceeding filed in the Tasmanian Supreme Court since the introduction of its legislative representative proceedings regime in 2019.

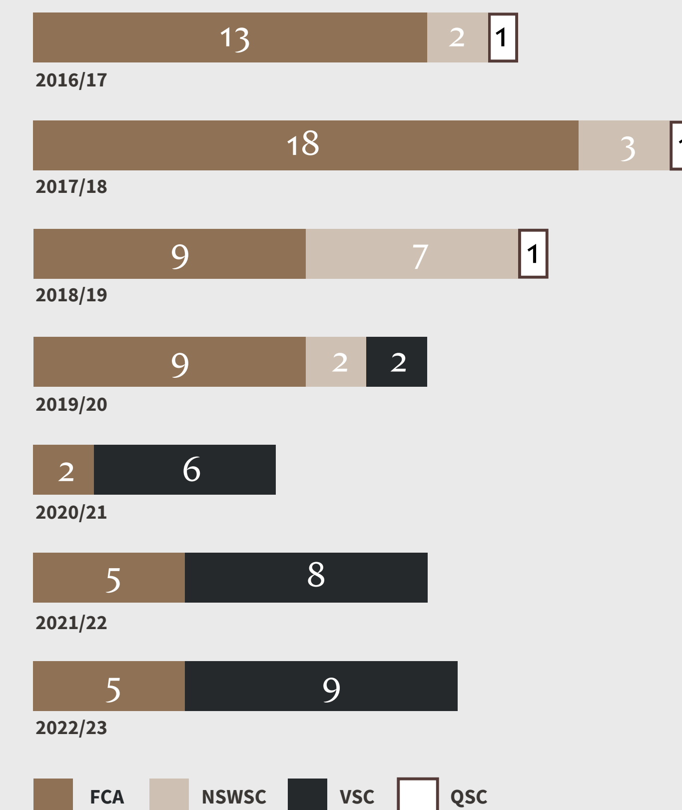
Actions filed by court



VSC actions as % of total actions



Where have securities actions been filed?



SETTLEMENTS

Thirty class action settlements were approved in 2022/2023, exceeding $1B in settlement funds for the first time since 2019/2020. The $300M settlement in the *Ethicon Sàrl* class action, concerning pelvic mesh implants, is the largest settlement in a product liability class action in Australia to date.[3]

A full list of settlements appears on the following pages. Additional class action settlements remain subject to Court approval, or were approved just outside of the review period, which are detailed in the **Outlook** section of The Review.

JUDGMENTS ON LIABILITY AND DAMAGES

More class actions are proceeding to judgment. In none of the three class actions that proceeded to a judgment on liability did the plaintiff succeed: the claim by NSW Local Governments regarding insurance selling, by horse owners regarding the Hendra virus vaccine, and by investors in the TM Index (financial product).[4] Judgments on damages included the Navy trade training and European River Cruise class actions.

Appeals were dismissed from initial trial judgments in the Carwoola bushfire, Toyota diesel particulate filters and Shattercane class actions. Most recently, an appeal from the initial trial judgment in the Volkswagen Takata Airbags class action was dismissed by the NSW Court of Appeal.[5]

2 See KWM Insight Western Australia's own class action regime at the ready 5 September 2022.

3 See **Health** section of The Review.

4 *Richmond Valley Council v JLT Risk Solutions Pty Ltd* [2022] NSWSC 1761; *Abbott v Zoetis Australia Pty Ltd* [2022] FCA 1390; *Kim v Wang* [2023] FCAFC 115; *Kim v Hodgson Faraday Pty Limited* [2022] FCA 1190.

5 *Dwyer v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211.

CLASS ACTION SETTLEMENTS JULY 2022 – JUNE 2023

	CLASS ACTION	TYPE	DEFENDANTS	SETTLEMENT SUM (DAMAGES)[6]	PLAINTIFFS' COSTS	REPRESENTATIVE OR GROUP MEMBER REIMBURSEMENTS	LITIGATION FUNDER % OR $	ADMINISTRATION COSTS
1	CoreStaff	Employment	CoreStaff NT Pty Ltd	$6,400,000	$1,565,000	$20,000	35%	Included in costs
2	Red Centre NATS	Consumer	Car Festivals Pty Ltd	$3,200,000	$1,000,000	N/A	N/A	N/A
3	Romeo's Supermarkets (x2)	Employment	Romeo Lockleys Asset Partnership	$1,550,000 (excluding costs) (+ additional amount to be calculated)	$560,893.52	N/A	N/A	$11,550 (included in costs)
4	Mayfair's IPO Wealth Fund	Financial Products	Vasco Trustees Limited and DH Flinders Pty Ltd	$5,600,000	$1,144,000	$20,000	N/A	$235,720
5	Drakes Supermarkets	Employment	The Fourth Force Pty Ltd and Dramet Pty Ltd	$2,062,380 (+ additional amount to be calculated)	$365,357.30	N/A	N/A	$95,634
6	Suncorp – Super Fees	Financial Products	Suncorp Portfolio Services Ltd and others	$33,000,000	$8,569,149.08 + $1,334,160 ATE	$12,000 + $5,000 + $5,000	25% $8,250,000	$504,512.47
7	Opal Tower	Consumer	Sydney Olympic Park Authority and others	Not disclosed	$6,471,005.99	$20,000 + $20,000	25%	Not disclosed
8	Box Hill Pilot Licences	Consumer	Box Hill Institute	$33,000,000	$4,623,835.14	$20,000 + $15,000 x3	N/A	Capped at $3,250,000
9	BSA Limited	Employment	BSA Limited	$20,000,000	$3,270,145	$15,000 x2	18.66%	$122,500
10	On The Run	Employment	SEPL Pty Ltd	$5,800,000	$1,650,000	N/A	N/A	$406,560 (included in costs)
11	Slater & Gordon	Securities	Pitcher Partners	$41,000,000	$13,117,121	$16,800	28% $11,480,000	Included in costs
12	RMS Engineering	Employment	RMS Engineering & Construction Pty Ltd and others	$130,000	$66,703.15	N/A	N/A	Included in costs
13	Woolworths	Securities	Woolworths Group Ltd	$44,500,000	$14,576,736.36	$20,000	$4,730,000	$756,433

6 Gross settlement including plaintiffs' legal costs, group member reimbursements, funder amounts and administration costs unless noted otherwise.

	CLASS ACTION	TYPE	DEFENDANTS	SETTLEMENT SUM (DAMAGES)[6]	PLAINTIFFS' COSTS	REPRESENTATIVE OR GROUP MEMBER REIMBURSEMENTS	LITIGATION FUNDER % OR $	ADMINISTRATION COSTS
14	Sims Metals	Securities	Sims Limited	$29,500,000	$8,484,114.94 + $798,085.19 ATE	$10,000	25.3% of funded group members $5,440,557.67	$241,123.95
15	GetSwift	Securities	GetSwift Limited	$1,000,000	$100,000 + $393,870 ATE	$6,130	0% (funder waived commission)	Included in costs
16	Montara Oil Spill	Environmental	PTTEP Australasia (Ashmore Cartier) Pty Ltd	$192,500,000	$28,566,727.79 (+ additional amounts)	$30,000	$57,750,000 + $88,621.33	To be approved
17	Gunns	Financial Products	Gunns Plantations Ltd and others	Not disclosed	Not disclosed	Not disclosed	Not disclosed	Not disclosed
18	Ethicon Sàrl – Mesh (x2)	Consumer	Ethicon Sàrl, Ethicon, Inc. and Johnson & Johnson Medical Pty Limited	$300,000,000	To be approved Interim distribution: $22,600,999.24	To be approved	To be approved	To be approved
19	Boston Scientific – Mesh	Consumer	Boston Scientific Corporation and Boston Scientific Pty Limited	$105,000,000	To be approved	To be approved	To be approved	To be approved
20	Farmer's Farmgate Milk Price	Consumer	Fonterra Australia Pty Ltd and others	$25,000,000	$3,984,264	$30,000	27.5% $6,875,000	$468,711
21	Stolen generation compensation (NT)	Government Liability	Commonwealth of Australia	$50,450,000	$1,900,000 + $1,000,000 ATE	$10,000 + $5,000	10.9% $5,500,000	Up to $3,000,000
22	Tyro Payments	Consumer	Tyro Payments Ltd	$5,000,000	$1,545,000	$20,000	20% $1,000,000	$25,000
23	UGL	Employment	UGL Operations and Maintenance Pty Ltd	$438,000	$110,000 (cap)	N/A	N/A	Not disclosed
24	Wreck Bay contamination	Government Liability	Commonwealth of Australia	$22,000,000	$5,000,000 (+ up to $650,000)	Not disclosed	N/A	Up to $250,000
25	Linchpin Capital (partial settlement only)	Financial Products	Linchpin Capital Group Limited and others	$4,400,000 + $1,890,000	Part of settlement sum	No payments to group members	Part of settlement sum	Part of settlement sum
26	Credit Card Insurance – Westpac	Consumer	Westpac Banking Corporation	$29,000,000	$8,257,577.69 + $275,000 ATE	$20,000 + $3,000 x10	N/A	Included in costs
27	Credit Card Insurance – ANZ	Consumer	Australia and New Zealand Banking Group Limited	$47,000,000	$9,941,501.97 + $275,000 ATE	$20,000 x2 + $3,000 x9	N/A	Included in costs
28	Thiess	Employment	Thiess Pty Ltd	$858,116.15	$60,000	N/A	N/A	N/A

6 Gross settlement including plaintiffs' legal costs, group member reimbursements, funder amounts and administration costs unless noted otherwise.

GROUP COSTS ORDERS

The Victorian Supreme Court has had the power to grant a group costs order (**GCO**) in class actions since July 2020. There were eight GCOs granted in the review period (up from two the year before).

A GCO permits a plaintiff law firm to charge legal costs as a percentage of the amount recovered in the proceeding – either as a fixed percentage or a sliding scale. In exchange, the plaintiff's lawyers take on the financial risk of the costs of the proceeding and may also be required to provide security for costs. To grant a GCO, the Court must be satisfied that it is *'appropriate or necessary to ensure that justice is done in the proceeding'*.[7] The Court will give primacy to the interests of group members in conducting a 'broad evaluative assessment' of the facts and evidence before it – meaning the evidence of plaintiffs' interests and position is critical.[8]

Victoria remains the only jurisdiction where GCOs are expressly permitted. It is otherwise unlawful for solicitors to enter into costs agreements with clients for their fees to be calculated as a percentage of the damages award or settlement.

The availability of GCOs has seen the number of class actions filed in Victoria increase as a proportion of total class actions filed and a decrease in filings in the Federal Court (see **Headlines**). The use of the GCO mechanism in Victoria has given rise to questions about whether:

- a GCO granted in Victoria can 'travel' if the matter is transferred to another jurisdiction, and
- the Federal Court can grant common fund orders (**CFOs**) that function like GCOs.

The Victorian Supreme Court approved eight out of nine GCO applications heard in the review period. The Court has granted GCOs:

- Without appointing a contradictor. A number of decisions have now detailed the kind of evidence required to show that a GCO is in a plaintiff's interests.
- On a sliding scale (decreasing the GCO percentage as the recovery amount increases), where there is a legitimate basis for doing so.
- Acknowledging that rates may need to be reassessed and varied by subsequent orders of the Court. The factors required for reassessment have not yet been tested.

ROLE OF DEFENDANTS AND CONTRADICTORS

The GCO regime is 'directed to matters on the plaintiff's side'.[9] What role then for contradictors and defendants? The Court's growing experience and the expanding body of GCO decisions means that fewer contradictors have been appointed in recent times. Contradictors are, however, still being appointed by the Court for complex matters, including where GCO applications are heard simultaneously to carriage applications as happened with the competing *Star Entertainment* proceedings.[10]

7 *Supreme Court Act 1986* (Vic) s33ZD(1).
8 *Allen v G8 Education Ltd* [2022] VSC 32 at [20].
9 *Fox v Westpac Banking Corp* [2021] VSC 573 at [15].
10 *Ramon Huang v Star Entertainment Group Limited* (S ECI 2023 00428); *Jowene Pty Ltd (as trustee for Biro Citer Souvenirs Pty Limited Pension Fund) v The Star Entertainment Group Ltd* (S ECI 2023 00413); *Travis Donald Drake v The Star Entertainment Group Limited* (S ECI 2022 04492); *DA Lynch Pty Limited v The Star Entertainment Group Ltd* (S ECI 2022 01039).

Defendants have generally accepted their limited role in respect of GCO applications and have limited their involvement to discrete issues in which they have a legitimate interest. Defendants have raised matters such as:

- whether the Victorian Supreme Court was the appropriate jurisdiction[11]
- the appropriate order as to costs of the GCO application[12]
- whether the GCO sought was in the nature of a CFO and should be assessed as such[13]
- the plaintiff law firm's capacity to give security.[14]

TIERED PERCENTAGES

The Court has shown a willingness to order a sliding scale of percentages, depending on the award amount.

A sliding scale will only be applied where it serves a legitimate purpose; for example, preventing the plaintiff's lawyers from recovering a disproportionate or unreasonable sum if an award at a higher end is made.[15] The Court will not apply a sliding scale where the evidence does not show:

- that a tiered approach is needed, or
- that there is a sound basis for each tier attracting a different percentage.

The Court has not to date required a plaintiff firm to give an undertaking that they will not later seek to increase the percentage amounts.

EFFECT OF REGIME IN OTHER JURISDICTIONS

To date, no other Australian jurisdiction appears to be actively contemplating introducing a GCO regime. In that context, questions have arisen about the spread or expansion of GCOs, specifically:

- If the proceedings are transferred from the Victorian Supreme Court to the NSW Supreme Court:
  - will a GCO be made in the Victorian Supreme Court remain in force and be capable of being enforced by the NSW Supreme Court, subject to any order of that Court, and
  - if the GCO remains in force, does the NSW Supreme Court have power to vary or revoke the GCO?

  These questions are currently reserved in the Victorian Court of Appeal.[16]
- Whether the Federal Court can grant a 'solicitors CFO' that would function like a GCO. A CFO obliges all group members to pay a proportionate share of any amount recovered to the litigation funder, including those who did not enter into an agreement with the funder themselves. The Federal Court was asked to consider whether a CFO could be granted for the benefit of solicitors, so that their legal costs would be paid in the same way. This has been deferred for the Full Federal Court to decide following the delivery of two relevant outstanding judgments.[17]

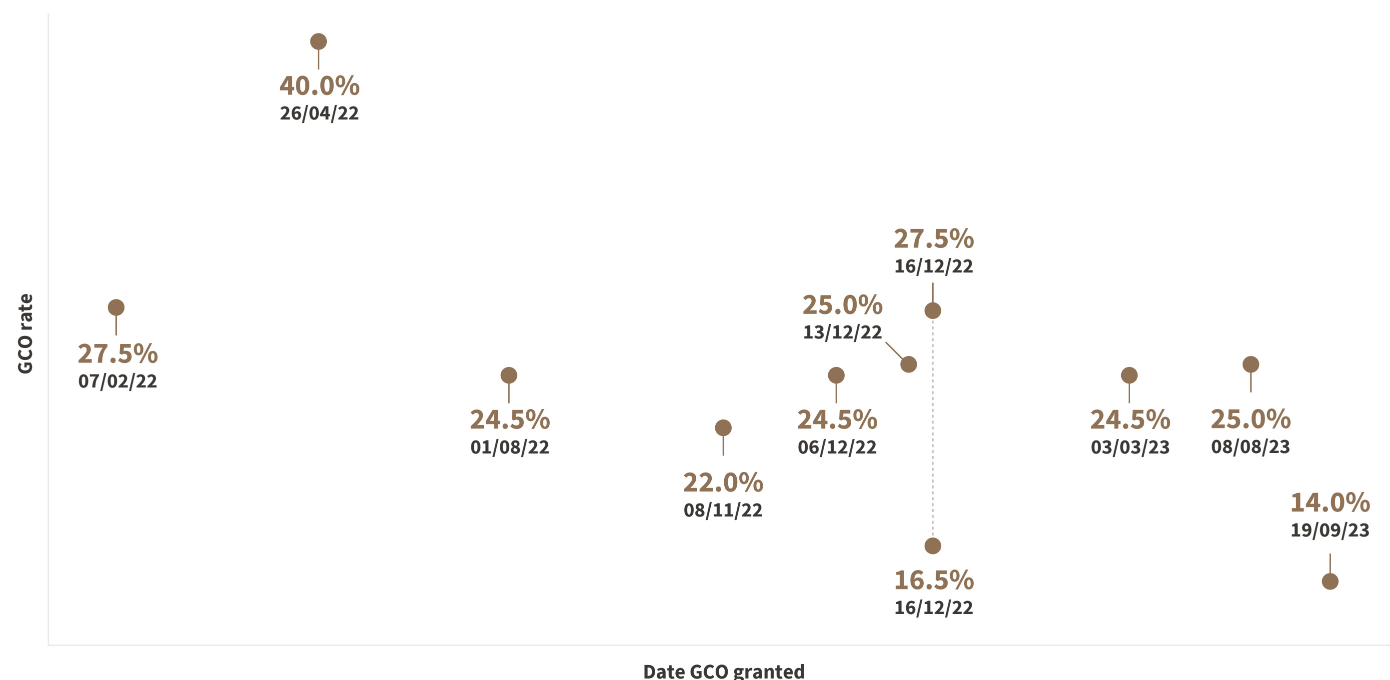
If the Federal Court determines it has the power to grant a 'solicitors CFO', this may reverse the trend towards filing in the Victorian Supreme Court. Likewise, if GCOs are able to be transferred to other jurisdictions, this may have a bearing on transfer applications seeking to move proceedings commenced in the Victorian Supreme Court.

11 *Bogan v The Estate of Peter John Smedley (Deceased)* [2022] VSC 201 (**Bogan**) at [104].
12 *Gehrke v Noumi Ltd (formerly Freedom Foods Group Ltd)* [2022] VSC 672 at [11]; *Lieberman v Crown Resorts Ltd* [2022] VSC 787 (**Crown Resorts**) at [10].
13 This submission by the defendants was not accepted by the Court, which determined that the funding arrangement, while broadly relevant to the exercise of the discretion in respect of whether to make a GCO and what percentage to fix, does not transform the application into a funder's application for a common fund order: *Bogan* at [98] and [99].
14 *Fox v Westpac; Crawford v Australia and New Zealand Banking Group Ltd* [2021] VSC 573 at [37].
15 *Crown Resorts* at [57].
16 *Bogan v The Estate of Peter John Smedley (Deceased) (No 3)* [2023] VSC 103.
17 *R&B Investments Pty Ltd as trustee for the R&B Pension Fund v Blue Sky Alternative Investments Limited & Ors* [2023] FCA 703, where the Court made an order standing over the interlocutory application until the delivery of judgments in *Jade Elliott-Carde & Anor v McDonald's Australia Limited* (VID 726 of 2021) and *Shop, Distributive and Allied Employees Association v Bandec Pty Ltd & Anor* (SAD 127 of 2022); and *Leah Maree Greentree & Anor v Jaguar Land Rover Australia Pty Ltd* (NSD 1010 of 2022) and *Michelle Elizabeth Jennings v Jaguar Land Rover Australia Pty Ltd* (NSD 85 of 2023).

OVERVIEW OF GCO CASES DURING THE REVIEW PERIOD

	CASE	DATE	JUDGE	% SOUGHT	GRANTED?	KEY TAKEAWAYS
1	*Nelson v Beach Energy* [2022] VSC 424	1 Aug 2022	Nichols J	24.5% (proposed in both competing class actions)	✓ (competing class action stayed)	• The Court may set a rate for a GCO whilst acknowledging that it may need to be reviewed and varied in the future. • The Court was satisfied that it was likely that group members would obtain a worse outcome through third-party litigation funding.
2	*Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479	23 Aug 2022	Nichols J	Lay & Batchelor: third-party funding (consolidated proceeding) Bahtiyar: Tiered GCO	✗ (Bahtiyar proceeding stayed in favour of consolidated Lay & Batchelor proceeding)	• The cost to plaintiffs of a funding arrangement is relevant, but not determinative, as to whether a GCO is in their best interests. • The Court may refuse a GCO if it is not satisfied that the plaintiff's lawyers have sufficient resources to run the matter in a way that would adequately protect the group members' interests and provide security in the event of an adverse costs order.
3	*Gerhke v Noumi Ltd (formerly Freedom Foods Group Ltd)* [2022] VSC 672	8 Nov 2022	Nichols J	22%	✓	• The GCO rate can be amended, but only following judicial consideration. • Plaintiff lawyers do not need to give an undertaking that they will not apply to increase the rate of the GCO. • It is not necessary to show a proposed GCO is more beneficial to group members than an alternative funding model, although this is a relevant consideration.
4	*Mumford v EML Payments Ltd* [2022] VSC 750	6 Dec 2022	Delany J	30%	✓ (30% refused, 24.5% granted)	• The Court will prioritise certainty, stability and transparency in assessing funding arrangements. • GCOs can counteract the otherwise disproportionate financial risk faced by lead plaintiffs in group proceedings. They also ensure a stable funding base and reduce the risk of the proceedings being discontinued, abandoned or delayed.
5	*Tracy-Ann Fuller & Jordan Wilkinson v Allianz Australia Insurance Ltd & Allianz Australia Life Insurance Ltd* (S ECI 2020 02853)	13 Dec 2022	Nichols J	25%	✓	• No reasons (orders only).
6	*Lieberman v Crown Resorts Ltd* [2022] VSC 787	16 Dec 2022	Stynes J	Tiered GCO (27.5% up to $100M, 22% between $100M and $150M, and 16.5% over $150M)	✓	• The GCO provided the plaintiff and group members with certainty about their exposure from the outset of the proceeding when compared with hourly billing, which the plaintiff's evidence demonstrated was important. • Tiered GCOs will be granted where there is a legitimate reason, supported by evidence, to set different percentages at different award amounts where reasonable and proportionate. Their purpose is to prevent plaintiff lawyers from recovering a disproportionate or unreasonable sum.
7	*Fox v Westpac Banking Corp (No 2)* [2023] VSC 95	3 Mar 2023	Nichols J	24.5%	✓ (multiple actions), on the second attempt	• Plaintiffs should put on clear evidence of alternative funding arrangements, and group members will be assisted by independent legal advice on their interests and position.
8	*O'Brien v Australia and New Zealand Banking Group Ltd* [2023] VSC 95					
9	*Nathan v Macquarie Leasing Pty Ltd* [2023] VSC 95					

GCO rates across GCOs granted



COMMON FUND ORDERS – AN OPPORTUNITY FOR CLARITY

UNCERTAINTY SINCE BREWSTER

Until 2019, common fund orders (**CFOs**) were routinely sought by representative applicants at the behest of a litigation funder. Typically sought at an early stage of proceedings, a CFO empowered the litigation funder to receive a percentage of the overall settlement sum or damages awarded, irrespective of whether each group member had entered into a funding agreement. CFOs avoided a costly and lengthy book building process.

The High Court determined in *Brewster* that neither the Federal Court nor the NSW Supreme Court had the power to make a CFO under the general case management provisions applicable to representative proceedings.[18]

After *Brewster*, Courts frequently made CFOs under the settlement approval provisions.[19] These decisions distinguished *Brewster* on the basis that the High Court was concerned with a type of CFO sought at an early stage of a representative proceeding (not at the time of settlement) and under different statutory provisions.

In February 2023, in the *7-Eleven* class action, O'Callaghan J decided that the Federal Court did not have the power to make a CFO at all.[20] In his Honour's view, the High Court's reasoning in *Brewster* could not meaningfully be distinguished simply because the CFO was sought at the time of settlement, and not before that time.

That conclusion marks the first time that a court has decided that it did not have the power to make a settlement CFO.[21] This was a contrary view to the more favourable sentiments about the availability of a CFO expressed by the Full Federal Court (in *dicta*) in a previous judgment in the same proceeding.[22]

AN IMMINENT RESOLUTION

Two weeks after O'Callaghan J's decision, in the *McDonald's* class action, Lee J reserved the question of whether a settlement CFO could be made for the Full Federal Court.[23] This was the second occasion on which the Full Federal Court has considered this issue. [24]

The Full Federal Court, comprising Beach, Lee and Colvin JJ, heard arguments on the issue in March 2023. Judgment is reserved. In August 2023, Lee J approved a settlement CFO in separate proceedings.[25] His Honour had previously doubted the correctness of *7-Eleven*, maintaining that a CFO could be made on settlement.[26] Similarly, in *Iddles & Anor v Fonterra Australia Pty Ltd & Ors*, Delany J approved a settlement CFO on the basis that the court was bound by the ruling by the Victorian Court of Appeal in *Botsman* that s33V(2) of the *Supreme Court Act 1986* (Vic) confers power to make a CFO as part of the approval of a settlement.[27]

18 *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45 (**Brewster**).
19 In the review period: *Haselhurst v Toyota Motor Corporation Australia Ltd t/as Toyota Australia* [2022] NSWSC 1076; *Quirk v Suncorp Portfolio Services Ltd in its capacity as trustee for the Suncorp Master Trust (No 2)* [2022] NSWSC 1457; *Hall v Pitcher Partners (a firm)* [2022] FCA 1524; *Hall v Arnold Bloch Leibler (a firm) (No 2)* [2022] FCA 163; *Bradshaw v BSA Limited (No 2)* [2022] FCA 1440; *Ellis v Commonwealth of Australia* [2023] NSWSC 550.
20 *Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84 (**7-Eleven**).
21 In *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637 at [421] Foster J doubted the power to grant a CFO at settlement, however did not consider that it was necessary to decide the issue and refused the application on discretionary grounds.
22 *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 at [1] (Middleton J), [4] (Moshinsky J), [31]-[42] (Lee J).
23 In *Jade Elliott-Carde v McDonald's Australia Limited* (VID726/2021) (**McDonald's**).
24 The first occasion being *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183, at which time the issue of the Federal Court's power to make a settlement CFO was hypothetical in the context of that proceeding at the time.
25 *Haswell v Commonwealth of Australia (No 3)* [2023] FCA 1093.
26 See *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq)* [2023] FCA 703 and *Davaria Pty Limited v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183 at [31]-[42]. Similarly, in *Hall v Pitcher Partners (a firm)* [2022] FCA 1524, Beach J observed that he had the power to make a CFO under s33V of the of the FCA Act, although the issue of the Federal Court's power did not appear to be argued.
27 [2023] VSC 566 at [109], applying *Botsman v Bolitho* [2018] VSCA 278.

7-Eleven is also subject to an appeal brought by the litigation funder, which has not yet been heard.[28] Any appeal judgment is not likely to be delivered prior to the Full Federal Court's judgment in *McDonald's* on the reserved question in relation to CFOs.

WHY DOES IT MATTER?

Prior to *7-Eleven*, the prevailing assumption shared by litigation funders and plaintiff lawyers was that a CFO could still be obtained at the time of settlement or judgment. If the first instance decision in *7-Eleven* is upheld, litigation funders and plaintiffs will likely be required to reassess their current funding arrangements, particularly if the class action progressed on the understanding that a book build was unnecessary.

A CFO also has the effect of overriding divergent interests as between different types of class members; for example, as between:

- funded group members (who are contractually bound to pay a funding commission to the funder out of any settlement sum) and unfunded group members (colloquially referred to as 'free riders', who do not have that contractual obligation and who may see no incentive to enter into a funding agreement), or
- group members within consolidated proceedings (who may have differing contractual obligations to different funders, or no contractual obligations at all).[29]

OPTIONS IN A CFO-FREE WORLD

If O'Callaghan J's views prevail in the Full Federal Court, a plaintiff may choose to seek a funding equalisation order (**FEO**).

Pursuant to a FEO:

- a deduction is made from the settlement sum limited to the amount of the litigation funder's contractual entitlements, and
- that amount is shared equally among all group members (funded and unfunded).

The consequence is that funded group members are not 'worse off' compared to unfunded group members just because they entered a funding agreement. A FEO is sought at the time of settlement under the same settlement provisions as have been relied upon for CFOs, which empower a court to make such orders as are 'just' with respect to the distribution of any money paid under a settlement.

Despite their different operative effect, Courts have drawn on reasoning from CFO decisions in deciding whether to make a FEO in a particular case. In *Augusta Pool 1 UK Ltd v Williamson*,[30] the NSW Court of Appeal held that the primary judge did not err in considering previous CFO decisions that discussed the reasonableness of the amount of the commission payable to a litigation funder when making a FEO.

The disadvantage of a FEO for funders is that it necessitates the litigation funder to undertake a book building process to ensure that their contractual entitlement is sufficiently large so as to make the proceeding commercially attractive. Book building can be time-consuming and resource intensive. For this reason, plaintiff lawyers and the litigation funders who stand behind them may prefer the group costs order regime in the Victorian Supreme Court if CFOs are beyond power.

As a third option, there remains an as-yet untested possibility that a plaintiff could obtain an order in a court's equitable jurisdiction that replicates the substantive effect of a CFO. In Edelman J's dissenting judgment in *Brewster*, his Honour commented that CFOs could be justified on the basis that they are analogous to orders made in equity in circumstances where work had not been requested and remuneration depended upon success, pointing to orders made to reward maritime salvors.[31] Justice Lee has made similar comments (in *dicta*) indicating the potential availability of equitable relief in several judgments.[32]

From a defendant's perspective, greater clarity on the availability of CFOs may reduce the risk of protracted stoushes (either at an interlocutory stage or at the settlement approval stage) as to the appropriateness of a funding arrangement.

28 *Galactic Seven Eleven Litigation Holdings LLC v Pareshkumar Davaria & Ors* (VID209/2023).
29 See, for example, *Southernwood v Brambles Limited* [2019] FCA 1021 at [73].
30 [2023] NSWCA 93.
31 *Brewster* at 643-4 [188].
32 *Klemweb Nominees Pty Ltd v BHP Group Ltd* [2019] FCAFC 107 at [128]-[129]; *Asirifi-Otchere v Swann Insurance (Aust) Pty Ltd* (No 3) [2020] FCA 1885 at [34]-[40]; *R&B Investments Pty Ltd v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application No 2)* [2023] FCA 142 at [18].

DOOR STILL OPEN FOR A CLIMATE CHANGE DUTY OF CARE

A class action brought on behalf of Torres Strait Islanders is set to test whether Australian Courts will recognise a climate change duty of care.[33] *Pabai* was commenced in the wake of the initial success in the landmark Australian case of *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560, which established that the Minister owed Australian children a duty of care in respect of climate harms. That case was subsequently overturned on appeal by the Full Federal Court.[34]

A NOVEL DUTY OF CARE WAS REJECTED IN SHARMA

The Full Federal Court focussed, in part, on the unsuitability of the Court to decide core policy matters, which were held to be political duties falling within the remit of government and not the Court.[35] Justice Beach in the minority, however, rejected arguments that such a duty should not be recognised simply because it involved questions of policy.[36]

PABAI

Sharma has not marked the end for negligence cases in relation to climate change. In *Pabai*, the applicants allege that the Federal Government owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them, their traditional way of life, and the marine environment from the current and projected impacts of climate change.[37]

The applicants allege the Commonwealth owes:

- A duty of care to take reasonable care to protect Torres Strait Islanders from the harms caused by climate change in the Torres Strait Islands. In fulfilling its duty, the Commonwealth must have regard to the best available science in relation to climate change.[38]
- An alternative duty of care to avoid causing property damage, loss of distinctive customary culture (known as *Ailan Kastom*), loss of native title rights, and physical harm to Torres Strait Islanders arising from a failure to implement reasonable adaptation measures to prevent or minimise the current and projected impact of climate change in the Torres Strait Islands.[39] The adaptation measures include adequate infrastructure to protect from the impacts of sea level rise and heatwaves.[40]

Unlike *Sharma*, the applicants in *Pabai* argue that various international treaties, plans and programs that Australia has entered into specifically concerning the Torres Strait Islands and Torres Strait Islanders give rise to a duty to take action to protect the Torres Strait Islanders in the face of climate change impacts, both actual and predicted. Further, the class of persons to whom the alleged duties are owed is arguably narrower and better defined than in Sharma, where Beach J considered '*indeterminacy arises because of the lack of ascertainability of the relevant class*.'[41]

33 *Pabai Pabai & Anor v Commonwealth of Australia* VID622/2021 (**Pabai**).
34 *Minister for the Environment v Sharma* [2022] FCAFC 35 (**Sharma**).
35 Ibid at [260].
36 Ibid at [754].
37 Applicant's Second Further Amended Statement of Claim, 11 April 2023, at p 44 [81], available at <https://www.fedcourt.gov.au/__data/assets/pdf_file/0019/110854/Applicants-Second-Further-Amended-Statement-of-Claim.pdf>.
38 Ibid at p 45 [82].
39 Ibid at p 44 [81A].
40 Ibid at p 46 [82A].
41 *Sharma* at [704] (Beach J).

The applicants in *Pabai* are seeking:

- declarations recognising the Commonwealth's duty of care and its alternative duty of care (to avoid causing harm) to Torres Strait Islanders
- injunctive relief, including requiring the Commonwealth to take reasonable care to protect Torres Strait Islanders and their *Ailan Kastom* from harm caused by climate change, and
- damages.

The Federal Government denies that it owes the duty of care or the alternative duty of care as alleged by the applicants and asserts that *'[t]he duty and alternative duty as pleaded are framed at too high a level of abstraction and, as noted, would involve the Court in assessing at the point of breach questions of policy-making unsuited to judicial determination.'*[42] This position echoes the Full Federal Court's decision in *Sharma*. Among other things, the Government asserts that:

- there is a lack of foreseeability and/or knowledge since Australia contributes a small proportion of global greenhouse gas emissions, which would not increase global temperatures to a degree that would cause any person or class of persons to suffer loss and damage, and
- climate change is a global problem, that requires global action, and so it is not possible for the Federal Government, acting alone, to mitigate climate change and its impacts. Instead, global action is required for 'meaningful impact on climate change' to be felt.

CURRENT STATUS OF PABAI

On-country hearings took place in June 2023 on the islands of Boigu, Badu and Saibai, and in Cairns.[43]

The Commonwealth representative acknowledged that matters of climate science were not in dispute and acknowledged the vulnerability of Torres Strait Islanders to the impacts of climate change.[44] Nevertheless, the Commonwealth denies the existence of the duties of care as alleged, and denies it breached any such duties or caused loss flowing from such breach.

A hearing of expert evidence has been listed for November 2023.

WHAT MIGHT A SUCCESSFUL RESULT IN PABAI MEAN?

There is a growing trend globally for courts to consider international law (and cases) as informing the obligations of companies and governments in relation to alleged breaches of human rights, which may have flow on effects for future cases in relation to climate impacts grounded in similar obligations and duties. In *Nevsun Resources Ltd v Araya*,[45] the Supreme Court of Canada held that customary international law was part of Canadian law, and therefore Canadian Courts could find Canadian companies to be in breach of customary international law. The case concerned alleged human rights abuses at Nevsun's mine in Eritrea.

If the applicants in *Pabai* are successful in the Australian Courts, it may push the boundaries of climate change related cases. The *Pabai* claim is founded on existing obligations and responsibilities of the Government, some of which are sourced in international instruments. Following *Urgenda v Netherlands*,[46] where the Dutch Supreme Court held that the Dutch Government had a duty to protect its citizens from climate harms, cases grounded in similar arguments have been commenced in various jurisdictions around the world. Claimants will be watching the decision in *Pabai* closely to see whether a similar playbook can be used to assert government duties in relation to climate harms.

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42 Respondent's Amended Concise Statement, 29 May 2023, at p 3 [13] available at <https://www.fedcourt.gov.au/__data/assets/pdf_file/0005/110858/Respondents-Amended-Concise-Statement-in-Response.pdf>.
43 Grata Fund, 'Media Release: Landmark Climate Case Hearings Start On-Country' (Web Page, 5 June 2023) <https://www.gratafund.org.au/climate_hearings_start>.
44 Kirstie Wellauer, 'Torres Strait Islander elders call on government to improve conditions in landmark climate case', Australian Broadcasting Corporation News (9 June 2023), available at: <https://www.abc.net.au/news/2023-06-09/federal-court-hears-evidence-boigu-torres-strait-climate-case/102455250>.
45 *Nevsun Resources Ltd v Araya* [2020] 1 SCR 166.
46 *Urgenda v Netherlands ECLI:NL:HR:2019:2007* (Supreme Court, 20 December 2019), English translation in (2020) 59 ILM 811.

COMPETING CLASS ACTIONS

A significant number of competing class actions were commenced in the review period.

The following trends emerged:

- consolidation as a solution to multiplicity rather than proceeding to a contested beauty parade
- the primacy of the interests of group members, particularly as against the interests of legal representatives and funders, and
- plaintiff law firms emphasising, as part of the multifactorial approach, their prior knowledge and experience or the extent of the work and investigations they have already undertaken in the proceeding.

PRIMACY OF THE INTERESTS OF GROUP MEMBERS

Courts have continued to emphasise that the interests of funders and lawyers in respect of funding arrangements and costs are irrelevant in applying the multifactorial approach.

In the initial *Blue Sky* carriage decision, Lee J found that a consolidation arrangement would be in the group members' best interests because group members would be best assisted by the fruits of the work that had been done by both sets of solicitors and counsel.[47] The mere fact that this might not be to the commercial advantage of the litigation funder was irrelevant.[48] His Honour ordered the parties to confer with a view to consolidating the proceedings.

In a further carriage judgment in the *Blue Sky* proceedings, Lee J commented that the matter had 'regrettably' gone into 'stasis' since the first decision, as the parties had been unable to reach agreement during conferral regarding consolidation.[49] The draft consolidation agreement contemplated that the plaintiffs would seek a solicitors' common fund order or, if the matter was transferred to the Victorian Supreme Court, a group costs order (**GCO**).

Justice Lee commented, without needing to make a determination, that a transfer application would frustrate the substantive progress of the proceedings and was difficult to reconcile with the lawyers' overarching duties. This, he said:

> *'reinforces a concern that one often has about Pt IVA proceedings, namely that solicitors and funders are focussed so intently on their own position that they forget that it is their duty to advance the claims of the applicant and group members towards a swift resolution of the substantive matter.'*[50]

47 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application)* [2022] FCA 1444 at [85].
48 Ibid at [79]; an application for leave to appeal this decision was dismissed by Middleton J, who found no error in Lee J's approach at first instance: *Furniss v Blue Sky Alternative Investments Limited (Administrators Appointed) (Receivers and Managers Appointed) (in liq)* [2022] FCA 1546.
49 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Ltd (Administrators Appointed) (in liq) (Carriage Application No 2)* [2023] FCA 142 at [6].
50 Ibid at [20]-[21].

In *Nuix*, there was a three-way carriage dispute between Banton Group, Shine Lawyers and Phi Finney McDonald. The evidence given in the carriage dispute by the principal of Banton Group was that the law firm was 'not prepared' to entertain a no win no fee (**NWNF**) funding arrangement on the basis that *'the risk and cost to the firm is too great when compared with the comparatively limited reward of proceeding pursuant to that approach.'*[51] Justice Nichols observed that, although the interests of the defendant are relevant, the *'interests of funders and law firms acting in representative proceedings are not'*. The proceedings commenced by Banton Group were permanently stayed.

In considering whether to consolidate the remaining two sets of proceedings brought by Shine Lawyers and Phi Finney McDonald, Nichols J closely considered the complexities in decision-making presented when there are two clients, two law firms and two funders. Justice Nichols accepted that the terms of the joint funding proposal were a sufficient basis to permit both plaintiffs to remain in the proceeding.[52] Justice Nichols consolidated the proceedings with Shine Lawyers appointed as solicitors for the joint plaintiffs. The Court also accepted the joint proposal that Phi Finney McDonald be engaged by Shine as an agent to undertake litigation work.

EVOLVING APPLICATION OF THE MULTIFACTORIAL APPROACH

(a) NWNF vs GCO

The Victorian Supreme Court recently compared a NWNF arrangement to GCO arrangements as part of its multifactorial analysis in the carriage dispute in the *Star Entertainment* proceedings. Four firms filed competing class actions against Star Entertainment: Shine Lawyers, Slater & Gordon, Maurice Blackburn and Phi Finney McDonald. Shine Lawyers proposed a NWNF arrangement while the other three solicitors proposed GCOs (at varying rates). The Court ordered that the Slater & Gordon proceeding will continue, with a GCO at 14%, and that the other three proceedings be permanently stayed.[53]

In preferring a GCO to the NWNF proposal, the Court accepted the Contradictors' submission that *'the significant risk of costs overruns had to be taken into account'* and found that, on the whole of the evidence, *'the guarantee against group members'* returns being eroded by legal costs that would be afforded by a GCO funding mechanism, to be a real benefit to group members and protective of their interests.'[54]

(b) Focus on state of progress of the proceeding and experience of legal practitioners

Wigmans identified a number of factors which may be relevant in resolving a multiplicity problem by comparing competing proceedings.[55] These factors, referred to as the multifactorial approach, are typically evaluated in the context of 'beauty parades' (where firms compete to obtain carriage of a proceeding).

Recent cases have highlighted the importance of two of the *Wigmans* factors: the state of progress of the proceeding, and the experience of legal practitioners. These factors were considered in the following carriage disputes in the review period:

- In *Blue Sky*, Lee J considered the costs arrangements between the parties were not determinative and instead found that the most significant factor was the extensive work and investigations already undertaken in the proceeding by one of the competing firms.[56]
- In *Jaguar*,[57] where two competing proceedings have been filed, Gilbert + Tobin and Maurice Blackburn each argued that their firm should be awarded carriage. Gilbert + Tobin pointed to the fact that they successfully ran a similar class action against Toyota in 2022. They argued that it was *'invaluable to have gone through that experience'* and on that basis there were *'increased prospects of a successful outcome for group members.'*[58] While judgment is reserved, during the hearing Lee J observed that the matter presented an 'unusually difficult multiplicity argument' because Gilbert + Tobin had the experience of the Toyota matter, however Maurice Blackburn had proposed a favourable funding arrangement and 'unparalleled experience' in class actions.[59]
- The *Kia* and *Hyundai* proceedings were commenced in February and May 2023 alleging faulty anti-lock braking systems. Maurice Blackburn filed proceedings against Kia and Hyundai in the Victorian Supreme Court[60] while Bannister Law filed proceedings in the Federal Court.[61] A multiplicity dispute seems likely, after the Federal Court proceedings were transferred to the Victoria Supreme Court.[62] In a novel development, Bannister Law has proposed a cooperation agreement with the New York based class action law firm Hagens Berman Sobol Shapiro (**Hagens Berman**).[63] That firm represented class action litigants in similar proceedings against Hyundai and Kia in the United States, which resulted in a settlement worth more than US$200M.[64] The agreement would allow Hagens Berman to share relevant non-confidential and non-privileged information with Bannister Law with a view to giving Bannister Law a 'competitive advantage' in the carriage proceedings.[65] In a further development, Bannister Law is now planning to merge with Pogust Goodhead, an American law firm, and will bring an application for Pogust Goodhead to become the solicitor on record.[66]

51 *Lay v Nuix Ltd; Batchelor v Nuix Ltd; Bahtiyar v Nuix Ltd* [2022] VSC 479 at [25(h)].
52 Ibid at [125].
53 *DA Lynch Pty Limited v The Star Entertainment Group Ltd; Drake v The Star Entertainment Group Ltd; Huang v The Star Entertainment Group Ltd; Jowene v The Star Entertainment Group Ltd* [2023] VSC 561.
54 Ibid at [207] and [274].
55 *Wigmans v AMP Ltd* (2021) 270 CLR 623 at 651, [60].
56 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Carriage Application)* [2022] FCA 1444 at [85]. An application for leave to appeal this decision was dismissed by Middleton J, who found no error in Lee J's approach at first instance: *Furniss v Blue Sky Alternative Investments Limited (Administrators Appointed) (Receivers and Managers Appointed) (in liq)* [2022] FCA 1546 at [22].

57 *Michelle Elizabeth Jennings v Jaguar Land Rover Australia Pty Ltd* (NSD85/2023); *Leah Maree Greentree & Anor v Jaguar Land Rover Australia Pty Ltd* (NSD1010/2022).
58 Cindy Cameronne, 'In Jaguar Land Rover class action contest, "innovative" funding model challenged', *Lawyerly* (28 February 2023), available at <https://www.lawyerly.com.au/innovative-funding-model-questioned-in-jaguar-land-rover-class-action-contest/>.
59 Ibid.
60 *Anne-Maree Johnston v Hyundai Motor Company Australia Pty Limited* (S ECI 2022 05424); *Jane Victoria Moroney v Kia Australia Pty Limited* (S ECI 2023 00959).
61 *Samantha Jane Edwards & Anor v Hyundai Motor Company Australia Pty Limited & Anor* (NSD464/2023); *David John Sims v Kia Australia Pty Ltd & Anor* (NSD466/2023).
62 *Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd* [2023] FCA 1134.
63 Cindy Cameronne, 'Law firm teams up with US plaintiffs giant to run Hyundai, Kia class actions', *Lawyerly* (13 July 2023), available at <https://www.lawyerly.com.au/law-firm-teams-up-with-us-plaintiffs-giant-to-run-hyundai-kia-class-actions/>.
64 Hagens Berman, 'Hyundai/Kia Car Theft Defect' (18 May 2023), available at: <https://www.hbsslaw.com/press/hyundai-kia-car-theft-defect/hyundai-kia-theft-class-action-lawsuit-reaches-settlement-valued-at-more-than-200-million>.
65 Cindy Cameronne, 'Law firm teams up with US plaintiffs giant to run Hyundai, Kia class actions', *Lawyerly* (13 July 2023), available at <https://www.lawyerly.com.au/law-firm-teams-up-with-us-plaintiffs-giant-to-run-hyundai-kia-class-actions/>.
66 Cindy Cameronne, 'Law firm accused of 'gazumping' in fight to run Hyundai, Kia class actions', Lawyerly (20 September 2023), available at <https://www.lawyerly.com.au/law-firm-accused-of-gazumping-in-fight-to-run-hyundai-kia-class-actions/>.

LOOKING FORWARD

The year ahead will require the Courts to consider the involvement of third parties in competing class actions, including:

- The involvement of government and unions in the *McDonald's* class action. Both Shine Lawyers and the representative union, the Shop Distributive and Allied Employees Association (**SDA**), have commenced proceedings.[67] The SDA argues that its proceeding should continue rather than the class action commenced by Shine and has challenged whether the Federal Court has the power to hear employment cases as representative proceedings. The question will be determined by the Full Federal Court as ancillary to the question of whether the Federal Court has the power to make a CFO (see **Common Fund Order** section of The Review). The Full Federal Court is presently reserved on that question. The Australian Government has publicly supported the Union's action prevailing over Shine Lawyers' action, with Workplace Relations Minister Tony Burke saying *'we'll be turning up to court and making the legal case as to why the case from the union where the workers would get 100 per cent of the funds is the one that should be allowed to proceed'*.[68]
- The involvement of regulatory bodies, such as the Office of the Australian Information Commissioner (**OAIC**) arising from its investigations of Medibank and Optus over 2022 data breaches. Maurice Blackburn filed a representative complaint against Medibank with the OAIC, which the OAIC has confirmed that it will investigate. The OAIC, which has the power to award compensation, is conducting its investigation alongside the Federal Court class action claim (see **Data breaches** section of The Review). In relation to Optus, the OAIC has elected to investigate a complaint lodged by Johnson Winter Slattery over one lodged by Maurice Blackburn – a decision now being challenged in Court at the same time the class action brought by Slater & Gordon proceeds.

67 *Jade Elliott-Carde & Anor v McDonald's Australia Limited* (VID726/2021) (class action) and multiple SDA actions (eg *Shop, Distributive and Allied Employees Association v Bandec Pty Ltd & Anor* (SAD127/2022)).
68 Australian Financial Review, 'Labor backs union in McDonald's 'wage theft' case' (5 March 2023), available at <https://www.afr.com/work-and-careers/workplace/labor-backs-union-in-mcdonald-s-wage-theft-case-20230305-p5cph8>.

DATA BREACH RELATED FILINGS

Cyber-attacks in Australia are on the rise. Over the last year, millions of Australians have been affected by data breaches at some of Australia's largest companies including Optus, Medibank and Latitude. This has resulted in an uptick in two types of cyber class actions: shareholder class actions and the more novel consumer claims based on privacy laws.

CLASS ACTIONS AGAINST MEDIBANK AND OPTUS

Three 'consumer' class actions were filed in 2023 on behalf of current and former customers for loss and damage arising from the disclosure of personal information in a cyber-attack (two against Medibank, one against Optus). Two securities class actions have also been filed against Medibank for loss and damage arising from alleged breaches of disclosure obligations under ASX Listing Rules in relation to the cyber-attack.[69] In August and September 2023 respectively, the Courts ordered the consolidation of competing class actions filed against Medibank such that there is now a single consumer class action and a single securities class action. In addition, representative complaints have been filed against both Optus and Medibank with the Australian privacy regulator, the Office of the Australian Information Commission (OAIC).

In the *Medibank* and *Optus* consumer class actions, group members seek damages (both for economic loss and for non-economic loss for distress and disappointment) based on the following causes of action:

- breach of express contractual terms
- misleading and deceptive conduct (s18 of the Australian Consumer Law)
- breach of an alleged duty of care (negligence)
- breach of an equitable duty of confidence, and/or
- breaches of statutory duty, alleged to arise from breaches of the Australian Privacy Principles (set out in the *Privacy Act 1988* (Cth) (**Privacy Act**)) and APRA Prudential Standard CPS 234 Information Security.

In the *Medibank* shareholder class action, the claimants allege that Medibank's IT security systems were deficient, and that its directors and officers ought to have known and disclosed those deficiencies to the market as a matter likely to have a material effect on Medibank's share price.

WHY ARE PRIVACY CYBER CLASS ACTIONS SO RARE?

Class actions brought by consumers for damages arising from the disclosure of their personal information in cyber-attacks (**privacy cyber class actions**) are notoriously difficult and historically rare. Before 2023, only one privacy cyber class action had been filed in Australia (the *NSW Ambulance* case), which ended in a modest settlement.[70]

The key reason for this is that, unlike jurisdictions such as the UK and New Zealand, there is no express or direct avenue to claim compensation for privacy breaches in Australian Courts:

- There is no recognised tort of invasion of privacy in Australia (in statute or common law).
- There is no express private cause of action for breaches of the Privacy Act. Breaches of the Privacy Act are dealt with exclusively by complaints to Australia's privacy regulator — the OAIC.
- Additionally, there are likely to be difficulties in proving causation and economic loss.
- The *Optus* and *Medibank* privacy cyber class actions claim damages for non-economic loss, including distress, frustration and disappointment. There is great uncertainty as to whether damages or equitable compensation for mental harm falling short of a psychiatric illness can flow from any of the causes of action outlined above. Damages for emotional distress was considered, both at trial and on appeal, in the *Scenic Tours* class action (albeit in the context of a dispute about a holiday contract, and not a privacy breach), where a settlement was recently approved by the NSW Supreme Court.[71]

Accordingly, the claims brought in the *Optus* and *Medibank* consumer class actions are novel and challenging.

Both the *Optus* and *Medibank* class actions also face novel procedural complexity arising from overlapping group proceedings before the OAIC known as a 'representative complaint'. Under the Privacy Act, the OAIC has the power to consider complaints on behalf of groups of people for breaches of the Australian Privacy Principles and award compensation to group members if a breach is found (including for hurt feelings and humiliation). Representative complaints are similar to class actions — but are handled by the regulator, not the Court.

Representative complaints have been lodged with the OAIC against Optus and Medibank on behalf of substantially the same groups of persons and arising out of the same incidents as the class actions. Neither the Courts nor the OAIC have previously considered the issue of overlap between a class action and representative complaint before the OAIC. Medibank has applied for orders to stop the OAIC from further investigating or determining the representative complaint in light of the overlapping consumer class action. The OAIC has stayed the second in time filed representative complaint in the Optus case, and that decision is being challenged under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). All of these novel applications are due to be heard by the same judge (Beach J) later this year.

WHY HAVE PRIVACY CYBER CLASS ACTIONS BECOME PREVALENT NOW?

As cyber-attacks become more frequent, and the number of affected people grows, privacy cyber class actions may be increasingly attractive to plaintiff law firms and their funders, despite their novel nature. It is estimated that 11M people were affected by the Optus cyber-attack, and 9.7M with respect to Medibank. These numbers are far greater than for past cyber-attacks. In contrast, the *NSW Ambulance* case involved a data breach affecting 130 people.[72]

If successful, while individual damages awards may be modest, plaintiff lawyers and their funders stand to gain substantial sums of money. Therefore, the cost-benefit analysis of pursuing these claims, despite their challenges, appears to have shifted. We expect to see an increase in the number of privacy cyber class actions filed.

WHAT ABOUT DIRECTORS' CONTINUOUS DISCLOSURE OBLIGATIONS?

The *Medibank* shareholder class action raises novel issues for directors and officers of public companies about the knowledge and awareness required of their company's IT security systems. The plaintiffs' case appears to suggest an obligation to disclose IT security deficiencies in circumstances where disclosing those deficiencies is itself likely to increase the risk of a cyber-attack by putting potential threat actors on notice.

69 KWM is acting for Medibank in each of the actions against it.
70 *Evans v Health Administration Corporation* [2019] NSWSC 1781, see The Review 2019/2020.

71 *Moore v Scenic Tours Pty Ltd* (No. 6) [2023] NSWSC 948.
72 Harriet Alexander, 'Paramedics Launch Class Action over the Sale of their Medical Records to Personal Injury Solicitors', The Sydney Morning Herald (18 November 2017), available at: <https://www.smh.com.au/national/nsw/paramedics-launch-class-action-over-the-sale-of-their-medical-records-to-personal-injury-solicitors-20171118-gzo44u.html>.

LEGISLATIVE REFORM ON THE HORIZON?

On 16 February 2023, the Commonwealth Attorney-General released the Privacy Act Review Report (**Report**) following a two-year consultation and review process.[73] The Report addressed whether the Privacy Act provides adequate privacy protection in the modern, digital age and set out 116 proposals for reform. On 29 September 2023, the Government released its long awaited response to the Report, supporting most of the proposals and indicating an intention to legislate some of the less controversial changes in the near future.

The Report had acknowledged that the *'avenues available to individuals to litigate a claim for breach of their privacy under the Act are limited'*, and relevantly recommended the introduction of the following new causes of action:

- a **direct right of action** in the Privacy Act to permit individuals to apply to the courts for relief in claims of an interference with privacy which have caused harm (Proposal 26.1), and
- a **statutory tort** for serious invasions of privacy (Proposal 27.1).

The Government has agreed in principle with these proposals,[74] which will now be subject to further consultation, noting that:

- For the **direct right of action**, individuals will be required to first lodge and conciliate a complaint with the OAIC or a recognised dispute resolution scheme before being able to pursue the matter further in the courts (similar to the current procedure for conciliation of human rights complaints). Available remedies would include damages.
- For the **statutory tort**, the Government is considering legislating liability for a serious intrusion into seclusion or a serious misuse of private information. The tort include would include additional thresholds, such as requiring intentional or reckless conduct rather than mere negligence, and a public interest test.[75]

Uncertainty persists regarding whether a cyber incident involving a malicious third-party criminal would meet the criteria for either of the proposed legal actions, especially when the defendant is the victim of a cybercrime. Distinguishing between recklessness and negligence in the difficult context of data breaches will pose challenges for both plaintiffs and defendants.

It remains to be seen the form in which either proposal will be legislated — but we expect the intersection of privacy and technology law to evolve over the coming years. While the Privacy Act already contemplates class action-'like' complaints led by representative complainants, class actions may play an important role in developing the law in this space.

73 Attorney-General's Department, Privacy Act Review: Report 2022 (Report, 16 February 2023), available at: <https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf>.
74 Government Response: Privacy Act Review Report (28 September 2023), <https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report>.
75 Read more in our KWM Insight Inching forwards: Government responds to Privacy Act Review Report, 28 September 2023

PRODUCTION OF OTHERWISE UNDISCOVERABLE DOCUMENTS

In the review period, several Federal Court decisions have considered the circumstances in which the Court may make orders requiring production of documents that are **not** relevant to a fact in issue (and otherwise not discoverable). The decisions reaffirm the longstanding principle that disclosure of insurance policies will typically only be considered appropriate where there has been an insolvency event.

In *Dixon Advisory*,[76] DASS, one of the respondents, was in administration. The applicant was a creditor of DASS. The applicant sought disclosure of certain insurance policies on the basis that disclosure was reasonably necessary to make an appropriate assessment of whether to seek to proceed with its claims against DASS. The insurers opposed disclosure on the basis that it would confer an inappropriate advantage on the applicant. One of the scenarios emphasised by the insurers was that disclosure of the existence and context of exclusions would provide for the applicants to tailor their claims so as to seek to avoid the application of such exclusions.[77]

The Court determined that it was reasonably necessary for the insurance policies to be disclosed, but that production *'should not be required of parts of the documents where disclosure was not reasonably necessary for the applicant to be given information sufficient for it to make an appropriate assessment of whether to seek to proceed against DASS and how rigorously to press its claims'*.[78] Justice Thawley was not satisfied that the provision of the specific information objected to by the insurers (limits and sub-limits, and the existence and content of policy exclusions) would be likely to confer an inappropriate advantage on the applicant.[79]

In *3A Composites*,[80] Wigney J confirmed the principles articulated in *Dixon Advisory*, but refused to order production of commercial documents (which were not relevant to the facts in issue). The commercial documents were sought for the purposes of estimating the value of the group members' claims and to facilitate settlement discussions at mediation. Unlike in *Dixon Advisory*, the respondent was not insolvent.

Justice Wigney agreed with the rulings in *Dixon Advisory* and *Davantage*[81] that s23 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) provides the power to order production of otherwise undiscoverable documents. Justice Wigney commented that this is:

- a discretionary power that *'should be exercised with a degree of circumspection and caution'*
- to be exercised reluctantly for the purposes of mediation, given that it is a consensual process, and
- to be exercised even more reluctantly for the purposes of mediation where production would *'give rise to asymmetric bargaining positions'*.

76 *Watson & Co Superannuation Pty Ltd v Dixon Advisory and Superannuation Services Ltd (No. 2)* [2022] FCA 1504.
77 Ibid at [13].
78 Ibid at [11].
79 Ibid at [14].
80 *The Owners – Strata Plan No 87231 v 3A Composites GmbH (No 6)* [2023] FCA 188.
81 *Evans v Davantage Group Pty Ltd (No 2)* [2020] FCA 473.

HIGH BAR TO OBTAIN CONFIDENTIALITY ORDERS

Confidentiality orders are more likely to be granted where the information might give an **unacceptable** tactical (or forensic) advantage to another party. In this context, the Court has emphasised that the statutory test for granting confidentiality orders under Part VAA of the FCA Act is demanding and parties must identify with detail what parts of a document are 'truly confidential' as opposed to proposing any 'overarching' confidentiality order.[82]

In *Blue Sky*,[83] Lee J rejected an application for what his Honour described as 'swingeing' confidentiality orders. The applicants had sought confidentiality orders in relation to legal cost budgets, litigation funding agreements and other financial information.

His Honour reiterated that in the context of class actions, the statutory test is a strict one, and the relevant onus is 'a very heavy one'. His Honour indicated he would only make confidentiality orders in respect of 'war chest' information which *'if revealed, may give a forensic advantage to the respondents'* in a proceeding. Justice Lee made clear that parties to a class action should not assume that, just because they want information to be suppressed, that the Court will accede to requests for confidentiality orders.

'War chest' information is information central to a party's case that might reasonably be expected to confer a tactical advantage on another party to the proceeding, such as those items identified at paragraph 13.7 of Victorian Supreme Court Practice Note SC Gen 10 – *Conduct of Group Proceedings (Class Actions) (Second Revision)*, being information:

(a) as to the budget or estimate of costs for the litigation or the funds available to the plaintiff, in total or for any step or stage in the proceeding, or

(b) that might reasonably be expected to indicate an assessment of the risks or merits of the proceeding or any claim in, or aspect of, the proceeding.

82 *R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Confidentiality Orders)* [2022] FCA 1443 at [3].
83 Ibid.

SETTLEMENTS SCRUTINY

Class action settlements require Court approval. If the Court approves the settlement, it may make such orders as are just with respect to the distribution of any money paid under a settlement. This reflects the Court's protective and supervisory role in respect of group members who are not parties to the proceedings. Recent decisions illustrate how Federal Court judges are exercising this supervisory role in an attempt to reduce costs and improve outcomes for group members.

BIFURCATED APPROVALS

A new Federal Court practice has emerged of separating, or 'bifurcating', settlement approval from the subsequent question of how the settlement funds will be distributed. For the latter question, Courts generally consider the operation of the settlement distribution scheme, including appropriate deductions for legal costs and funding commissions.

The Federal Court bifurcated the approval of various settlements in the review period, including investor class actions against Quintis[84] and Linchpin Capital,[85] the *Montara Oil Spill* class action,[86] the pelvic mesh class actions,[87] and the *Tyro* class action.[88]

The Court may decide to bifurcate settlement approval applications to provide certainty to group members that the global settlement figure has been approved, before going on to decide complex questions about funding, legal and other costs to be deducted from the settlement pool.[89] However, the Court will only do this if it is appropriate in the circumstances of the case.

The primary consideration is whether it is possible to determine that the total settlement sum is fair, reasonable and in the interests of group members without specifying the net amount that each group member would receive after deductions.[90]

In *Montara Oil Spill*, Lee J determined that it was appropriate to approve the headline sum even though there was an outstanding dispute about the amount of legal costs and funding commission to be deducted. This was because the Court has the power to control the legal costs payable, and would not allow payment of legal costs that is above what would be considered fair, reasonable and just. The funder had in that case also provided an undertaking to the Court in relation to the amount it would seek to recover from group members.

Justice Lee noted, however, that it may not be appropriate to approve a headline settlement sum in cases where there is uncertainty about the amount to be paid to a litigation funder - for example, because an application for a CFO is outstanding or where there is a dispute about the funding agreement.

In *Linchpin*, Lee J confirmed that the Court can approve some distributions (the litigation funder's costs and disbursements and solicitors' legal costs) but still defer other distributions for a later date (the funder's commission and distributions to group members).

84 *Davis v Quintis Ltd (Subject to Deed of Company Arrangement)* [2022] FCA 806.
85 *J & J Richards Super Pty Ltd v Linchpin Capital Group Limited (Settlement Approval)* [2023] FCA 656 (**Linchpin**).
86 *Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Approval)* [2023] FCA 143 (**Montara Oil Spill**).
87 See **Health** section of The Review.
88 *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd* [2023] FCA 590; *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd (No 2)* [2023] FCA 643.
89 *Fowkes v Boston Scientific Corporation* [2023] FCA 230 at [17].
90 *Montara Oil Spill* at [18]-[19].

CLASS CLOSURE AT SETTLEMENT APPROVAL STAGE

The *Tyro* class action was brought on behalf of Tyro customers and merchants relating to an outage of payment processing terminals. The parties agreed to settle the proceedings for $5M. The proposed settlement contemplated that class closure orders would be made upon approval and this had previously been communicated to group members in a notice regarding registration.[91]

At a hearing on 19 May 2023, however, Rares J expressed concern that only 429 group members (out of 13,128 potential group members) had registered to participate in any settlement. Of the 429 registered group members, 98 did not provide any estimate of their loss. In light of this, as well as a concern regarding the quantum of legal fees and funding commission sought to be deducted from the settlement fund, his Honour made orders, at the parties' invitation, to approve the settlement terms under s33V(1) of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) but adjourned the proceedings to a future date to allow the parties further time to propose a new distribution scheme that addressed his concerns.[92]

When the matter returned on 30 May 2023, his Honour made orders under s33V(2) of the FCA Act approving the new settlement distribution scheme. His Honour was satisfied that the concern identified in the previous hearing would be ameliorated by a small, but nominal, payment of $100 out of the settlement fund as compensation to the non-registered group members and the 98 registered group members who provided no evidence of their losses. The balance of the settlement fund would then be shared between the remaining registered group members.[93] His Honour later made orders, including class closure orders, giving effect to the terms of settlement distribution.[94]

TENDERS FOR SETTLEMENT ADMINISTRATION

In the *Ethicon Sàrl* and *Boston Scientific* class actions,[95] the Court ordered a settlement scheme administrator to be appointed through a competitive tender process. This deviates from the default position that settlement schemes are administered by the applicant's solicitors. The orders reflect concerns raised by Federal Court judges and commentators that the fees charged by plaintiffs' solicitors for settlement administration may be higher than other suitably qualified third-party administrators, such as accounting firms.

(a) Background

Concerns about the excessive cost of lawyers administering a settlement scheme are not new. While the Federal Court has at times appointed third parties to administer settlement distribution schemes, in some proceedings this has been determined to be an inappropriate course because of the complexity of the case or the advantages associated with the applicant's solicitors' familiarity with the proceeding.[96]

In *Linchpin*, Lee J approved the appointment (by further order) of an accounting firm proposed by the applicant's solicitors following a tender process run by the law firm. The evidence was that *'an accounting firm is more likely to be both cheaper and more capable of efficiently administering the scheme than a law firm'*, and Lee J commented that the tender process *'was a very sensible and commendable course'* to take.[97]

(b) The competitive tender process in the mesh class actions

Justice Lee appointed contradictors (counsel who had previously provided an independent opinion to the Court about the settlement) to run the tender process in the *Ethicon Sàrl* (mesh) class actions for the award of settlement administration work. A tender process was adopted in this case due to its size, complexity and the fact that individual assessments of damages were required. This included developing tender criteria, publishing a tender notice, inquiring into and reviewing the tenders received and providing the Court with written submissions as to whose tender response should be chosen on approval of the settlement. In approving the settlement sum, Lee J noted some tenderers had complained about the transparency of the process. His Honour reflected that it would have been preferable to appoint a referee under ss37P(2) and 54A of the FCA Act to consider the candidates. Accordingly, to ensure procedural fairness, Lee J decided to appoint a referee to report back to the Court as to the best candidate based on objective criteria and questions to be set by the Court.[98]

Based on the learnings from these mesh class actions, Lee J initiated a tender process in the *Montara Oil Spill* class action, and appointed a referee to decide *'which response to the tender would best provide a fair and reasonable distribution of funds pursuant to the settlement scheme'*.[99]

Justice Lee also appointed a referee in the mesh class action against *Boston Scientific* to determine (1) the form of the settlement distribution scheme and (2) who should be appointed to administer the scheme (including, if the referee thinks fit, by inviting any tenders or adopting any other process to obtain expressions of interest).[100]

The referee's report in the mesh class actions, identifying the preferred tenderer, was adopted in full by the Court in September 2023.[101]

(c) Key takeaways

- In considering the proposed costs of the applicant's solicitor for administration, the Court emphasised the Court's supervisory role and duty to protect the interest of class members who are *'commonly ill-informed as to the accumulation of costs, yet are commonly made liable for a share of the costs.'*[102]
- Being appointed administrator of a settlement distribution scheme of $300M represented a *'commercial opportunity of some real value and should not just be presented on a platter, without appropriate scrutiny, to the solicitors who have acted for the applicant.'*[103]
- Justice Lee has noted that 'there is no doubt' that competition in terms of determining who administers the scheme is likely to produce a better outcome for group members.[104]

As with bifurcated approvals, it will be interesting to see whether the practice of tendering for settlement approvals becomes common practice in the Federal Court (including by adoption of tender processes in practice notes in the future).

91 NSD1100/2021, orders made on 22 July 2022.
92 *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd* [2023] FCA 590 at [9]-[10], [12], [16]-[29] and [32].
93 *Spozac Pty Ltd as trustee for the LDB Family Trust t/as Not Just Cakes v Tyro Payments Ltd (No 2)* [2023] FCA 643 at [17], [28], [30]-[31].
94 NSD1100/2021, orders made on 19 June 2023.
95 See **Health** section of The Review.
96 See *Wotton v State of Queensland (No 10)* [2018] FCA 915 at [42], [50] (Murphy J) and *Liverpool City Council v McGraw-Hill Financial Inc (now known as S & P Global Inc)* [2018] FCA 1289 at [77] (Lee J).
97 *Linchpin* at [102].
98 *Gill v Ethicon Sàrl (No 11)* [2023] FCA 229 at [26].
99 *Lay v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Distribution)* [2023] FCA 242 at [34].
100 Orders of Lee J made on 23 June 2023 in *Debra Fowkes v Boston Scientific Corporation* (NSD244/2021).
101 *Gill v Ethicon Sàrl (No 13)* [2023] FCA 1131.
102 *Gill v Ethicon Sàrl (No 11)* [2023] FCA 229 at [7].
103 Ibid at [13].
104 Ibid at [14].

HEALTH: APPROVAL OF SETTLEMENTS OF PELVIC MESH CLAIMS

Product liability claims under Australian consumer protection laws dominate class actions in the health space. In 2023, the Federal Court approved four major settlements of pelvic mesh class actions:

- a $300 million settlement with respect to the two *Ethicon Sàrl* mesh class actions, making it the largest settlement in a product liability class action in Australia to date.[105]
- a $105M settlement in the *Boston Scientific* class action, relating to alleged defective mesh implants used to treat pelvic prolapse or stress urinary incontinence,[106] and
- a $41.45M settlement in the *IVS & TFS Manufacturing* mesh class action.[107]

APPROVED SETTLEMENTS

(a) Ethicon Sàrl

One of the two *Ethicon Sàrl* class actions, the Gill Proceeding, went to trial on common questions of liability in relation to complications suffered as a consequence of the surgical insertion of transvaginal mesh products. The trial took place between July 2017 and February 2018. In 2019, the Federal Court found in favour of the representative applicants in the Gill Proceeding against the respondent companies.[108] The Full Federal Court upheld this decision in 2021, unanimously dismissing all 17 grounds of appeal.[109] The High Court refused an application for special leave later that year.[110]

In late 2022, the parties to the Gill Proceeding, as well as the related Talbot Proceeding (which was filed after the Full Federal Court delivered judgment in the 2021 appeal in the Gill Proceeding), agreed to a $300M settlement. Justice Lee approved the settlement on 16 March 2023, making it the largest settlement in a product liability class action in Australia to date. Justice Lee observed in the judgment that while *'the proposed settlement sum'* was *'within the range of fair and reasonable outcomes'* it was *'at the lowest end of that scale.'*[111]

To assist the Federal Court to determine whether the settlement amount was within the range of what was fair and reasonable, Lee J appointed a contradictor who made submissions at the settlement approval hearing. Contradictors are sometimes appointed in settlement approval applications to represent the interests of group members and assist the Federal Court to test the reasonableness of the proposed settlement amount in all the circumstances.[112]

In deciding that the settlement amount was fair and reasonable, Lee J considered:

- **The reaction of the class** — while some group members objected to the settlement, those objections were thought to be mitigated by the fact that a settlement *'avoids or substantially lessens the distress which would be suffered'* as a result of a protracted process that would involve answering questions, undergoing physical examinations and preparing statements, as well as the costs associated with the process.
- **The adequacy of the settlement sum** — Lee J concluded that while the amount was less than *'what might be obtained in a "best case scenario" borne out through persistence in this litigation'*, it would provide sizeable compensation to each group member. It would also provide each group member with *'certainty, "closure", the avoidance of further delay, and the not inconsiderable further vexation that would result in proving claims.'*
- **The applicants' choice to adopt an assessment of compensation in accordance with Commonwealth law** — Justice Lee was concerned that the damages regime under the *Trade Practices Act 1974* (Cth) and the *Competition and Consumer Act 2010* (Cth) was 'ungenerous' (due to the legislated maximum amounts that can be awarded for non-economic loss). Notwithstanding these concerns, his Honour noted that adopting a compensation model based on those Commonwealth laws would apply to all group members equally and would contribute to the efficient administration of the settlement, compared with a compensation model derived from the State-specific legislation applicable to claims in negligence.

Just outside the review period, in August 2023, Lee J dismissed an application by the class actions lawyers to deduct $32M from the approved settlement fund to cover the interest on a loan the lawyers took out to run the class actions. His Honour, noting previous concerns regarding the approved settlement figure, found that the net sum left for group members would not be sufficient if the deduction was made.[113] His Honour left open the possibility that the class actions' lawyers could make another application in the future.

(b) Boston Scientific

In March 2023, Lee J approved a $105M settlement in the class action filed against Boston Scientific over alleged defective mesh and sling implants that were used to treat pelvic prolapse and stress urinary incontinence.[114] Boston Scientific has not admitted liability as part of the settlement.

The class action was brought in 2021 alleging that Boston Scientific was negligent and that its mesh and sling devices were not fit for purpose or of acceptable quality. Members of the class action alleged that they had experienced significant complications after the devices were surgically implanted, that they were left in severe and chronic pain, and that the devices were very difficult in the event a complication arose.

A deed of settlement of the Australian proceedings followed a global in-principle settlement that had been reached in April 2022. The originally proposed deed sought to impose obligations on group members (including obligations of non-disclosure about the settlement), that Lee J thought raised 'real questions' as to whether a representative applicant could agree to a regime that imposed obligations on class members who were strangers to the deed of settlement. The proposed drafting was not included in the final settlement deed and it was not necessary for the issue to be finally resolved by Lee J.

In approving the settlement, Lee J reflected that (despite not appointing one in this case) it may have been appropriate to appoint a contradictor in circumstances where there was the potential for significant opposition to the settlement by group members who wished to be heard.

105 *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228.
106 *Fowkes v Boston Scientific Corporation* [2023] FCA 230.
107 *Schofield v TSF Manufacturing (Settlement Approval)* [2023] FCA 1045.
108 *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905. See KWM Insight Applicants Succeed in Vaginal Mesh Class Action 2 December 2019 and KWM Insight Common Questions in Pelvic Mesh Class Action Resolved 10 March 2020.
109 *Ethicon Sàrl v Gill* [2021] FCAFC 29.
110 *Ethicon Sàrl v Gill* [2021] HCATrans 187.
111 *Gill v Ethicon Sàrl (No 10)* [2023] FCA 228 at [131].
112 A contradictor can be appointed in relation to a class action for the purpose of representing the interests of particular parties (eg group members) whose interests would not otherwise be represented and to do so in a way that assists the Court. The orders appointing a contradictor define the scope of the contradictor's role in relation to a specific case.

113 *Gill v Ethicon Sàrl (No 12)* [2023] FCA 902.
114 *Fowkes v Boston Scientific Corporation* [2023] FCA 230.

(c) IVS & TFS Manufacturing

A class action was filed in February 2020 alleging IVS, TFS Manufacturing, Covidien and doctors were negligent in failing to properly evaluate pelvic implant devices and in failing to warn doctors and patients of the risks associated with the use of the devices.

In February 2023, the Federal Court was informed that the 103 group members had reached an in-principle settlement with the insurer of TFS Manufacturing, which had gone into voluntary liquidation in February 2021.[115]

In July 2023, the Federal Court was informed that a global settlement with the manufacturers and their insurers had been reached and that the Australian applicants would receive a total of $41.45M (with no admission of liability).[116]

In August 2023, Lee J approved the $41.45M settlement, finding that it was *'within the range of settlements which are fair, reasonable and in the interests of group members'*.[117] His Honour added that the average compensation would be significantly greater per group member compared to the settlements in the *Boston Scientific* and *Ethicon Sàrl* proceedings and accordingly, *'this settlement is not a borderline case'*.[118] His Honour also approved the inclusion of 15 women in the settlement who received their implants at a time when the respondent did not own the intellectual property in question on the basis that it would be fair and reasonable for the women not to be excluded entirely. In circumstances where the doctor who engaged in the procedures was impecunious and little was known as to his insurance position, Lee J included the 15 women in the settlement but on the basis that there should be an additional recoverability deduction.[119] Justice Lee deferred making a ruling on costs for the law firm running the case, criticising the practice of firms engaging their own costs consultants. Instead, he said he would appoint a costs referee and deal with the issue on the papers.

ONGOING MATTERS - ASTORA / AMERICAN MEDICAL SYSTEMS

In 2018, a class action was filed in the Federal Court against American Medical Systems LLC (**AMS**) alleging that certain pelvic mesh and sling implants were defective and had resulted in serious health complications.

After Astora Women's Health (**Astora**), a related entity to AMS, was substituted for AMS in August 2022, Astora entered bankruptcy in the United States and on 26 October 2022, the Federal Court noted Astora's bankruptcy.[120]

While the Astora class action in Australia was stayed, Lee J noted that it was troubling that Astora (and AMS) had gone from making profits out of selling mesh products to having no assets to meet a claim for damages. However, Lee J indicated that this was a matter to be considered in the United States bankruptcy proceedings, not the Federal Court.

The class action's Australian representatives are now taking steps to protect group members' claims in the United States bankruptcy proceedings.

115 Sam Matthews, 'TFS pelvic mesh class action reaches partial settlement', *Lawyerly* (22 February 2023), available at: <https://www.lawyerly.com.au/partial-settlement-reached-in-tfs-pelvic-mesh-class-action/>.
116 Christine Caulfield, 'Covidien, TFS pelvic mesh class action settles with remaining defendants' *Lawyerly* (5 July 2023), available at: <https://www.lawyerly.com.au/covidien-tfs-pelvic-mesh-class-action-settles-with-remaining-defendants/>.
117 *Schofield v TSF Manufacturing (Settlement Approval)* [2023] FCA 1045.
118 Ibid at [11].
119 Ibid at [24].
120 *Bradley, in the matter of Astora Women's Health, LLC v Astora Women's Health, LLC* [2022] FCA 1268.

CRYPTOCURRENCY CLASS ACTIONS: A RIPPLE EFFECT?

In Australia, ASIC has taken a range of investigatory and enforcement actions against crypto-asset players. Notwithstanding regulatory action, there were no class actions relating to cryptocurrency commenced in Australia in the review period.

This chapter examines ASIC's enforcement actions in this space as class action activity is a common corollary of enforcement actions. We also discuss the United States, which remains the dominant forum for cryptocurrency class actions, and examine recent enforcement actions and class action activity in that jurisdiction.

AUSTRALIA

Similar to the US Securities and Exchange Commission's (**SEC**) approach, ASIC considers certain crypto-assets to be financial products and/or unregistered managed investment schemes.

ASIC's enforcement focus is on reducing the risk of harm to consumers by promoting compliance with Design and Distribution Obligations (**DDO**) and mandatory Target Market Determinations (**TMD**). ASIC's recent interim stop orders preventing Holon Investments Australia Limited from offering and distributing three cryptocurrency funds to retail investors with non-compliant DDOs and TMDs is one example of ASIC intervening to curtail crypto-asset offerings.[121] ASIC has also referred cryptocurrency lenders to the Commonwealth Director of Public Prosecutions for illegal representations of compliance with the licensing requirements for the sale of financial products.[122]

Recently, ASIC has issued warnings to *'FINfluencers'* - individuals offering financial services and advice without possessing the requisite licence. These include those who make stock purchase recommendations via social media platforms.

Australian Securities & Investments Commission v BPS Financial Pty Ltd **(QUD380/2022)**

ASIC initiated legal proceedings against BPS Financial Pty Limited (**BPS**) in the Federal Court in October 2022. ASIC alleges BPS made false, misleading, or deceptive representations and engaged in unlicensed conduct, including not holding an appropriate AFSL. Not long after ASIC commenced its claim, BPS sought a stay in the related class action, in which purchasers of Qoin and merchants allege they suffered loss by being unable to use or exchange Qoin tokens on the BT Exchange.[123] BPS contended that defending the ASIC proceeding would prejudice BPS' position in the class action. The Federal Court declined to order a stay, finding that it could not discern sufficient grounds to *'outweigh the prima facie entitlement of the applicants to have their case proceed in the ordinary way.'*[124]

Australian Securities & Investments Commission v Web3 Ventures Pty Ltd **(NSD1007/2022)**

On 23 November 2022, ASIC initiated civil penalty proceedings in the Federal Court against crypto-asset application, Block Earner. ASIC's allegations include that Block Earner had delivered unlicensed financial services associated with its crypto-asset-based offerings and had operated an unregistered managed investment scheme. ASIC contends the Earner Products are properly characterised as financial instruments that should have been subject to AFSL requirements as a managed investment scheme.

121 ASIC, 'ASIC places interim stop orders on Holon crypto funds' (Media Release, 22-278MR, 17 October 2022), available at <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-278mr-asic-places-interim-stop-orders-on-holon-crypto-funds/>.
122 ASIC, 'Cryptocurrency lender sentenced for false licence claims' (Media Release, 23-223MR, 17 August 2023) via < https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-223mr-cryptocurrency-lender-sentenced-for-false-licence-claims/>.
123 Discussed in The Review 2021/2022.
124 *Its Eco Pty Ltd v BPS Financial Pty Limited (No 2)* [2023] FCA 110 at [53].

UNITED STATES – WHETHER CRYPTOCURRENCY OFFERINGS ARE UNREGISTERED SECURITIES

Many cryptocurrency class actions filed in the United States are securities class actions. In these class actions, and several of the SEC's lawsuits, the critical and still-unresolved question is: are certain cryptocurrency offerings properly characterised as unregistered securities? This question arose in the *Ripple* and *Terraform* proceedings, detailed below. The answer to this question will have wide-ranging implications about how:

- crypto-asset products are sold and listed, and
- liability attaches to their providers and promoters.

***SEC v Ripple Labs Inc., 2023 WL 4507900* (S.D.N.Y. July 13, 2023) (Ripple)**

The SEC sued Ripple in the US District Court for the Southern District of New York (**SNY District Court**), seeking a determination that Ripple's 'XRP' token was an 'investment contract' offered to retail and institutional investors as an unregistered security.

Summary judgment was granted in favour of Ripple on the basis that sales of the XRP token to **retail** investors did not meet the definition of an 'investment contract' for the purposes of US securities laws as enunciated in *Howey*.[125] In particular, Judge Torres was unconvinced that a key element of the *Howey* test (relating to buyers' expectations) had been satisfied. Retail investors who purchased XRP through exchanges were, the judge concluded, unaware that Ripple was the entity behind the token offering and could not have *'reasonably expected that Ripple would use the capital it received from its sales to improve the XRP ecosystem and thereby boost the price of XRP'*.[126]

By contrast, Judge Torres determined that the sale of XRP tokens to **institutional** investors could be characterised as investment contracts. Unlike retail investors, Ripple engaged directly with institutional investors, even outlining a vision to establish XRP as an *'indispensable mode of blockchain payment'*, which, in turn, satisfied the third element of the *Howey* test.

The SEC has indicated it will appeal the decision in relation to retail sales of XRP. *Ripple* has also not been followed by another SNY District Court judge.

***SEC v Terraform Labs Pte. Ltd.*, 2023 WL 4858299 (S.D.N.Y. July 31, 2023) (Terra)**

Within days of the *Ripple* decision, a motion to dismiss a case against TerraForm Labs in respect of its stablecoin 'TerraUSD' and sister-token 'Luna' was denied. The motion sought to rely on Judge Torres' judgment.[127]

Judge Rakoff considered but expressly rejected the approach in *Ripple*, finding that 'TerraUSD' and 'Luna' should be properly characterised as unregistered investment contract securities.

Judge Rakoff declined to draw a distinction between investors who acquired tokens directly from the defendants and those who obtained tokens through secondary transactions. His Honour explained that the *Howey* test does not draw such a distinction among purchasers.[128] Judge Rakoff noted:

> *[Whether] a purchaser bought the coins directly from the defendants or, instead, in a secondary resale transaction has no impact on whether a reasonable individual would objectively view the defendants' actions and statements as evincing a promise of profits based on their efforts.*

Taken together, the *Ripple* and *Terra* decisions offer little clarification as to when a crypto-asset will be characterised as a security.

125 This seminal test, stemming from the case of *SEC v W.J. Howey Co.,* as established by the U.S. Supreme Court, under which an investment contract is a contract, transaction, or scheme whereby a person: (a) invests their money; (b) in a common enterprise; and (c) is led to expect profits solely from the efforts of the promoter or a third party.
126 *SEC v Ripple Labs Inc.,* 2023 WL 4507900 (S.D.N.Y. July 13, 2023).
127 *SEC v Terraform Labs Pte. Ltd.,* 2023 WL 4858299 (S.D.N.Y. July 31, 2023), available at <https://storage.courtlistener.com/recap/gov.uscourts.nysd.594150/gov.uscourts.nysd.594150.51.0.pdf>.
128 Ibid at [40].

UNITED STATES – JOINDER OF THIRD PARTIES FOR THE PROMOTION OF UNREGISTERED SECURITIES

Stresses in the industry generally, including increases in bankruptcy filings, have created difficulties for plaintiff law firms in pursuing larger players. As a result, plaintiffs are increasingly naming third parties who have played a role in promoting, facilitating, or directly engaging in the offering of allegedly unregistered securities.

For example, in the wake of cryptocurrency exchange FTX's collapse, numerous class actions by investors have been consolidated into a sizeable class action proceeding, now pending in the Florida Supreme Court.[129] This consolidated proceeding takes aim at public figures, including athletes and actors, who are accused of either endorsing unregistered securities traded on FTX's exchange or neglecting to disclose compensation received for their promotional activities.

129 RE: *FTX Cryptocurrency Exchange Collapse Litigation*, MDL No. 3076, (J.P.M.L.), available at <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/r3Hpd0NQHxi4/v0>.

OUTLOOK – WHAT'S NEXT FOR CLASS ACTIONS IN AUSTRALIA?

ON THE RADAR

A large number of hearings have been set down, including:

- **March 2024:** Apple App Store; Count Financial – life insurance fees
- **June 2024:** Queensland electricity generators; Axsesstoday Limited; Wellard
- **July 2024+:** Boral; Cladding; Super fees – OnePath; CIMIC Group.

JUDGMENTS AND APPEALS

We await the results of:

- **initial trials:** securities class actions against Brambles, Commonwealth Bank and Insignia Financial (formerly IOOF Holdings); product liability class action against Bayer in relation to the Essure contraceptive device
- **Full Court decisions:** on the availability of CFOs (see Common Fund Orders section of The Review)
- **appeals:** Ford transmission failures; Ruby Princess;[130] Redland City Council levy
- **High Court special leave applications:** Toyota Diesel Particulate Filters.

STOP PRESS

Just outside the review period we have seen:

- **Class actions commenced:** claims against Qantas relating to travel credits; securities class actions against IG Markets and Ansell; an employment class action against Sydney Trains.
- **Settlements:** at least 5 settlements have been approved since 1 July 2023, including in the *Scenic Tours* class action relating to damages for disappointment and distress.[131] At least a further 8 settlements are awaiting the Court's approval. Together, these represent over $500M in potential settlement funds.
- **Judgments:** liability judgments in relation to doctors' working hours against Peninsula Health, the impacts of the Sydney light rail project and AMP financial advisers class actions; an appeal dismissed from the judgment for Volkswagen Australia relating to allegedly defective airbags; judgment granting registration and soft closure orders in the Flex Commissions cases.[132] The Federal Court has also stayed a class action alleging bans on cryptocurrency ads were anticompetitive because of the conflict of interest between group members and the representative applicant, who stood to benefit financially as the sole shareholder and director of the litigation funder financing the proceeding.[133]

130 Discussed in The Review 2021/2022 (Unfair or Up in the Air?).
131 *Moore v Scenic Tours Pty Limited (No. 6)* [2023] NSWSC 948.
132 *Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie* [2023] VSC 415.
133 *Hamilton v Meta Platforms, Inc.* [2023] FCA 1148.

OUR CLASS ACTIONS & REGULATORY INVESTIGATIONS PRACTICE

In the last 12 months, KWM has been acknowledged as 2022 Law Firm of the Year in Litigation by Best Lawyers and won the 2022 Disputes Team of the Year award at the Asia Legal Awards. A large part of our market leading reputation is based on our class action practice.

Whether it be across securities and financial products; product liability; projects, infrastructure, energy & resources; antitrust or other, our team is known for their adaptability to changing circumstances and finding innovative ways to achieve favourable outcomes.

We focus on early resolution and we do this by bringing to each class action: subject matter expertise, experienced leadership, specialised teams, robust research & investigation, cutting edge technology, and a no surprises client centric approach at every stage of the claim.

Our track record includes some of the most high-profile, commercially significant and challenging proceedings in the market, including:

Securities and financial products

- **The Star:** defending four securities class actions.
- **Woolworths:** acting for Woolworths in class action proceedings brought on behalf of shareholders.
- **Medibank**: acting for Medibank in defending two class actions brought on behalf of shareholders.
- **Insignia Financial:** acting for Insignia Financial (formerly IOOF Holdings) in defending a class action brought on behalf of shareholders.
- **Shine Lawyers:** acting for Shine (an ASX listed law firm specialising in class actions) in defending a securities class action in the Queensland Supreme Court.
- **Westpac:** acting in class action relating to flex commissions.
- **Allianz:** defending class action proceeding in relation to add on insurance.
- **Tyro:** acting for Tyro Payments Ltd in a class action brought on behalf of Tyro customers and merchants relating to payment processing terminals.
- **AMP:** acting in the class action regarding the changes that AMPFP made to the Buyer of Last Resort (BOLR) policy, and defending two class actions in the Federal Court in relation to superannuation fees and insurance.
- **Suncorp and NULIS:** acting in class action proceedings regarding grandfathering of superannuation commissions.
- **NAB:** settling the first post-Royal Commission consumer credit insurance class action.
- **Suncorp:** defending class action proceeding in relation to add on insurance.
- **Westpac:** acting for Westpac in class action proceedings alleging breaches of responsible lending legislation (and successfully defending the related ASIC civil penalty proceedings).
- **PricewaterhouseCoopers:** acting in relation to multiple class actions.
- **IAG:** acting for Swann Insurance (Australia) Pty Ltd and Insurance Australia Limited in class action proceedings in relation to the sale of add on insurance products.
- **QSuper Board:** defending class action proceedings in relation to changes to insurance policy premiums.

Product liability

- **Aspen Pharmacare:** acting for Aspen Pharmacare defending class action proceedings in the Federal Court in relation to the sale of a pharmaceutical product.
- **Cladding:** acting for a German cladding manufacturer in defending class action proceedings alleging breaches of the Australian Consumer Law.

Projects, Infrastructure, Energy & Resources

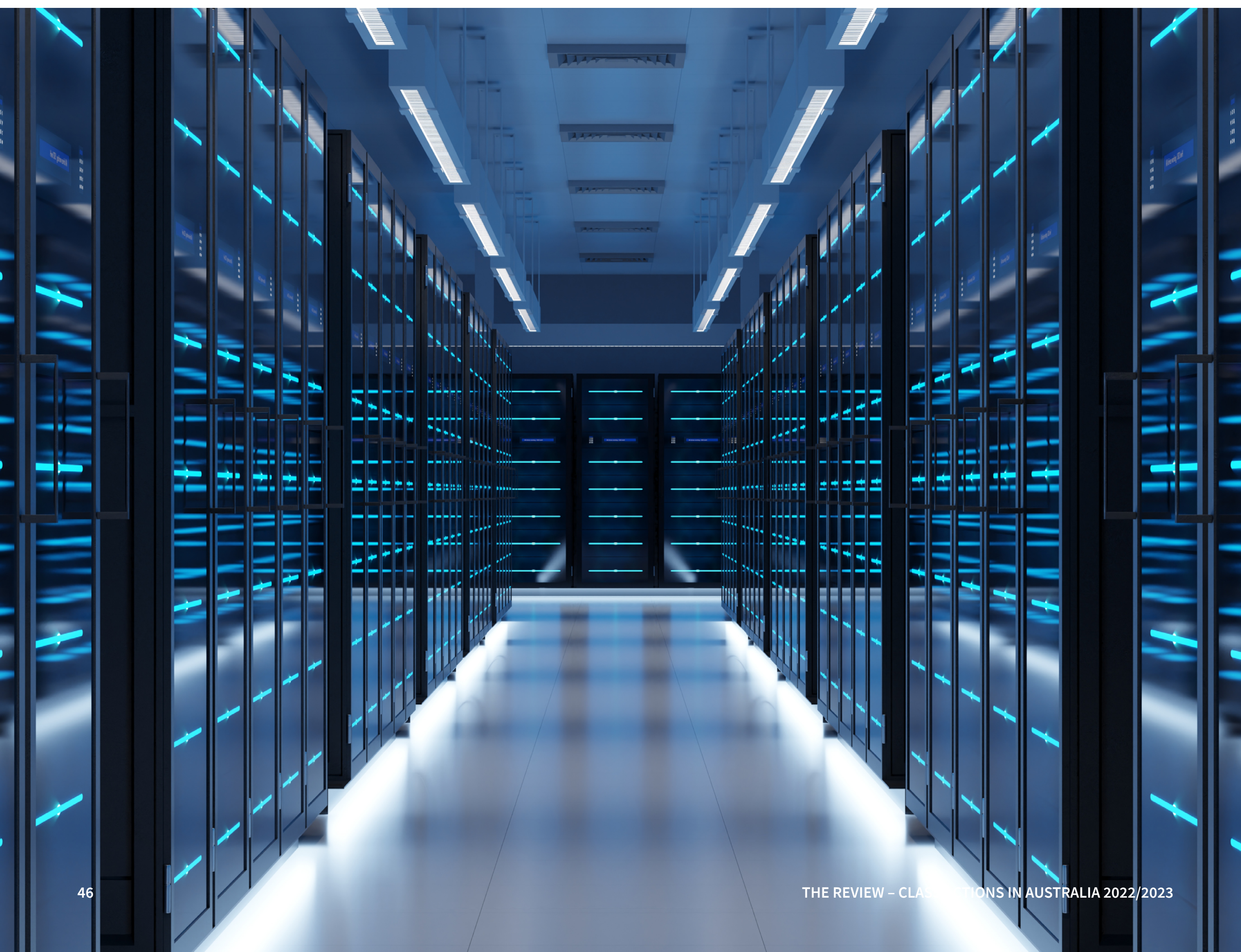
- **Transurban:** acting for the tollroad operator in defending a class action alleging unreasonable fees for late payment of tolls.
- **Seqwater:** acting for the Queensland Government dam authority in its successful defence of Australia's largest ever class actions arising from the 2011 Brisbane floods.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

Competition

- **Foreign exchange:** acting for a global bank in class action proceedings alleging cartel conduct and other anti-competitive arrangements or understandings in relation to the alleged manipulation of foreign exchange benchmark rates and other financial instruments.

Other

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



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We help our clients manage their risk and enable their growth. Our full-service offering combines un-matched top tier local capability complemented with an international platform. We work with our clients to cut through the cultural, regulatory and technical barriers and get deals done in new markets.

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