Mina Mina Jukurrpa by Nancy Nungarrayi Collins

THE REVIEW

CLASS ACTIONS IN AUSTRALIA 2023/2024

KING&WOOD MALLESONS
金杜律师事务所

MEET OUR NATIONAL CLASS ACTIONS EXPERTS

KWM has Australia's leading dispute resolution practice. We have a strong track record in obtaining favourable results for our clients in some of Australia's most high-profile class actions. Our strength lies in our ability to meld class action expertise with deep subject-matter understanding. Our partners with class action experience are known as subject matter experts in a diverse range of industries: from financial services to health, gaming, and manufacturing.

DOMENIC GATTO

PARTNER
MELBOURNE

TEL +61 3 9643 4460
MOB +61 439 249 987
EMAIL domenic.gatto@au.kwm.com

TAMARA HUNTER

PARTNER
SYDNEY

TEL +61 2 9296 2897
MOB +61 488 902 762
EMAIL tamara.hunter@au.kwm.com

BEN KIELY

PARTNER
MELBOURNE

TEL +61 3 9643 4241
MOB +61 457 735 183
EMAIL ben.kiely@au.kwm.com

SAMANTHA KINSEY

PARTNER
MELBOURNE

TEL +61 3 9643 4155
MOB +61 408 433 554
EMAIL samantha.kinsey@au.kwm.com

EMMA LAWRENCE

PARTNER
CANBERRA

TEL +61 2 6217 6111
MOB +61 439 514 609
EMAIL emma.lawrence@au.kwm.com

DAMIAN LOVELL

PARTNER
SYDNEY

TEL +61 2 9296 2482
MOB +61 427 983 504
EMAIL damian.lovell@au.kwm.com

ELEANOR ATKINS

PARTNER
SYDNEY

TEL +61 2 9296 2119
MOB +61 430 222 405
EMAIL eleanor.atkins@au.kwm.com

LIAM BURGESS

PARTNER
SYDNEY

TEL +61 2 9296 2468
MOB +61 412 109 879
EMAIL liam.burgess@au.kwm.com

EMMA COSTELLO

PARTNER
BRISBANE

TEL +61 7 3244 8115
MOB +61 439 190 046
EMAIL emma.costello@au.kwm.com

SAM DUNDAS

PARTNER
PERTH

TEL +61 8 9269 7097
MOB +61 411 105 336
EMAIL sam.dundas@au.kwm.com

AMANDA ENGELS

PARTNER
SYDNEY

TEL +61 2 9296 2450
MOB +61 408 335 972
EMAIL amanda.engels@au.kwm.com

JASMINE FORDE

PARTNER
BRISBANE

TEL +61 7 3244 8103
MOB +61 417 813 671
EMAIL jasmine.forde@au.kwm.com

ALEX MORRIS

PARTNER
SYDNEY

TEL +61 2 9296 2495
MOB +61 412 878 650
EMAIL alexander.morris@au.kwm.com

JAMES RUSSELL

PARTNER
MELBOURNE

TEL +61 3 9643 4204
MOB +61 449 844 755
EMAIL james.russell@au.kwm.com

MOIRA SAVILLE

PARTNER
SYDNEY

TEL +61 2 9296 2311
MOB +61 407 241 824
EMAIL moira.saville@au.kwm.com

PETA STEVENSON

PARTNER
SYDNEY

TEL +61 2 9296 2492
MOB +61 438 289 743
EMAIL peta.stevenson@au.kwm.com

JAMES WANG

PARTNER
PERTH

TEL +61 8 9269 7215
MOB +61 427 078 140
EMAIL james.wang@au.kwm.com

OUR CLASS ACTIONS & REGULATORY INVESTIGATIONS PRACTICE

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

SECURITIES AND FINANCIAL PRODUCTS

Insignia Financial: successfully defended a shareholder class action, one of a few that have proceeded to trial, the first to concern the materiality of non-financial information.

Westpac: acting in a class action proceeding relating to flex commissions.

Medibank: acting in defence of 2 class actions brought on behalf of shareholders.

The Star: defending a securities class action.

Woolworths: acting in class action proceedings brought on behalf of shareholders.

Aristocrat: acting in defence of a class action in relation to social casino games.

Shine Lawyers: acting for an ASX listed law firm specialising in class actions in defending a securities class action in the Queensland Supreme Court.

AMP: acting in the class action regarding the changes that AMPFP made to the Buyer of Last Resort (BOLR) policy, and defending 2 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.

Allianz: defending a class action proceeding in relation to add on insurance.

Suncorp: defending a class action proceeding in relation to add on insurance.

Westpac: acting 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.

Tyro: acting in a class action brought on behalf of Tyro customers and merchants relating to payment processing terminals.

NAB: settling the first post-Banking Royal Commission consumer credit insurance class action.

OnePath Custodians Limited: acting for OPC, a subsidiary of Insignia Financial Limited, in a class action brought by 2 members of OPC's superannuation fund on behalf of members.

IG Markets Limited: acting for the IG entities in defending significant class actions relating to IG's marketing and offering of derivative financial products known as 'contracts for difference'.

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.

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.

United Petroleum: acting for United Petroleum in defending class action proceedings alleging breaches of contract and consumer laws arising from franchise and commission agent arrangements.

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.

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 and seeking compensation for alleged property value diminution in relation to PFAS contamination.

Commonwealth of Australia (Department of Finance and Department of Agriculture, Fisheries and Forestry): acting in 2 significant proceedings relating to the 2016 outbreak of white spot disease in the Logan River and Moreton Bay areas of Queensland.

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.

Gladstone Ports: acting for Gladstone Ports in defending a class action brought by commercial fishermen alleging financial loss suffered as a result of damage to a bund wall at the Port of Gladstone.

CONTENTS

INTRODUCTION

Welcome to The Review – Class Actions in Australia 2023/2024, in which we consider significant judgments, events and developments between 1 July 2023 and 30 June 2024.

It has been a significant year for class actions – there have been sizable developments both in substantive law and in class action procedure.

The High Court has demonstrated a willingness to hear applications involving vexed questions of class action practice and procedure. Special leave has been granted in *Lendlease*, with that appeal expected to clarify the divergent approaches of the NSW Supreme Court and the Federal Court with respect to class closure orders. The High Court will also hear a removal application regarding the Victorian Court of Appeal's decision in *Bogan* that group costs orders are unable to 'travel' if the proceeding is transferred to another jurisdiction.

There has also been significant judicial attention given to the question of how to establish, and measure, loss. Issues of quantum have arisen in the following cases in the review period:

- In *Worley*, the Court found that there had been a breach of the company's continuous disclosure obligations but that causation and loss had not been established. The material, including the evidence of the applicant's event study expert, did not satisfy the Court on the balance of probabilities that an adverse effect on the market would have occurred in any counterfactual scenario.
- In *CBA*, the Court found that liability was not established but the Court also held that it did not have sufficient evidence of the valuation of the applicants' loss. There, the Court rejected the central propositions of the applicants' event study, including because that the alleged counterfactuals did not correspond with the alleged corrective disclosures. The Court emphasised that the applicants bear the onus of proving the existence of loss; the respondent does not bear an onus of negativing the existence of loss.
- In *Toyota*, it is anticipated that the High Court will provide clarity on the method of evaluating damages in cases involving defective goods that have been the subject of remediation. The appeal was from the Full Federal Court's finding that the appropriate measure of damage (for a defective product that is wholly rectified) is for the diminished utility for the period before the repair is effected.

The coming year will be interesting. Appeals have been lodged in *Worley* and in *CBA*; judgment is reserved in *Toyota*; and the High Court will hear the matters of *Lendlease* and *Bogan*. It may also bring legislative change to the continuous disclosure regime and funding models.

The editors hope you find this report informative,

ELEANOR ATKINS
PARTNER
SYDNEY

ALEX MORRIS
PARTNER
SYDNEY

MOIRA SAVILLE
PARTNER
SYDNEY

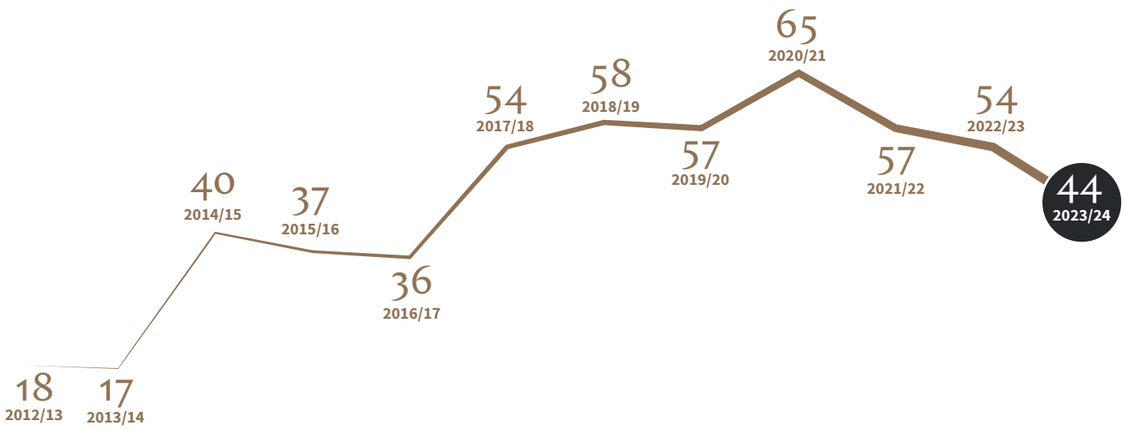
PETA STEVENSON
PARTNER
SYDNEY

HEADLINES

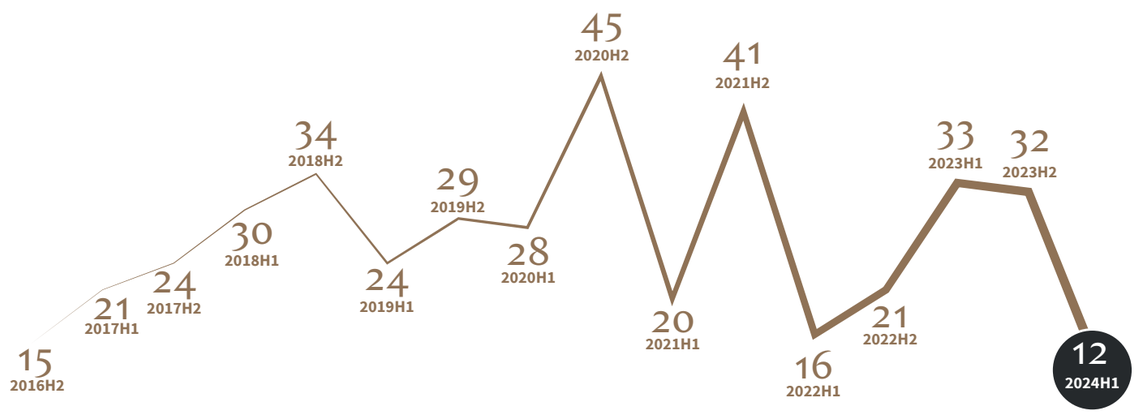
WHAT'S NEW?

The year to 30 June 2024 saw **at least 44 new class actions filed**, the lowest total since 2016/2017, with only 12 actions filed in the first 6 months of 2024.

Class actions filed



Class actions filed - 6 month periods



TYPES OF CLAIMS

The review period saw an uptick in financial product class actions and a decline in securities claims, while the number of consumer class actions remained fairly constant.

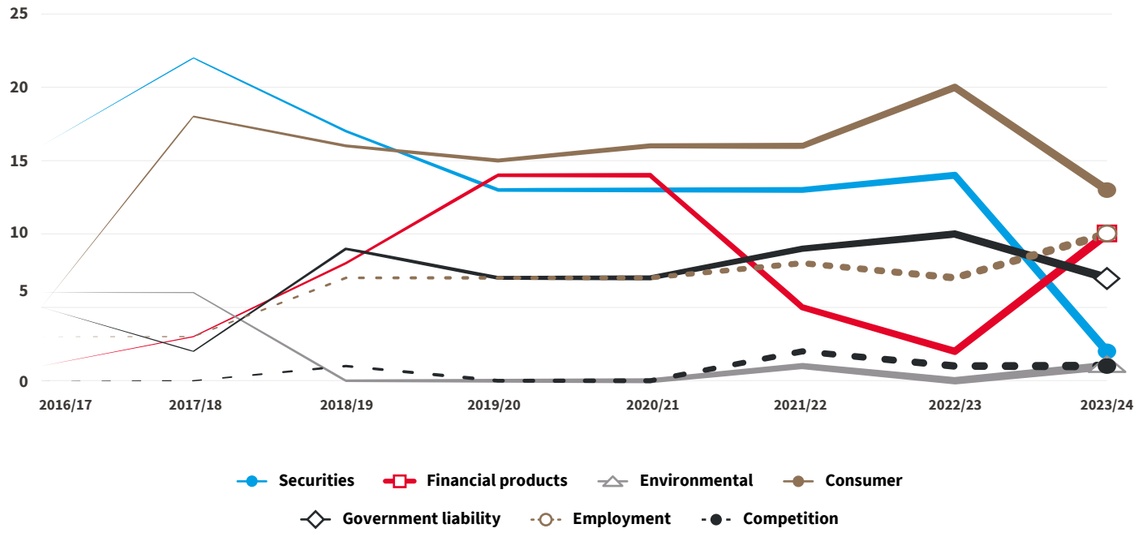
Class actions filed in the review period included the following claim types:

- **Consumer:** insurance products; motor vehicle performance; travel credits; extended warranties; termination of franchise agreements.
- **Financial products/investments:** International Capital Markets; IG Markets; Plus500; Best Leader Markets; Rest Employees Superannuation; Asgard and BT superannuation.
- **Employment:** doctors' working hours; wage underpayments; superannuation underpayments; paid breaks; racial discrimination.
- **Against the State:** fishing rights; immigration detention; public housing; racial discrimination.
- **Securities:** FleetPartners; Ansell.

Types of claims

Consumer, financial product and employment actions were the leading categories of class actions. Only 2 securities claims were filed, both in 2023 in the Victorian Supreme Court.

Types of claims - trend



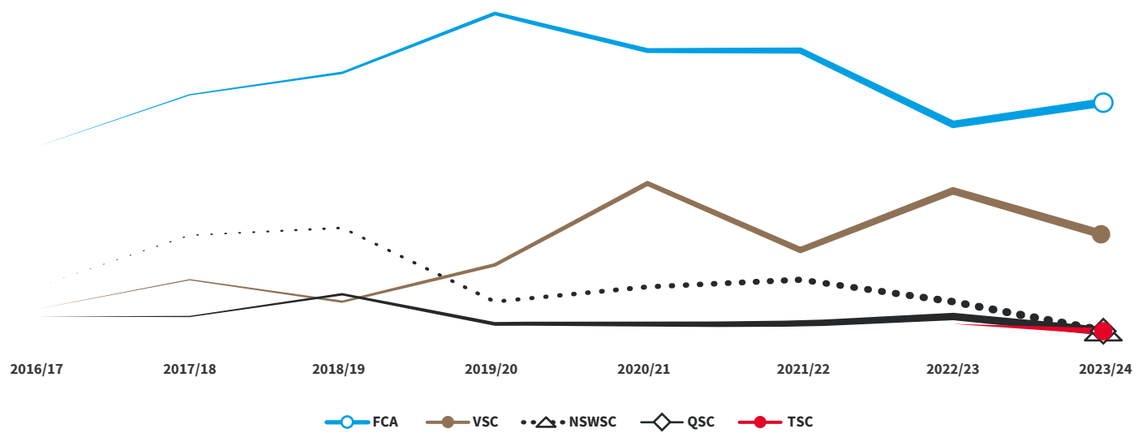
JURISDICTIONAL PREFERENCES

The Federal Court and the Victorian Supreme Court were the only jurisdictions with new actions filed:

- 31 in the Federal Court (up from 28 in 2022/2023)
- 13 in the Victorian Supreme Court (down from 19 in 2022/2023).

However, just after the review period we saw the first class action filed in the WA Supreme Court, seeking compensation for delayed residential construction projects.

Actions filed by court



THE PLAYERS

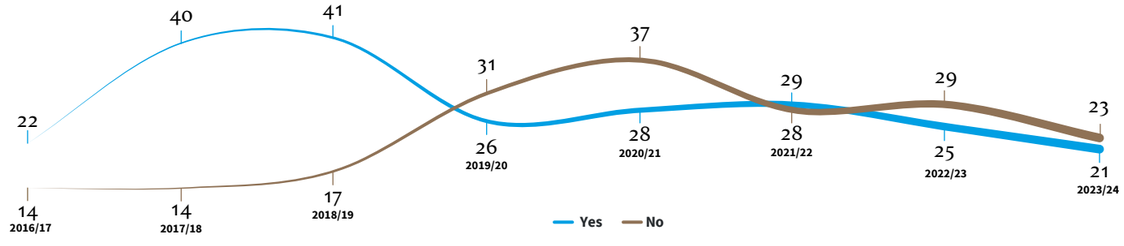
At least 25 firms filed a new action, including 11 firms that had not previously filed a class action, with no firm filing more than 4:

- 11 firms filed actions in the Victorian Supreme Court
- 21 firms filed actions in the Federal Court
- 5 firms filed actions in both jurisdictions
- 1 firm filed 4 actions and 3 firms filed 3 actions each (down from 7 firms that filed at least 3 actions in 2022/2023, and 4 firms that filed at least 5 actions in 2021/2022).

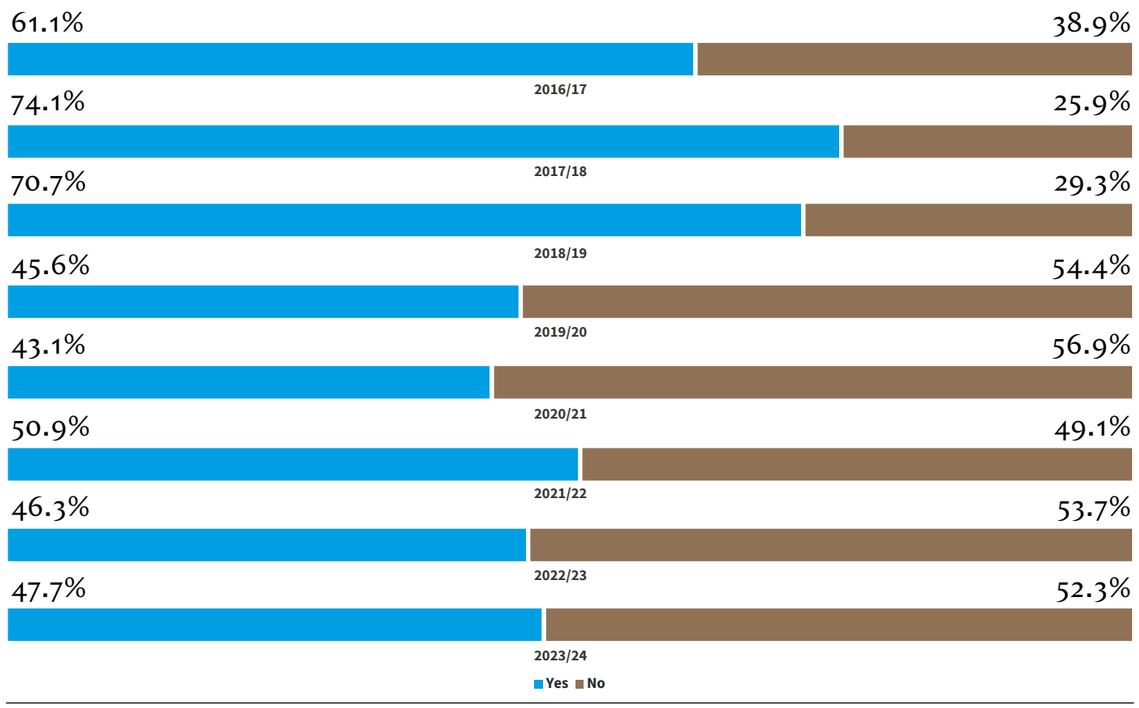
Funders included Woodsford Litigation Funding (6), CASL (5) and Omni Bridgeway (3).

The proportion of new actions involving a litigation funder (48%) sits at similar levels to the past 4 years.[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.

SETTLEMENTS

At least 20 class action settlements were approved in 2023/2024, representing over $600m in settlement funds, with a further $1b in class action settlements awaiting Court approval (or approved just outside of the review period, which are detailed in the **Outlook** section of The Review).

A full list of settlements appears on the following pages.

JUDGMENTS ON LIABILITY AND DAMAGES

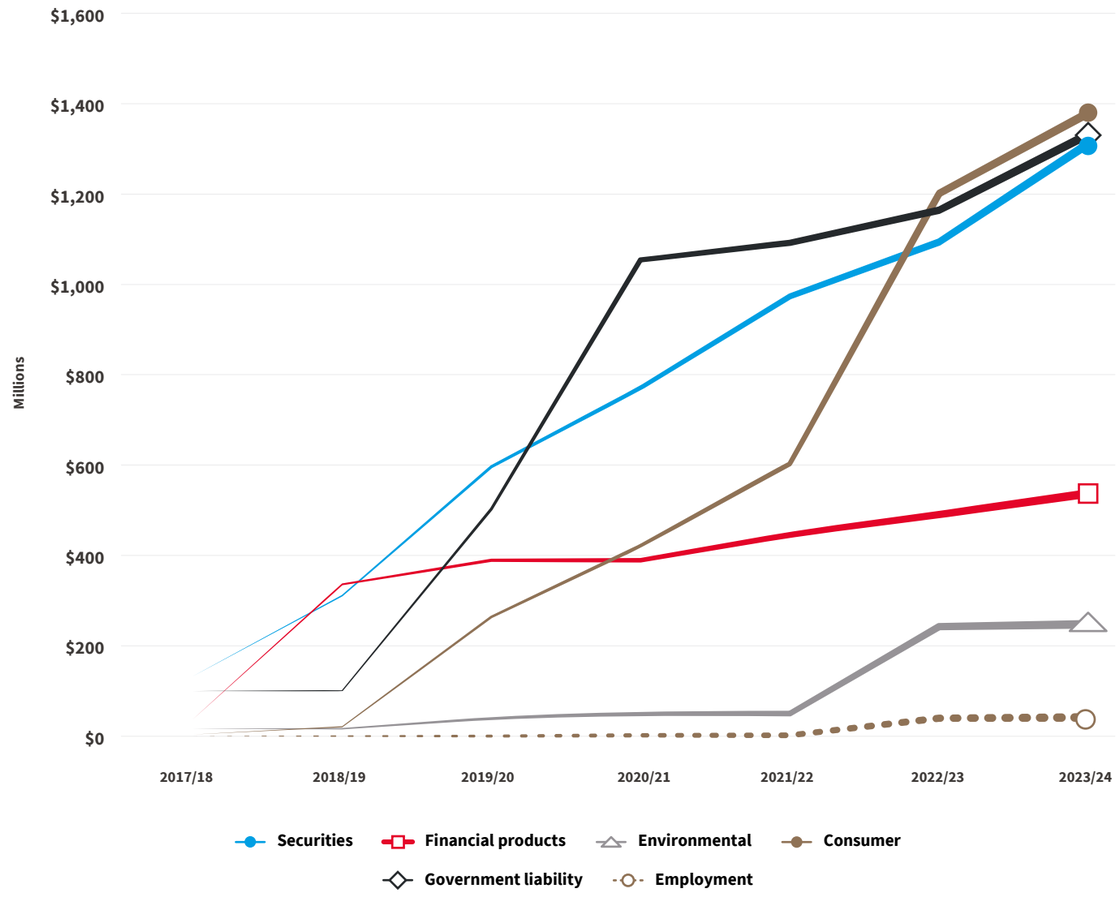
More class actions are proceeding to judgment (and appeal) than in past years, including:

- **Securities:** *CBA*, *Insignia Financial*, and *Worley* (see **Securities class actions** section of The Review)
- **Consumer:** *Ruby Princess*; *AMP financial advisers* (settled after judgment of initial trial); an appeal was dismissed (and special leave to appeal to the High Court refused) from judgment for the defendant in the Volkswagen Takata Airbags class action
- **Employment:** *Doctors' working hours*.

Approved settlements - types of claims

$217.5m Securities	$178.4m Consumer	$167.7m Government liability
$1.3m Employment	$46.4m Financial products	$4.5m Environmental

Cumulative settlement funds



CLASS ACTION SETTLEMENTS
JULY 2023 – JUNE 2024

	CLASS ACTION	TYPE	SETTLEMENT SUM (DAMAGES)[2]	PLAINTIFFS' COSTS	LITIGATION FUNDER % OR $
1	European River Cruise	Consumer	$10,250,000 + an amount per group member + $3,000,000 for costs + agreed costs for HCA appeal	$4,864,111.61	Not disclosed
2	Victorian public housing towers lockdown (COVID-19)	Government liability	$5,000,000	In addition to settlement sum	N/A
3	Mesh – TFS Manufacturing	Consumer	$41,450,000	$7,361,812.19	N/A
4	Land contamination – multi-site action	Government liability	$132,700,000	$17,386,522	25% ($33,175,000)
5	Credit Card Insurance – CBA	Consumer	$50,000,000	$4,898,747.81 + $275,000 ATE	N/A
6	Farmer's Farmgate Milk Price	Consumer	$25,000,000	$3,984,264	27.50% ($6,875,000)
7	Climate change risk – sovereign bonds	Government liability	No compensation sought	Parties to bear own costs	N/A
8	Hastie Group Limited	Securities	$18,500,000	$7,462,313.35	$5,130,000 + $2,673.74 project costs
9	AMP	Securities	$110,000,000	$26,213,702.45	N/A
10	Ardent Leisure (Dreamworld)	Securities	$26,000,000	$5,038,076.36	30% ($7,800,000) + $737,836 ATE
11	Rimfire	Consumer	Not disclosed	$915,000	N/A
12	Super fees – Westpac	Financial products	$29,950,000	$7,417,044	23% ($5,708,500 + $1,180,000 ATE)
13	Bankwest/CBA	Financial products	Respondent to receive $2.9m for costs	$450,000	N/A
14	Aveo Group	Consumer	$11,000,000	$8,918,054 (subject to appeal)	Waived commission

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

	CLASS ACTION	TYPE	SETTLEMENT SUM (DAMAGES)[2]	PLAINTIFFS' COSTS	LITIGATION FUNDER % OR $
15	Detention centres – unlawful detention as adults	Government liability	$27,500,000 + costs	$2,894,103.38 (in addition to settlement sum)	N/A
16	Bushfire – Palmers Oaky Fire	Environmental	$4,500,000	$1,914,498.32	N/A
17	Hays Recruitment	Employment	$1,325,000	$397,500 (cap of 30% of settlement)	$182,500 reimbursement included in applicant's costs
18	Wellard	Securities	$23,000,000	$8,665,214	21.15% ($4,865,510) + $41,261 bookbuild + $513,984 claim management fee + $1,026,466 ATE
19	Dixon Advisory	Financial products	$16,000,000	$2,781,554.70	N/A (for funder in stayed competing proceedings: $126,797.55)
20	Armidale Investments Default	Financial products	Not disclosed	Parties to bear own costs	N/A
21	The Cosmetic Institute	Consumer	$25,000,000	$10,000,000	N/A
22	RCR Tomlinson	Securities	$40,000,000	$11,010,155.84	20% ($8,000,000)

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

SECURITIES CLASS ACTIONS

During the review period, the Federal Court dismissed 3 securities class actions in just under 6 months: *Worley*,[3] *Insignia Financial*,[4] and *CBA*.[5]

To put this in context, in Australia:

- there have been 2 other securities class actions that proceeded to an initial trial (*Myer*[6] and *Iluka*[7]), neither of which resulted in an award of damages in favour of the class
- prior to the *Myer* decision in 2019, more than 50 securities class actions had been commenced – often involving alleged contraventions of continuous disclosure obligations - and none had ever run to trial.

The recent judgments in *Worley*, *Insignia Financial* and *CBA* provide clarity on the legal principles applicable to securities class actions, although appeals are due to be heard in *Worley* and *CBA* in March 2025 and November 2024, respectively. The judgments may have contributed to the low number of shareholder class actions filed this year, with only 2 shareholder class actions filed in the review period.

RECENT DECISIONS

(a) Snapshot: Worley

In The Review 2021/2022, we discussed Mr Crowley's successful appeal to the Full Federal Court from Gleeson J's first instance decision which dismissed allegations that Worley had breached its continuous disclosure obligations. In *Worley*, Jackman J as remitter judge found that, while the FY14 earnings guidance was misleading and made without a reasonable basis, the applicant had failed to establish causation and loss, in part because the expert evidence did not support the relief sought. The applicant appealed Jackman J's decision and the case is now set for its second Full Court appeal.

(b) Snapshot: Insignia Financial

In *Insignia Financial* the applicant alleged that Insignia had breached its continuous disclosure obligations under the ASX Listing Rules and s674 of the *Corporations Act 2001* (Cth) (**Corporations Act**), and had engaged in misleading or deceptive conduct (including by silence). These contraventions were alleged to arise on the basis that Insignia failed to disclose to the market material information about governance and compliance issues, including claims of insider trading and front running. The applicant alleged that the information was substantially disclosed in Fairfax Media articles and through comments made before the Australian Senate's Economics References Committee, following which Insignia's share price dropped in June and July 2015. The Court found that none of the alleged information – individually or cumulatively – constituted material information under the Listing Rules. The decision was not appealed.

(c) Snapshot: CBA

The 2 shareholder class actions (heard concurrently) against CBA arose out of a civil penalty proceeding commenced in August 2017 by the Chief Executive Officer of the Australian Transaction Reports and Analysis Centre (**AUSTRAC**), in which it was alleged that CBA had failed to comply with its obligations under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**). CBA settled the AUSTRAC proceeding for $700m in 2018. The applicants in the class actions contended that CBA:

- breached its continuous disclosure obligations because it failed to disclose certain information that related to what CBA ultimately admitted were contraventions of the AML/CTF Act for the purposes of the AUSTRAC civil penalty proceeding
- engaged in misleading or deceptive conduct because it represented that it had 'effective policies, procedures, and systems to ensure its compliance with relevant regulatory requirements, and with its continuous disclosure obligations'.

The Court found in favour of CBA for the following reasons:

- there were weaknesses in the way in which the applicants pleaded the relevant information that they contended should have been disclosed (**Information**) and, in particular, the counterfactual was not properly pleaded. Justice Yates considered that had the Information as pleaded been disclosed to the market, it would have likely misled the market because it was either too uncertain and/or there were key contextual omissions
- CBA was relevantly 'aware' of only some of the Information
- on causation, the applicants failed to establish that, had the Information (or any part of it) been disclosed at any particular time in the relevant period, the market price would have been lower immediately following the disclosure or that any lower price would have endured for the remainder of the relevant period
- on the issue of damages, which had been based on share price inflation, the Court held that it did not have sufficient evidence of the valuation of the applicant's loss, largely due to the Court's rejection of central propositions in the applicants' event study.

The Court did accept the validity of market-based causation theory insofar as that theory provides a causal explanation of how particular shares might come to have been purchased at an artificially inflated price. The Court recognised, however, that the theory does not permit some persons to establish compensable loss, such as where they had purchased their securities with knowledge of the relevant non-disclosed information, or where the class member would have still purchased the securities had they known the non-disclosed information.

KEY TAKEAWAYS

(a) The flaws of hindsight analysis

During the review period, the Federal Court was mindful of the role of hindsight bias. For example, in *Worley*, Jackman J commented at [237]:

> *… there are four fundamental flaws in Mr Crowley's primary submission that WOR should have made an announcement on or about 14 August 2013 to substantially the same effect as the corrective disclosure which was actually made on 20 November 2013. The first flaw is the hindsight error in contending that there was a reasonable basis to conclude that WOR should have been aware of what it knew on 20 November 2013 some three months earlier.*

Justice Yates made similar comments in *CBA* at [140] in relation to minor coding errors in systems used to manage CBA's anti-money laundering and counter-terrorism financing (**AML/CTF**) obligations:

> *With hindsight, there should have been further investigation to elucidate whether there was a "bigger issue". Had there been further investigation, it is likely that the general problem associated with cash deposits processed under code 5000 would have come to light. The applicants' disclosure case, however, is concerned with the information that officers of the Bank had, or ought reasonably to have had. The employees with knowledge of the matters in 2013 that I have described, were many levels below "officer" level, and none had identified a general and significant problem with deposits processed through IDMs under transaction code 5000.*

3 *Crowley v Worley Limited (No 2)* [2023] FCA 1613, following a remitter from the Full Federal Court.
4 *McFarlane as Trustee for the S McFarlane Superannuation Fund v Insignia Financial Ltd* [2023] (**Insignia Financial**) FCA 1628.
5 *Zonia Holdings Pty Ltd v Commonwealth Bank of Australia Limited (No 5)* [2024] FCA 477.
6 *TPT Patrol Pty Ltd as Trustee for Amies Superannuation Fund v Myer Holdings Limited* [2019] FCA 1747.
7 *Bonham as Trustee for the Aucham Super Fund v Iluka Resources Ltd* [2022] FCA 71.

(b) Material effect on share price

In cases based on a non-disclosure (as compared to a misleading disclosure), the applicant bears the onus of establishing that a reasonable person would expect the information to have a material effect on the company's share price. It is not enough to show that information that detracts from a company's reputation may affect its share price, or that certain disclosures have had some negative bearing on the company's reputation.[8]

In *Insignia Financial*, the Court was ultimately not persuaded that any of the information which had been established by the applicant to be true constituted information that an investor, acting rationally, would regard as material to their decision to buy or sell shares in Insignia.

In *CBA*, the Court similarly scrutinised the impact of the relevant information on investors, with Yates J finding at [595]:

> *Armed with the September 2015 Late TTR Information, and nothing more, the reasonable investor would be prompted to ask: Why am I being told this? What is the significance, and what are the consequences for the Bank, of not lodging the Late TTRs on time? In this scenario, the regulator's then known attitude to the problem is highly significant information for investor decision-making. And, as to this, I do not think that the reasonable investor is concerned with mere theoretical possibilities. The reasonable investor wants meaningful information on the significance and consequences of what he or she is being told in order to make an informed and rational decision on whether to acquire or dispose of securities.*

(c) Indirect market-based causation

Recent judgments have continued to raise significant questions about how causation and loss, and the quantification of damages, can be established by applicants.

Critical to any reliance on market-based causation is the need to establish by sufficient expert evidence that the relevant share price movement on a particular day was caused by the corrective disclosure or ASX announcement. An 'event study' is typically conducted. This type of analysis, however, will only be useful to the Court if the appropriate counterfactual question is asked and if the analysis can identify and strip out the effect of confounding information (being 'price-relevant information that becomes known at around the same time as the information of interest').

In *Insignia Financial*, the applicant's expert failed to consider the effect of any confounding information in the Fairfax articles or Senate testimony. According to Anderson J at [673], the 'all or nothing' nature of the event study undertaken by the applicant's expert meant that it could not have been relied upon to prove indirect market-based causation and the inflation-based measure of loss, or to provide a rational foundation for a damages valuation (even if the applicant had successfully established a contravention of the continuous disclosure regime).

SETTLEMENTS

Notwithstanding the favourable case law, settlements remain attractive to some defendants due to the reputation, financial and legal risks of proceeding to trial.

There were at least 5 approved settlements of securities class actions during the review period, with the largest settlement sum being $110,000,000 in *AMP*[9] (a class action alleging breaches of AMP's continuous disclosure obligations in the wake of evidence given by AMP executives regarding 'fees for no service' on 16 and 17 April 2018 to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry).

For further details on other settlements during the review period, see **Class action settlements** section of The Review.

8 *Insignia Financial* at [628].
9 *Komlotex Pty Ltd v AMP Limited (No 4)* [2023] NSWSC 1378.

CONTINUOUS DISCLOSURE PROVISIONS REVIEW (MAY 2024)

In The Review 2021/2022 we reported on amendments to the Corporations Act to require a disclosing entity's state of mind to be considered when determining whether it contravened the continuous disclosure obligations, in both ASIC enforcement proceedings and private actions for damages (**2021 Amendments**). In September 2023, the Assistant Treasurer appointed Dr Kevin Lewis to conduct an independent review into the 2021 Amendments. Dr Lewis' report was tabled in the Senate in May 2024.

In the report, Dr Lewis' main conclusion was that it is too soon to evaluate the impact of the 2021 Amendments given the limited sample size available. We agree, but note that it may be difficult in any event to isolate the impact of the 2021 Amendments on cases from other changes that occurred around the same time, including the introduction of the group costs orders regime in the Victorian Supreme Court from 1 July 2020.

Dr Lewis also found that, while the 2021 Amendments had a negative impact on ASIC's enforcement activities, the 2021 Amendments had not affected the number and type of continuous disclosure class actions initiated against disclosing entities. Accordingly, at the time of the report, there was 'no evidence of an urgent or compelling need to repeal the 2021 Amendments to facilitate continuous disclosure class actions'. Dr Lewis did recommend repealing the 2021 Amendments to the extent that they apply in civil penalty proceedings initiated by ASIC (**Recommendation 1**), though considered that the 2021 Amendments should remain in place for private litigants alleging a breach of continuous disclosure laws (**Recommendation 2**).

The report also referred to Treasury's consultation paper *Climate-related financial disclosure* (June 2023), in which Treasury rejected suggestions from some stakeholders that climate-related financial disclosures should be excluded from continuous disclosure obligations. Treasury's justification was that '[e]xempting listed companies from [disclosing material price sensitive information on a timely basis] would undermine the integrity of ASX Listing Rules and the market itself.' Dr Lewis contended that these comments should be borne in mind before announcing or implementing any decision to accept Recommendation 1 and/or reject Recommendation 2 (**Recommendation 3**).

Dr Lewis also suggested that, should the Government reject Recommendation 1 and/or accept Recommendation 2, then the Corporations Act should be amended 'to address more fully how knowledge, recklessness or negligence is to be attributed to the disclosing entity' (**Recommendation 4**). In an instance where Recommendation 1 is rejected and/or Recommendation 2 is accepted, Dr Lewis suggested that the 'Government should consider whether the requirement to prove a disclosing entity acted knowingly, recklessly or negligently should attach to the determination of whether the relevant information should have been disclosed to the market', as opposed to determining whether the information in question was market sensitive (**Recommendation 5**). Lastly, Dr Lewis suggested that the Australian Government consider amending ss674 and 675 of the Corporations Act to specify applicable physical and fault elements (**Recommendation 6**).

On 12 August 2024, the Australian Government issued its response to Dr Lewis' report. The Australian Government's response largely agreed with Dr Lewis' recommendations. In particular, the Australian Government agreed with Recommendations 1-4. Recommendations 5 and 6 were noted, and may be pursued at a later time in the context of broader changes to the continuous disclosure regime. Accordingly, we should expect to see the repeal of the 2021 Amendments as they apply to ASIC and amendments to the continuous disclosure regime in the Corporations Act to address explicitly the way state of mind can be attributed to an entity.

CLASS CLOSURE, REGISTRATION AND OPT OUT

THE STATUS QUO: OPT OUT CLASS ACTIONS IN AUSTRALIA

The 'opt out' process is the default mechanism to form the group represented in the proceedings in each class action jurisdiction in Australia.[10] This means a person can be a group member without consenting or indicating an interest to participate in the proceeding, provided that they satisfy the group member definition and do not file a notice to 'opt out'.

In some class actions, uncertainty regarding the size and composition of the class presents a real barrier to settlement. Pre-settlement orders requiring group members to register their interest to participate in a settlement is a tool to address these barriers. If a group member does not register by the date specified by the Court and does not otherwise opt out, they are not permitted to receive a share of any settlement reached before the 'sunset' date and are bound by the terms of the settlement (which includes a release in respect of their claims). This mechanism is also known as 'soft' class closure.

Unlike 'hard' class closure, a soft class closure order does not remove group members who do not register from the represented class and does not affect the entitlement of any unregistered group member to benefit from any judgment in favour of the plaintiff or any settlement arrived at after the expiry of the soft class closure order.

DIFFERING ATTITUDES TO CLASS CLOSURE BETWEEN JURISDICTIONS

In the review period, we have seen divergent approaches on class closure between jurisdictions.

While the Federal Court has made pre-settlement soft class closure orders since at least 2017,[11] in 2020 the NSW Court of Appeal held that the NSW Supreme Court did not have the power under s183 of the *Civil Procedure Act 2005* (NSW) (**CPA**) to make a class closure order that contingently extinguished the rights of unregistered group members.[12] That decision was followed by the Court of Appeal decision in *Wigmans* in 2020 that held an order excluding group members who had not registered or opted out by the relevant deadline from receiving any benefit was also beyond the powers conferred by ss175 and 176 of the CPA.[13]

The Federal Court , however, maintained its approach to soft class closure orders in *Parkin* in 2022.[14] In that case, it was held that the NSW Court of Appeal's decision in *Wigmans* was 'plainly wrong' and should not be followed.[15] Further, it was held that the Federal Court had the power pursuant to s33X(5) of the *Federal Court of Australia Act 1976* (Cth) to approve a notice to group members indicating that a class closure order would be sought at settlement and, if made, that group members who did not register or opt out would remain as group members, but would not be able to benefit from any settlement without leave of the Court.

10 *Federal Court of Australia Act 1976* (Cth) s33J; *Civil Procedure Act 2005* (NSW) s162; *Supreme Court Act 1986* (Vic) s33J; *Civil Proceedings Act 2011* (Qld) s103G; *Civil Procedure (Representative Proceedings) Act 2022* (WA) s12; *Supreme Court Civil Procedure Act 1932* (Tas) s71.
11 *Jones v Treasury Wine Estates Ltd (No 2)* [2017] FCA 296 (**Treasury Wine Estates**) (Foster J).
12 *Haselhurst v Toyota Motor Corporation Australia Ltd* (2020) 101 NSWLR 890; [2020] NSWCA 66.
13 *Wigmans v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104 (**Wigmans**) at [79], [132].
14 *Parkin v Boral Limited* (2022) 291 FCR 116; [2022] FCAFC 47.
15 Ibid at [110].

The decision in *Parkin* was, however, not 'sufficiently persuasive' to convince the NSW Court of Appeal to revise that Court's position on class closure; when asked in 2024 to reconsider whether the Court is permitted to make class closure orders under ss175 and 176 of the CPA, the NSW Court of Appeal in *Lendlease* unanimously reaffirmed the decision in *Wigmans*.[16] In August 2024, the High Court of Australia granted special leave to hear an appeal from that decision. That appeal will clarify whether the NSW Supreme Court has power to make class closure orders under ss175 and 176 of the CPA.

The issue is less controversial in the Victorian Supreme Court, where the power to make soft class closure orders is expressly provided by statute.[17] Over the last year, a number of soft class closure orders have been made in the Victorian Supreme Court, providing a body of case law from which general principles applicable to soft class closure may be drawn.

As is apparent from the cases below, recent authorities in the Federal Court have emphasised the exceptional nature of soft class closure orders and the need to exercise caution in relation to applications made by respondents and opposed by applicants.[18] Until recently, orders for soft class closure in the Federal Court have generally been made by consent.[19] In the review period, the Victorian Supreme Court made orders on a number of occasions for soft class closure over the objection of the plaintiffs.

GENERAL PRINCIPLES REGARDING SOFT CLASS CLOSURE

Notwithstanding the difference in statutory powers, both the Federal Court and the Victorian Supreme Court will only make an order for soft class closure if it is necessary to ensure that justice is done in the proceeding.

In these 2 jurisdictions, whether or not a class closure will be made is fact-specific and will depend on the case.[20] The following factors have been considered:

- **Size of the class:** The size of the class and the difficulty in assuming participation rates may weigh in favour of an order for soft class closure. The Court in *Anderson-Vaughan* acknowledged that '[t]o know the worst case scenario so far as the defendants are concerned and the best case scenario so far as the plaintiff and group members are concerned is likely to be a critical element in attempts to resolve the proceeding.'[21]
- **Composition of the class:** The characteristics of the class may favour the making of a class closure order. For example, where the assessment of quantum is complicated by the payment of refunds or remediation to group members, registration will enable the parties to estimate quantum more accurately.[22]
- **It is not a question of if but when group members are required to take a positive step:** In some proceedings, group members will be required to take a positive step, either to assert their individual claim after the initial trial or participate in any settlement. The fact that a group member will need to take a positive step, irrespective of whether registration is ordered, is a factor in favour of pre-settlement class closure.[23] Soft class closure orders at an earlier stage in the proceedings simply accelerates the process.[24]

16 *David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd* [2024] NSWCA 83.
17 *Supreme Court Act 1986* (Vic) s33ZG.
18 *Alford v AMP Superannuation Limited (No 2)* [2024] FCA 423 (**Alford**) at [68] (Murphy J).
19 As noted by Beach J in *J Wisbey & Associates Pty Ltd v UBS AG (No 2)* [2024] FCA 147 (**Wisbey**) at [90].
20 *Fox v Westpac*; *O'Brien v ANZ*; *Nathan v Macquarie* [2023] VSC 414 at [17] (Nichols J).
21 *Anderson-Vaughan v AAI Ltd (No 2)* [2024] VSC 65 (**Anderson-Vaughan**) at [66] (Delany J).
22 *Anderson-Vaughan* at [68]-[69] (Delany J); see also *Wisbey* at [78] (Beach J).
23 *Anderson-Vaughan* at [77] (Delany J).
24 *Andrianakis v Uber Technologies Inc & Ors; Salem v Uber Technologies & Ors* [2023] VSC 415 (**Uber**) at [7] (Nichols J); however, this was not sufficient to persuade Foster J in *Treasury Wine Estates* at [62].

- **Position of the parties:** The parties' attitude to class closure and the complexity and likely duration of the case are relevant to whether a soft class closure order is made.[25] The fact the parties agree soft class closure orders are appropriate supports the making of an order.[26]

Factors that are *not* relevant to whether a soft class closure order should be made include:

- The proposition that registration alone could be 'confusing' to group members (as this is a risk that can be alleviated by appropriate drafting of the relevant notice).[27]
- Costs of the registration process, provided that the costs are reasonable and proportionate, or the diversion of the resources of the solicitors for the plaintiff.[28]
- Ensuring that future legal costs are 'proportionate' to the quantum of the claim (as notions of proportionality are not a basis for exercising the power to make class closure orders).[29]

Whether or not pre or post-registration rates in other proceedings are relevant is a contentious question. The Victorian Supreme Court has held that such data may be subject to the implied undertaking[30] or without prejudice privilege[31] and cannot be used as a proxy for the likely participation rate in an unrelated proceeding. Recent authority in the Federal Court casts doubt on whether such information is confidential, noting that not all registration procedures are confidential.[32]

Finally, factors weighing against the making of an order for soft class closure include:[33]

- the likelihood that registration levels will be low given the nature of the group members (for example, where the group is comprised of customers in the superannuation industry, whose members have relatively low engagement)
- the ability of the defendants to sufficiently understand group members' claims and their aggregate value from their own records. The evidence must address why the defendants' own records are insufficient to enable them to compile a representative sample of group member claims.

Care must be taken to ensure evidence in support of an application for soft class closure is not 'speculative'.[34] Courts should not exercise the discretion to make a class closure order based merely on an assertion by a party that it is unwilling to discuss settlement unless such an order is made.[35]

INCREASE IN REGISTRATION POST-SETTLEMENT

Developments in *Merivale*[36] provide an unusual but instructive case study on the difficulties that soft class closure can avoid. In those proceedings, the applicant in the employee underpayment class action against Merivale hospitality group reneged on an agreed $18m settlement following a higher-than-anticipated number of registrations. The applicant has argued that the dilution of the settlement fund is no longer a fair and reasonable outcome for group members. The parties subsequently agreed a $19.25m settlement, which is awaiting Court approval.

25 *Matthews v SPI Electricity Pty Ltd (Ruling No 13)* (2013) 39 VR 255; [2013] VSC 17 at [79(e)].
26 *Uber* at [7] (Nichols J).
27 *Anderson-Vaughan* at [75] (Delany J).
28 Ibid at [78] (Delany J); however, compare *Alford* at [33], [49] (Murphy J).
29 *Wisbey* at [56] (Beach J).
30 Also called the Harman undertaking, the implied undertaking requires parties who obtain documents and information in the course of proceedings to keep those documents confidential and to only use them for the purposes of the proceedings in which they were obtained.
31 *Anderson-Vaughan* at [70] (Delany J); compare, however, the analysis of pre and post-settlement registration rates in *Alford* at [21], [23], [25] (Murphy J).
32 *Alford* at [29] (Murphy J).
33 Ibid at [19], [63], [71] (Murphy J).
34 *Treasury Wine Estates* at [62] (Foster J).
35 *Wisbey* at [55] (Beach J).
36 *Boulos v M.R.V.L. Investments Pty Ltd* (NSD2168/2019).

SUMMARY OF SOFT CLASS CLOSURE ORDERS IN THE REVIEW PERIOD

JUDGMENT	JUDGMENT DATE	JURISDICTION	ORDERS FOR CLASS CLOSURE	'SUNSET' DATE OF THE CLASS CLOSURE ORDER
Fox v Westpac; O'Brien v ANZ; Nathan v Macquarie [2023] VSC 414	20 July 2023	Victorian Supreme Court (Nichols J)	✓	In principle settlement reached at Court ordered mediation occurring by 15 December 2023
Andrianakis v Uber Technologies Inc & Ors; Salem v Uber Technologies & Ors [2023] VSC 415	21 July 2023	Victorian Supreme Court (Nichols J)	✓	3 March 2024 (approximately 3 months after mediation)
5 Boroughs NY Pty Ltd v State of Victoria & Ors (S ECI 2020 03402)	21 February 2024	Victorian Supreme Court (Keogh J)	✓	In principle settlement reached at Court ordered mediation occurring by 22 November 2024
Paul Allen & Anor v G8 Education Limited (by consent)	26 February 2024	Victorian Supreme Court (Osborne J)	✓	7 June 2024
Anderson-Vaughan v AAI Limited (No 2) [2024] VSC 65	27 February 2024	Victorian Supreme Court (Delany J)	✓	The day prior to the commencement of the trial
J Wisbey & Associates Pty Ltd v UBS AG (No 2) [2024] FCA 147	27 February 2024	Federal Court (Beach J)	✓	Within 3 months of the first day of any mediation required to be commenced by 6 November 2024
David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83	17 April 2024	NSW Court of Appeal (Bell CJ, Ward P, Gleeson, Leeming and Stern JJA)	✗	N/A
Alford v AMP Superannuation Limited (No 2) [2024] FCA 423	24 April 2024	Federal Court (Murphy J)	✗	N/A
Tracy-Ann Fuller and Jordan Wilkinson v Allianz Australia Insurance Ltd and Allianz Australia Life Insurance Ltd (S ECI 2020 02853)	2 May 2024	Victorian Supreme Court (Waller J)	✓	The day prior to the commencement of the trial
Greg Lieberman v Crown Resorts Limited (S ECI 2020 04566)	7 June 2024	Victorian Supreme Court (Nichols J)	✓	Before the commencement of trial

SUPERANNUATION IN THE SPOTLIGHT

Since the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, a number of class actions have been commenced against superannuation funds, which draw upon the topics canvassed during the public hearings. In these proceedings, members, trustees and Courts have grappled with issues arising from the intersection between statutory duties, the general law of trusts and the commercial realities of large-scale superannuation funds.

Two such issues are:

- the proper characterisation of the nature of a member's interest in a superannuation fund and the consequences of that characterisation from the perspective of a claim for loss or damage under s55(3) of the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) (in particular for members who have not met a condition of release)
- the question of the appropriate remedy for a breach of the statutory covenants in s52 of the SIS Act.

There remains uncertainty as to the correct legal position with respect to these matters as some of these class actions have settled prior to a final hearing and others are awaiting hearing or judgment.

We explore these issues below.

WHAT IS THE NATURE OF A MEMBER'S INTEREST IN A SUPERANNUATION FUND?

The majority of judgments on the nature of a member's interest in a superannuation fund have held that this interest is in the nature of an 'expectancy' which crystallises upon satisfaction of particular statutory criteria, such as attainment of retirement age.[37] These cases have concerned the rights of an individual member and, in particular, whether the statute of limitations had barred the individual's claim.

The majority of the High Court in *Cornwell* characterised the interest of a member of a Commonwealth superannuation fund as an 'entitlement' conferred by statute which he stood to enjoy upon retirement.[38] The reasoning in *Cornwell* was applied by the Full Federal Court in *Innes*, where the Court stated that '[a]ny proprietary or other right to or interest in a future payment or revenue flow remained prospective and contingent, at least until one or other of the statutory criteria for the payment of a benefit had been satisfied'.[39]

In contrast, in *Shimshon*,[40] the Victorian Court of Appeal dealt with the issue for the first time in the context of a class action. In this case, the class included members of the fund who had met a condition of release and others who had not, as well as persons who had rolled their superannuation entitlements into a different fund. In this context, Whelan JA (with whom Sifris and Walker JJA agreed) remarked in obiter that a member's interest in a superannuation fund was 'prospective' rather than 'contingent' prior to meeting a condition of release,[41] since members have a 'present entitlement to the future enjoyment of their allocation of the funds'.[42]

37 *Re Coram ; Ex parte Official Trustee in Bankruptcy v Inglis* (1992) 36 FCR 250 at 253–254 (O'Loughlin J).
38 *Commonwealth v Cornwell* (2007) 229 CLR 519; [2007] HCA 16 at [18] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).
39 *Innes v AAL Aviation* (2017) 259 FCR 246; [2017] FCAFC 202 at [275] (Bromberg J, with whom Tracey and White JJ agreed at [169]).
40 *Shimshon v MLC Nominees Pty Ltd* (2021) 66 VR 277; [2021] VSCA 363.
41 Ibid at [17], [35] (Sifris and Walker JJA) and [253], [263] (Whelan JA).
42 Ibid at [13].

WHY DOES THIS MATTER?

The proper characterisation of the nature of a member's interest in a superannuation fund is relevant to the availability of relief under s55(3) of the SIS Act. Section 55(3) provides that a person who suffers loss or damage as a result of conduct of a person in contravention of the covenants contained in s52 of the SIS Act may recover the amount of the loss or damage by action against that person.

Whether a superannuation member has suffered loss or damage for the purpose of s55(3) of the SIS Act at a given time turns on the nature of the member's interest in the fund. In the class action context, this is important because the claim will be advanced on behalf of a class of superannuation members, at least some of whom likely will not have 'vested' interests in the fund.

Applying the reasoning in *Cornwell* and *Innes*, it is arguable that group members who have not met a condition of release – and who therefore have no present entitlement to any identifiable portion of the fund - cannot have suffered loss or damage within the meaning of s55(3) of the SIS Act. In these cases, the Courts held that the relevant member had sustained actual loss only upon retirement, at which point they had an entitlement to access their benefits under the applicable statutory defined benefit fund.[43]

If, however, a member's interest is properly characterised as 'prospective' rather than 'contingent', as remarked in obiter in *Shimshon*, it is arguable that a member holds a beneficial interest in the superannuation fund at all times and is capable of suffering loss or damage even prior to reaching a condition of release. In *Shimshon*, Sifris and Walker JJA remarked that 'loss or damage' within the meaning of s55(3) of the SIS Act was 'sufficiently broad as to include a diminution in the member's individual account within the fund, even where the member's entitlement to payment out of the fund has not crystallised'.[44]

There are 3 particular points to note about the remarks made by the plurality in *Shimshon*:

- *Shimshon* was an appeal from an interlocutory decision concerned with the terms of Part 4A of the *Supreme Court Act 1986* (Vic) and so the Court's remarks about the effect of s55(3) of the SIS Act are obiter.
- The Court decided the appeal without hearing submissions from the parties about the relevance of the reasoning in *Cornwell*,[45] and *Innes* was not cited in the judgments.
- There was no determination in the appeal as to whether those members whose superannuation rights have not vested had a right to claim loss or damage under s55(3) of the SIS Act for direct payment to them. The Court instead recognised that this issue was a matter for trial.[46]

WHAT IS THE APPROPRIATE REMEDY FOR A CONTRAVENTION OF S52 OF THE SIS ACT?

In the superannuation class action context, applicants have regularly sought relief in the nature of a direct payment to group members pursuant to s55(3) of the SIS Act, often only seeking an order in the alternative for restoration of the trust fund. Applicants have contended that s55(3) of the SIS Act does not limit the payment of compensation to the restoration of the trust and it is open to the Court to order that loss or damage be paid directly to members.

This question is most relevant for group members who have not met a condition of release. The statutory framework makes strict provision for when superannuation moneys may be released from the trust, and the purposes for which moneys in trust are held and may be used.[47] It would be an idiosyncratic outcome if s55(3) of the SIS Act supplied a mechanism for early de facto release of preserved benefits (ie where moneys are paid to these group members) outside of the strict requirements found elsewhere in the SIS Act and in a circumstance not countenanced by the statutory scheme.

There are also interesting issues for Courts to consider where the trustee pleads a promise to make good the assets of the fund if it is found to have acted in breach of trust. In those cases, if the trust is made whole, there would arguably be no loss or damage suffered by members to be claimed under s55(3) of the SIS Act.

43 *Cornwell* at [19]; *Innes* at [273].
44 *Shimshon* at [64] (Sifris and Walker JJA).
45 Ibid at [265] (Whelan JA).
46 Ibid at [14], [51] (Sifris and Walker JJA) and [266] (Whelan JA).
47 See SIS Act ss3, 31–34, 61, 62; *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**) Part 6. See also *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254; [2010] HCA 36 at [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *Frigger v Trenfield (No 3)* [2023] FCAFC 49 at [241]-[243] (Allsop CJ, Anderson and Feutrill JJ); *Shimshon* at [63] (Sifris and Walker JJA).

WHY DOES THIS MATTER?

The question of the appropriate remedy under the SIS Act is relevant in at least 2 ways in the class action context. It is relevant to:

- the relief that may be available for breaches of trust by superannuation trustees
- the availability of moneys to pay a commission to any litigation funder if the class action goes to trial and the members are successful in their claim for loss, or if there is a settlement.

IMPLICATIONS OF THE CORRECT LEGAL POSITION ON THESE ISSUES

Some of the relevant implications of these issues are noted in the table below. At the close of the review period, a case dealing with these issues had been heard and is reserved for judgment,[48] and 4 others are listed for initial trial. It remains to be seen how the respective Courts will deal with these issues if they arise for determination at trial.

ISSUE	IMPLICATIONS
Can non-vested members claim to have suffered loss or damage?	• May impact the available relief and availability of a claim for aggregate damages where the class is said to comprise both vested and non-vested members. • May affect the viability and class composition in future superannuation class actions as applicants may need to decide whether a claim for breach of s52 of the SIS Act or breach of trust should include the claims of non-vested members. • Questions may arise as to the position of members of a fund to meet a condition of release during the course of a class action.
Would any judgment amount need to be paid into the trust to restore the account balances of members?	• Potentially impacts the commercial viability of the funding of a class action. • If moneys are not available to be paid to all group members outside of the superannuation scheme, this may impact the availability of funds which could be the subject of a group costs order or common fund order. This may have flow-on effects on the ability for the applicant's legal fees (to the extent not payable by the respondent) or the commission of a litigation funder to be paid from any judgment sum.

48 *Brady v NULIS Nominees (Australia) Limited in its capacity as trustee of the MLC Super Fund* (Federal Court Proceeding NSD1736/2019).

CONSUMER CLASS ACTIONS

Consumer class actions remain the leading category for class actions in Australia for the 5th year in a row. Despite this, the lowest number of consumer class actions were filed this year since 2016/2017, which reflects the lower level of class action activity overall. There were 13 consumer actions commenced in the review period - a significant drop from a peak of 25 filed in 2020/2021.

The subject matter of the consumer class actions filed is wide ranging, including allegations relating to financial products (such as extended warranties), defective goods, and misuse of market power (in the gaming and tech sector). The cases filed suggest a tendency for this category of class actions to follow on from regulator action and overseas proceedings.

In this section, we examine 2 significant cases that are likely to affect the future conduct of consumer class actions:

- *Ruby Princess*, where the High Court considered the application of unfair contract laws, specifically in relation to the regime's extraterritorial reach
- *Toyota* and *Ford*, where judgment is reserved but where it is anticipated that the High Court will provide clarity on the method of evaluating damages in cases involving defective goods that have been the subject of remediation.

We also examine the potential for environmental and sustainability class actions, based on recent decisions.

OFFSHORE AND UNFAIR

In October 2023, the High Court considered the national unfair contract terms (**UCT**) regime for the first time in the *Ruby Princess* class action.[49]

In its unanimous judgment, the High Court made 2 important findings:

1. The prohibition on UCTs in s23 of the Australian Consumer Law (**ACL**) extends to conduct that is engaged in outside Australia.

   The Court's finding was based on the extended operation of the ACL in s5(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), which extends certain parts of the CCA and ACL to the '*engaging in conduct outside Australia by bodies corporate incorporated or carrying on business in Australia*'.

   In this case, the making of the contract outside Australia – by Carnival as an entity carrying on business in Australia – was captured by the UCT regime. The Court found this interpretation of s23 was in line with not only the objectives of the ACL and the CCA but also with 'Australian norms of fairness,' as otherwise parties could circumvent the operation of the UCT regime just by including a foreign choice of law clause in their contracts.

2. The class action waiver clause contained in the passenger contract was unfair.

   In overturning the majority decision of the Full Federal Court on this point, the High Court held that the term was unfair because it:

   - caused a significant imbalance in the parties' rights under the contract, as it operated to impose 'limitations on passengers but in no way restricts the operations of the carrier', and 'had the effect of preventing or discouraging passengers from vindicating their legal rights where the cost to do so individually was or may be uneconomical'
   - was not reasonably necessary to protect the legitimate interests of Carnival
   - would, if relied upon, cause detriment to the passenger as they would be denied the benefits of the Federal Court's class action regime
   - was not transparent - whilst it was 'plainly legible', parties were only able to view the clause once they had received a booking confirmation email, and therefore was neither 'presented clearly, nor readily available'.

Recent reforms to the UCT regime are discussed below.

GUARANTEEING DAMAGES FOR CONSUMER GUARANTEE BREACHES

In claims for damages under product liability laws, the fact that a supplier or manufacturer has already sought to remediate customers in some way has the potential to dramatically reduce the quantum of damages payable.

In the *Toyota* class action currently before the High Court,[50] which relates to the sale of cars with defective diesel particulate filters, the key issue to be decided by the High Court is how to conceptualise damages for failure to comply with the guarantee of acceptable quality in circumstances where there have been attempts to make good the defects.

The Full Federal Court, in overturning the primary judge's assessment of damages, considered that the point in time for assessing damages for any reduction in value of the goods is the date of supply, however with allowances for the possibility for future repair and the utility that a consumer has been afforded notwithstanding the defect. The Court found that where repair is possible, and it wholly rectifies the defect, the reduction in value damages will be a measure of the diminished utility for the period before the repair is effected. Such an approach would, the Court concluded, ensure there was no over-compensation given the circumstances known at the trial.

In addition, the Full Federal Court provided the following observations on reduction in value damages in other circumstances where a good does not meet acceptable quality:

- If a good is replaced, there will be no reduction in the value of the good
- If a good is written off, the reduction in value will be the complete cost of the good (save for any salvageable value of the good's material)
- If repair is possible, but will only partially reinstate utility, the reduction in value may consider the cost of repair and the residual reduction in value
- If repair is impossible, but the good still retains some utility (should not be written-off), a comparison needs to be made with the lifetime use of the same good without the defect, and an objective assessment of the magnitude or significance of the defect.

In each scenario, however, consequential losses may be recoverable separately.

The High Court appeal in *Toyota* was heard concurrently with *Ford*[51] (concerning defective transmission systems), seeking determination as to whether post-supply events and information may be taken into account in assessing statutory compensation.

49 *Karpik v Carnival plc* [2023] HCA 39. The Federal Court decision and the Full Federal Court appeal were discussed in The Review 2021/2022 (Unfair or up in the air?). See also KWM Insight High Court hands down judgment in the Karpik v Carnival plc class action on unfair contract terms issues 8 December 2023.

50 *Toyota Motor Corporation Australia Limited v Williams & Anor* (S155/2023) and *Williams & Anor v Toyota Motor Corporation Australia Limited* (S157/2023).

51 *Capic v Ford Motor Company of Australia Ltd* (S25/2024).

OUTLOOK – WHAT'S NEXT IN CONSUMER CLASS ACTIONS?

(a) Financial products in connection with consumer goods and services

The selling (and alleged mis-selling) of financial products in connection with consumer goods and services continue to face scrutiny in consumer class action proceedings.

JB Hi-Fi - In December 2023, a class action was commenced against JB Hi-Fi, alleging that the retailer engaged in misleading or deceptive and unconscionable conduct in selling 'extended warranties' which allegedly had little or no value, as the customers already had the same rights for free under the ACL.

IAG - In May 2024, a class action was filed against 2 entities in the Insurance Australia Group (**IAG**), alleging that they used pricing strategies to inflate insurance premiums for customers who were considered less likely to switch to a different insurer. The conduct is characterised as a 'loyalty penalty', whereby customers who remain with their service provider are penalised by paying more than new customers would for the same service. The class action follows civil penalty proceedings brought by ASIC, which were settled in July 2023 for $40m.

(b) Gaming and tech

There is a trend, particularly in the tech and gaming industry, of plaintiff firms launching class action proceedings in Australia following proceedings being filed in the United States and United Kingdom. A number of follow on actions have been commenced, including:

Aristocrat Leisure Limited has faced class actions in the United States relating to its social casino apps. Aristocrat and one of its mobile gaming subsidiaries, Big Fish Games, Inc. were party to 2 Washington District Court class actions that settled in 2021. A 'copycat' claim has since been commenced in Australia relating to Big Fish Games and another Aristocrat mobile gaming unit, Product Madness, Inc and the lawfulness of their 'social casino' games apps alleging that the social casino apps are gambling products in contravention of the prohibition on online gambling services contained in the *Interactive Gambling Act 2001* (Cth), notwithstanding that the games do not permit consumers to bet or win real money. It is also alleged that the design of the apps and the social casino games are unconscionable, in breach of the ACL, because they are said to encourage players to play for longer and spend more money.

Sony is facing a class action commenced on behalf of game developers and game purchasers alleging abuse of market power. The claim alleges Sony has abused its dominant position in the console and game software market by forcing game developers and publishers to only distribute content through Sony's online PlayStation store, causing higher prices and commissions for games and add-on content than if there was competition in the market. The class action was filed in the Federal Court of Australia and follows similar proceedings in the UK and the US.

Apple and Google are facing a similar class action filed on behalf of app developers in Australia, alleging anti-competitive conduct by forcing app developers to distribute Apple and Android apps exclusively through Apple's App Store, and Google's Play Store respectively. Both companies are also accused of imposing inflated 30% commissions on app sales. The action alleges the behaviour has caused restricted competition, lower earnings for developers and higher prices for consumers. The class actions were heard concurrently with Epic Games' private actions against Apple and Google during a recent 16-week trial in the Federal Court. Epic Games, developer of the popular game Fortnite, brought proceedings against Apple and Google in many jurisdictions globally alleging misuse of market power by blocking or restricting the sale of Fortnite after Epic tried to introduce its own payment system to bypass the 30% commissions. Judgment is reserved.

(c) Environment and sustainability-related class actions

Although only one environmental class action was initiated in the review period, new proceedings relating to environment and sustainability claims were instituted in Australia by ASIC, the ACCC, and private litigants.[52]

On a per capita basis, Australia has the highest rate of climate-related litigation in the world, and is the second-largest jurisdiction (second only to the United States) in total volume of climate-related litigation.[53] Given Australia's well established class action regime, it is likely only a matter of time before more climate-related class actions are initiated.

Climate-related case law continues to develop.

Pabai Pabai v Commonwealth[54] is an ongoing class action alleging that the Commonwealth Government owes Torres Strait Islanders a duty of care to take reasonable steps to protect them from harms caused by climate change. During the review period, scientific experts gave evidence in November 2023 and closing submissions were heard in May 2024. We await the decision of the Federal Court as to whether it will recognise a climate change duty of care.

O'Donnell v Commonwealth was a class action commenced against the Commonwealth Government alleging that it engaged in misleading or deceptive conduct by not disclosing the risks of climate change to sovereign bond investors. This proceeding was settled in August 2023, and did not have a claim for damages or monetary relief. Under the terms of settlement, the Commonwealth Government agreed to publish a statement acknowledging that climate change is a systemic risk that may affect the value of government bonds.

Misleading environment or sustainability claims, also known as 'greenwashing', remains a priority area for both the ACCC and ASIC.

- **ASIC** has secured 3 wins in actions against businesses for greenwashing conduct in the review period.[55] Both Vanguard Investments Australia and Mercer Superannuation (Australia) Limited admitted to making misleading representations with respect to the sustainable nature and characteristics of some of their respective investment options. The Federal Court also found that Active Super made misleading representations concerning its environmental, social and governance (ESG) credentials. *Active Super* awaits a penalty decisions. An agreed penalty of $11.3M was recently approved in *Mercer*, and a penalty of $12.9M was ordered in Vanguard.
- The **ACCC** released new guidance in December 2023 on avoiding misleading environmental marketing and advertising claims,[56] and in April 2024, instituted civil proceedings for alleged greenwashing conduct against the manufacturer of GLAD garbage bags, Clorox Australia Pty Limited. The ACCC alleges that Clorox misrepresented that certain bags contained 50% recycled 'ocean-bound' plastic, when in fact the plastic was collected up to 50 kilometres from the ocean.

A number of significant actions have also been brought by public interest groups. Greenpeace is taking action against Woodside alleging it has made, and continues to make, misleading representations about its plans to reduce its greenhouse gas emissions, and Australian Parents 4 Climate Action has taken action against EnergyAustralia, alleging that it made misleading representations by marketing some of its products as 'carbon neutral' when the product is being 'offset' by carbon credits.

52 See KWM Insight Climate Litigation Review 2023 21 February 2024.
53 See Grantham Institute, *Global trends in climate change litigation* (27 June 2024) and Menzies Research Institute *Open Lawfare: How Australia became the lawfare capital of the world* (July 2024).
54 Discussed in The Review 2022/2023 (Door still open for a climate change duty of care).
55 *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308 (**Vanguard**); *Australian Securities and Investments Commission v LGSS Pty Ltd* [2024] FCA 587 (**Active Super**); *Australian Securities and Investments Commission v Mercer Superannuation (Australia) Limited* [2024] FCA 850 (**Mercer**).
56 ACCC, 'Making environmental claims: A guide for business' (December 2023).

(d) Increased enforcement of UCT regimes

In November 2023, significant amendments to the UCT regimes in the ACL and ASIC Act came into effect including:

- the introduction of a civil penalty regime, permitting the ACCC and ASIC to seek large fines as well as other relief for proposing, applying or relying on an unfair term
- an expansion of what is considered to be a 'small business' that has protection under the regime.

The changes apply to contracts entered into or renewed from 9 November 2023.[57]

Each of ASIC and the ACCC have 'strongly urged' businesses to take steps to comply with the UCT regime and have signalled that those who fail to comply are at risk of legal action.

As regulator action can trigger the commencement of a class action, it is imperative that businesses with contracts subject to the UCT regime undertake thorough compliance reviews to minimise the risk of legal action and potentially significant penalties.

57 See KWM Insight Expanded unfair terms regime: Is your business ready? 7 November 2023.

COMPROMISE OR COMPROMISED? UTILISING BANKRUPTCY AND RESTRUCTURING PROCESSES TO MANAGE MASS TORT LIABILITY

MASS TORTS AND THE LIMITATIONS OF CLASS ACTIONS REGIMES

The challenge of how to resolve mass tort and other claims against common defendants efficiently and fairly has arisen in various jurisdictions, but none more so than the US.

In the last 5 or 6 years, tens of thousands of multi district litigation cases have been commenced in the US advancing opioid (OxyContin) and talc (talcum powder) related claims respectively. This multiplicity of claims manifests significant costs, the potential for inconsistent findings and significant business interruption for the defendants. For example, in the talc litigation, 16 out of 17 court proceedings were successfully defended. However, in the 17th case, the defendant was found to be liable to pay damages in an award of approximately US$2.5b to the relevant plaintiff class.[58]

There are a number of limitations that exist in pursuing personal injury matters through a class action:

- The statutory regime in various jurisdictions (including Australia, Canada, the UK and the US) imposes significant limitations on personal injury claims (such as time bars and recoverability for certain types of loss), particularly where there are latency issues (ie, where consumers do not become sick as a result of the past use of a product until some unknown time in the future and may not be identifiable at the time of the class action).
- Settlements in mass tort claims are often funded (at least in part) by third parties (such as insurers or offshore parent companies). Such parties seek finality, in the form of releases from claimants, in exchange for the funding of a settlement. The class action regime does not facilitate releases in favour of third parties and may not achieve finality, especially when defendants face multiple concurrent or sequential class actions in respect of similar subject matter.
- Mass tort litigation (including class actions) in the US often involves a race to the courthouse to secure a settlement or payment of a judgment debt before the defendant's resources are exhausted, and the defendant becomes insolvent. This can leave future claimants (whose damage is latent) without effective remedy.

BANKRUPTCY AND RESTRUCTURING SOLUTIONS TO MASS TORT LIABILITY

As a consequence of these issues, efforts have been made by defendants to mass tort claims in various jurisdictions to use restructuring or bankruptcy processes to resolve mass tort claims.

One of the benefits of a bankruptcy or restructuring process is they can be more efficient than litigation, for example as they do not require resources to be expended on a potentially lengthy series of trials (liability and then damages assessment). Further, such processes typically bind all creditors (or all creditors of a particular class) in respect of present claims and future claims to the extent that the circumstances giving rise to those claims (eg the use of an allegedly harmful product) have already taken place. In this way, bankruptcy and restructuring processes provide an opportunity to achieve a holistic resolution of liability in respect of mass torts which is otherwise difficult to achieve, particularly where there are latency issues.

58 Lawrence Hurley, 'U.S. Supreme Court rebuffs J&J appeal over $2 billion baby powder judgment', *Reuters* (online), 2 June 2021, available at <https://www.reuters.com/legal/government/us-supreme-court-declines-hear-jj-appeal-over-2-billion-baby-powder-judgment-2021-06-01/>.

Such processes can also enhance fairness as they balance the interests of present and future claimants. This is typically achieved by the establishment of a trust that will process and pay claims to the individual claimants, present and future. The trust utilises a matrix which provides for the assessment and valuation of claims based on common claim features to determine the size of the fund, thereby providing a straightforward and certain result for claimants. In many of the primary examples where restructuring processes have been used, this is made simpler as liability can be assumed for the purposes of calculating the scope of loss (eg liability can be assumed when calculating the size of a fund to allocate for asbestos related damage given the extensive history of successful asbestos claims). This can result in the costs and delays associated with litigation being avoided by both claimants and defendants.

For these reasons, both Purdue Pharma and Johnson & Johnson have attempted, with mixed success, to utilise US Chapter 11 bankruptcy processes as a means of resolving these claims. This was carried out by a procedure commonly referred to as the 'Texas Two Step'. The procedure involves a company facing mass tort liability using Texas law to be split into 2 entities, one holding the company's primary assets and the other holding the mass tort liability (and sometimes other liabilities), and placing the liability-holding company into Chapter 11 bankruptcy.

These restructuring processes have, however, been the subject of litigation and controversy in the US, querying:

- the appropriateness of solvent companies seeking to use a Chapter 11 bankruptcy process to manage their mass tort liabilities,[59] and
- whether the Chapter 11 bankruptcy process can effect releases by claimants against third parties. This issue was recently considered by the US Supreme Court in respect of the Purdue Pharma Chapter 11 process (in which the Sackler family, the owners of US$4b in exchange for lawsuits against the family to be enjoined, thereby freeing the family from liabilities associated with OxyContin lawsuits). The US Supreme Court split 5-4 in holding that non-debtor releases were not permitted under the Bankruptcy Code.[60] The result of the Court's decision is an effective prohibition on non-debtor releases which are often commercially necessary to achieve any settlement of claims. In the words of Kavanaugh J, who wrote the lead dissenting judgment, the majority decision renders individuals who had valid claims in relation to OxyContin now becoming 'deprived of the substantial monetary recovery that they long fought for and finally secured after years of litigation'.[61]

Despite the challenges in the US, restructuring processes have been used successfully in Canada for decades to resolve mass tort litigation, including:

- where the Canadian Red Cross Society filed for protections under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (**CCAA**), to efficiently resolve claims in relation to tainted blood[63]
- *Muscle Tech*, in respect of claims relating to a weight loss drug (that compromise provided for releases in favour of retailers)[64]
- *Montreal Maine & Atlantic*, in which claims relating to a runaway train that destroyed a town were resolved and a fund was established by the relevant insurers to facilitate distribution to claimants in exchange for third party releases[65]
- 2 class action claims brought against 3 tobacco companies, JTI-MacDonald Corp, Imperial Tobacco Canada Ltee and Rothmans, Benson & Hedges Inc, all of which have sought protections under the CCAA after being found liable to pay damages of CA$15b.[66]

Similarly, in the UK, creditors' schemes of arrangement (a restructuring tool available to both solvent and insolvent companies) have been used to resolve mass tort claims relating to asbestos[67] and claims relating to the mis-selling of financial products.[68] Releases in favour of third parties (such as guarantors, insurers and joint tortfeasors) are permitted in respect of creditors' schemes of arrangement, such releases typically being granted on a without admissions basis.

AUSTRALIA – CREDITORS' SCHEME AS A TOOL TO RESOLVE MASS CLAIMS

In Australia, mass tort and other claims (including those claims brought by way of class actions) against solvent and insolvent companies can be finally resolved via a creditors' scheme of arrangement. This often involves establishing a creditors' trust which has the effect of not only settling existing claims but also providing an effective vehicle through which to resolve any future claims. Creditors' schemes under Australian law can also compromise contingent claims (in respect of latent and patent damages).[69] A creditors' scheme of arrangement is a flexible process by which claimants of the defined class will have their claims against the company compromised if 75% in value (assessed based on the dollar value of an existing claim or based on an agreed formula or methodology to calculate the value of a contingent claim) and 50% in number of claimants vote in favour of the scheme and the scheme is approved by the Court.

Importantly, unlike the James Hardie restructure (implemented by way of members' scheme of arrangement), creditors' schemes of arrangement are democratic and can only proceed with the requisite support of affected claimants. Once the Court has approved the scheme, all claimants of the defined class are bound by the scheme.

The binding effect of schemes on affected claimants, the fact that entry into a scheme results in a moratorium on proceedings and the *ipso facto* regime in the Corporations Act make the use of a creditors' scheme a particularly attractive, although underutilised, means by which to resolve mass tort claims. A creditors' scheme may minimise some of the difficulties and frustrations associated with prolonged and multiple class action litigation including litigation costs and payment of litigation funder premiums. It can also expedite resolution of claims and facilitates direct interaction with creditors. As with the UK creditors' scheme, an Australian creditors' scheme can provide releases in favour of third parties.

The Opes Prime creditors' scheme (prepared by KWM) provides a good local example of the use of the creditors' scheme of arrangement to resolve mass claims.[70] Upon its collapse into administration during the GFC, stockbroker Opes Prime (and its financiers ANZ and Merrill Lynch) faced more than 15 separate proceedings in different jurisdictions around Australia and overseas (including 2 class actions and one group proceeding) by clients who made various claims in respect of securities lodged with Opes Prime. Opes Prime's financiers contributed to a fund for the settlement of these claims, which was implemented via a creditors' scheme of arrangement, and all of the claims were resolved with a clear set of valuation principles that were implemented under the scheme.

Creditors' schemes have more recently been used in Australia to settle a shareholder class action[71] and to restructure contingent claims in respect of an insurer's liability to policyholders under contracts of insurance[72] (also a KWM designed scheme).

CONCLUSION

With our analysis showing an increase in filings for product liability class actions,[73] companies at risk of facing mass tort claims should consider all available options to achieve finality and resolve claims. The relative merits of restructuring processes against the (now) more traditional class action process should be considered.

59 See eg, Abbe R. Gluck et al, 'Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation' [2023-24] 133 *Yale Law Journal Forum* 525; Edward Janger, 'Aggregation and Abuse: Mass Torts in Bankruptcy' (2022) 91 *Fordham Law Review* 361.
60 *Harrington v Purdue Pharma L. P.*, 603 US ____ (2024).
61 Ibid [2].
62 For Canadian examples, refer to presentation delivered at the INSOL conference in San Diego in 2024: Greg Gordon et al, 'How much is too much? Channelling mass tort claims through an insolvency proceeding' (Speech, INSOL San Diego 2024, 24 May 2024).
63 *Re Canadian Red Cross Society* (2000) 19 CBR (4th) 158 (Ontario Supreme Court of Justice).
64 *Re Muscle Tech Research and Development Inc.* (2006) 25 CBR (5th) 231 (Ontario Supreme Court of Justice).
65 *In the Matter of the Plan of Compromise or Arrangement of Montreal Maine & Atlantic Canada Co* [2015] QCCS 3235.
66 *Letourneau v JTI-Macdonald Corp* [2015] QCCS 2382; Imperial Tobacco. Court file CV-19-616077-00CL. Initial Order. March 12th, 2019; JTI-Macdonald. Court file 19-CV-615862-00CL. Initial Order,. March 8, 2019; Rothmans, Benson and Hedges. Court file CV-19-616779-00CL. March 22, 2019.
67 *Re T&N Ltd (No 2)* [2006] 2 BCLC 374; *In the Matter of Cape Plc* [2006] EWHC 1316 (Ch); *In the Matter of T&N Limited* [2006] EWHC 1447 (Ch).
68 *Re Card Protection Plan Ltd* [2014] EWHC 114 (Ch).
69 *Re London Reinsurance Co Ltd* [2006] FCA 872.
70 *Re Opes Prime Stockbroking Ltd (No 2)* (2009) 179 FCR 20; [2009] FCA 813; *Re Panopus plc* [2012] FCA 158.
71 *Hall v Slater & Gordon Ltd* [2018] FCA 2071.
72 *Re Catholic Church Insurance Ltd* [2023] FCA 1197; *Re Catholic Church Insurance Ltd (No 2)* [2023] FCA 1352.
73 See **Headlines** section of The Review 2022/2023.

COMPETING CLASS ACTIONS

Competing class actions continued to be prevalent in the review period and have formed 'an increasing part of the business' of the Courts.[74]

Courts have again continued to encourage consolidation by agreement as the preferred mechanism for resolving competing proceedings,[75] and have even mooted the possibility of forced consolidation (although in most cases this is unlikely).[76] The key concern for the Courts is to avoid 'mini trials' – a common occurrence in contested applications.[77]

In determining carriage disputes, we have observed the following trends:

- the **multifactorial analysis** still applies, but 2 factors – **funding and experience** - have emerged as predominant
- there are **no second chances** when it comes to funding proposals
- commencing a competing class action **in a different court** will not avoid a multiplicity fight.

MULTIFACTORIAL ANALYSIS

Courts continue to evaluate competing class actions by considering the interests of group members and comparing each firm's proposal against an established list of factors - including funding models, causes of action, experience of legal practitioners and funders, the progress of the proceeding and the conduct of the representative plaintiffs.

However, it is now clear that ***2 factors*** 'loom large' in applications,[78] and have emerged as the critical considerations:

- the funding model - which model will likely result in the best return for group members
- the experience of legal practitioners.

Where both factors count in favour of the same firm, Courts are highly likely to be swayed in that direction. Similarly, if the firms cannot be differentiated on one factor, the other will likely carry the day.

In *Hino Motor Sales*:

- The difference in experience of the legal practitioners, and the level of support and resources, was identified as 'particularly important' and the most significant factor when assessing the best interests of the class. One plaintiff was represented by Maurice Blackburn and the other by Gerard Malouf & Partners. The Court held that Maurice Blackburn's superior experience and resources substantially outweighed that which could be provided by the other firm.
- Justice Osborne also emphasised that Maurice Blackburn's superior funding model was a factor that weighed in favour of carriage.[79] The 'better' funding model in this instance was a group costs order proposal which provided for a ***stepped rate*** (ie the maximum applicable rate was 25%, which reduced to 17.5% depending on the quantum recovered), in contrast to a 25% flat rate proposed by Gerard Malouf & Partners.

74 *Maglio v Hino Motor Sales Australia Pty Ltd; McCoy v Hino Motors Ltd* [2023] VSC 757 (**Hino Motor Sales**) at [27] .
75 See eg, *Lidgett v Downer EDI Ltd; Kajula Pty Ltd v Downer EDI Ltd; Jowene Pty Ltd v Downer EDI Ltd; Teoh v Downer EDI Ltd* [2023] VSC 574 at [20].
76 In *Greentree v Jaguar Land Rover Australia Pty Ltd (Carriage Application)* [2023] FCA 1209 (**Jaguar**) at [98], Lee J noted that "*while the absence of any cooperative agreement between the parties is not dispositive of the Court's power to order the consolidation of two or more representative proceedings, forced consolidation often suffers from the same problems as orders for specific performance of personal services: that is, you cannot make people work together*".
77 *Hino Motor Sales* at [28], [31].
78 *Jaguar* at [27].
79 *Hino Motor Sales* at [66].

Complex questions arise when the competing firms each claim a 'win' on one of these 2 factors – and it remains unclear which direction a Court will take in those circumstances. Recent judgments have gone both ways on this question,[80] and the best current view is that each case will be determined holistically, evaluating all relevant factors.[81]

NO SECOND CHANCES

It is increasingly unlikely that the Court will accept attempts to 'out-bid' the competing firm after evidence on the carriage motion has been received.

As Osborne J described in *Hino Motor Sales*, to permit a party to subsequently match a funding proposal would give one party the opportunity of 'obtaining the valuable right to make the last bid':[82]

> *To now allow the Maglio plaintiffs to seek to match a funding proposal … would permit one party alone the opportunity of in effect obtaining the valuable right to make the last bid. Although not the case here, if such a practice is encouraged, it is not difficult to imagine that in other cases, such late bids may then prompt the other party to seek a like indulgence and so on.*

In *Jaguar*, at first instance, Lee J had determined that Maurice Blackburn had the superior funding model but that Gilbert + Tobin (**G+T**) had the more relevant experience. To resolve the tension, Lee J gave G+T 28 days to decide whether they would lower their proposal to meet the funding model proposed by Maurice Blackburn and, if so, the proceeding involving G+T would have carriage. On appeal, the Full Federal Court overturned Lee J's decision, and held that it was procedurally unfair to permit a revision of the funding model after the hearing to one party – and not the other.[83]

This approach is also consistent with:

- the *Hyundai* and *Kia* class actions, which involved an application by one of the 2 competing plaintiffs to amend its statement of position.[84] The proposed amendments reflected new solicitors and a different funding model. Justice Nichols permitted the change in legal representatives but refused leave to amend the funding model on the basis that it is not fair to allow one party the chance to out-bid the other
- the *International Capital Markets* class actions, where the Court's orders expressly provided that the Court would not consider any revision or modification to the parties' positions following the filing of a statement of position and revised statement of position.[85]

NO FORUM SHOPPING

Carriage disputes also cannot be avoided by commencing proceedings in different jurisdictions.

The overlapping sets of proceedings in *Hyundai* and *Kia* were commenced in different Courts – 2 in the Victorian Supreme Court and 2 in the Federal Court. The Federal Court promptly transferred its set of proceedings to the Victorian Supreme Court, noting it was in the interests of justice to do so given the cost savings and 'inherent undesirability of there being 2 proceedings on substantially the same subject matter in 2 different superior courts'.[86]

80 For example, in *Hino Motor Sales*, experience was given primacy and described by Osborne J as 'particularly important' (see [52]) whereas Lee J in *Jaguar* appeared to find that the better funding model should prevail.
81 *DA Lynch v Star Entertainment Group; Drake v Star Entertainment Group; Huang v Star Entertainment Group; Jowene v Star Entertainment Group* [2023] VSC 561 (**Star Entertainment Group**) at [355].
82 *Hino Motor Sales* at [65]-[66].
83 *Jennings v Jaguar Land Rover Australia Pty Ltd* [2024] FCAFC 62 at [26].
84 *Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd* [2024] VSC 301.
85 *Vingrys v International Capital Markets Pty Ltd & Ors* [2024] VSC 455 at [20], [136]; *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847 at [36].
86 *Edwards v Hyundai Motor Company Australia Pty Ltd; Sims v Kia Australia Pty Ltd* [2023] FCA 1134 at [16].

THE BENEFITS OF COMPETITIVE TENSION

In contrast to the tenor of much commentary from the Courts that multiplicity disputes should be avoided, in *Hino Motor Sales* Nichols J suggested that 'competition' between firms had actually assisted to secure the 'lowest market price available to fund the proceedings' because the multifactorial approach requires parties to put on a proposal that 'would best advance the interests of group members'.[87]

Judges are also increasingly open to holding concurrent sittings of different Courts to efficiently dispose of multiplicity disputes. In *International Capital Markets*, O'Bryan J stated that the 'transfer applications served no useful purpose' where multiplicity can be addressed through a concurrent sitting of the Courts for stay applications.[88] In that case, following a concurrent sitting, the Victorian Supreme Court proceeding was permanently stayed, and the 2 Federal Court proceedings were consolidated.

MULTIPLICITY – BEYOND THE COURTS

Medibank Private Limited (**Medibank**) is defending a class action in the Federal Court brought on behalf of consumers whose data was involved in the 2022 data breach. Running concurrently is a quasi-class action process known as a 'representative complaint' before the Australian Information Commissioner, which also seeks compensation on behalf of substantially the same class for the same alleged loss. To address these competing actions, Medibank made an application in the Federal Court to restrain the Australian Information Commissioner from determining the representative complaint,[89] on the basis that:

- the issues and group members in the representative complaint substantially overlapped with the Federal Court class action
- because of that overlap, there was a risk of inconsistent findings between the regulator and the Court – which amounted to an interference with the administration of justice and the Court's processes in the Federal Court action.

The application was dismissed on the basis that any risk of inconsistent findings had not yet crystalised, was therefore theoretical at that point, and in any event could be managed by the Court's case management powers. However, Beach J considered that a risk of inconsistent findings *could arise* in the future, and left open the possibility that a similar application might succeed in the future.[90]

87 *Hino Motor Sales* at [109]; See eg, *Star Entertainment Group* at [356].
88 *Bain v International Capital Markets Pty Ltd (No 2)* [2024] FCA 847 at [39].
89 *Medibank Private Limited v Australian Information Commissioner* [2024] FCA 117.
90 Ibid at [124], [156] - [159].

GROUP COSTS ORDERS

The Victorian group costs order (**GCO**) regime allows law firms acting for plaintiffs to recover their legal costs as a percentage of the amount of any award or settlement in the proceeding. In exchange, the lawyers take on the financial risk of the costs of the proceeding, including the risk of an adverse costs order (however, in 50% of the proceedings where a GCO was granted in the review period, the plaintiffs' lawyers also entered risk-sharing arrangements with a litigation funder). The Court may only grant a GCO if it is satisfied that it is '*appropriate or necessary to ensure that justice is done in the proceeding*'.[91] The Court will conduct a 'broad evaluative assessment' of the facts and evidence, while prioritising the interests of group members.[92]

The Victorian Supreme Court is still the only court with the power to grant a GCO. Ten GCO applications were granted in the review period, up from 8 the year before.

TRENDS

(a) Filings by jurisdiction

Although the Federal Court continues to attract the highest number of class action filings, there has been an increase in the number and percentage (of total across all Australian jurisdictions) of new actions filed in the Victorian Supreme Court since the commencement of the GCO regime (see **Headlines** section). By contrast, **no** class actions were filed in the NSW Supreme Court in the review period. If this trend favouring Victoria continues, other jurisdictions may be tempted to consider introducing funding models akin to the GCO regime.

Indeed, the Federal Court recently confirmed the availability of a 'Solicitors' Common Fund Order', which operates similarly to a GCO and which is discussed in the **Common Fund Orders** section of The Review.

(b) GCO rates

GCO rates in the review period ranged from 14% (lowest to date) to 39% (second highest to date). The median GCO rate granted in the review period was 26.25%, slightly higher than the median of the previous review period (24.5%). Two thirds of GCOs granted in the review period were between 24% and 30%, but lower than the median funding commission charged by third-party funders, according to publicly available records in the period to 2020.[93]

In determining whether a GCO is appropriate and necessary, the Court will consider a range of factors including:

- whether the costs are proportional to the risk undertaken[94]
- the novelty[95] and complexity[96] of the proceeding
- costs payable by the group members under a GCO, compared to other funding methods such as third-party funding or a no win-no fee model[97]
- the existence of satisfactory third-party litigation providers,[98] and
- comparative costs awards in other cases, however this may be of limited use as the appropriateness of a GCO turns on the specific facts of each case.[99]

91 *Supreme Court Act 1986* (Vic) s33ZD(1).
92 *Allen v G8 Education Ltd* [2022] VSC 32 at [20].
93 The Australian Law Reform Commission determined that the median funding commission paid to third-party funders between 2013 and 2018 was 30%: see ALRC Report, *Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Report No 134, January 2019) Table 3.7, available at <https://www.alrc.gov.au/publication/integrity-fairness-and-efficiency-an-inquiry-into-class-action-proceedings-and-third-party-litigation-funders-alrc-report-134/>. Similarly, the Law Council of Australia found that the commissions charged by third-party funders between 2001-2020 averaged about 27%: see Law Council of Australia, Submission No 67 to Parliamentary Joint Committee on Corporations and Financial Services, *Litigation Funding and the Regulation of the Class Action Industry* (16 June 2020) Attachment A, available at <https://lawcouncil.au/resources/submissions/litigation-funding-and-the-regulation-of-the-class-action-industry>.
94 *Thomas v A2 Milk Co Ltd* [2023] VSC 768 (**A2 Milk**) at [36] .
95 *5 Boroughs NY Pty Ltd v State of Victoria (No 5)* [2023] VSC 682 (**5 Boroughs**) at [93].
96 *Norris v Insurance Australia Group Ltd* [2024] VSC 76 (**Norris**) at [51]; *A2 Milk* at [36], [41]; *5 Boroughs* at [93].
97 *Anderson-Vaughan v AAI Ltd* [2023] VSC 465 at [15]; *Maglio v Hino Motor Sales Australia Pty Ltd* [2023] VSC 757 at [106]-[109].
98 *5 Boroughs* at [88]; *Gawler v FleetPartners Group Ltd* [2024] VSC 365 at [45]-[46].
99 *Norris* at [49]-[51]; *Raeken Pty Ltd v James Hardie Industries PLC* [2024] VSC 173 at [60].

A GCO that performs across a wide spread of possible outcomes will be more likely to be approved compared to one that is closely tied to a specific outcome.[100]

Applicants have sought to justify higher percentage recoveries under a GCO where the GCO is 'funding of last resort'.[101] This will be made out where evidence establishes that the proceeding would be discontinued if the GCO was not made and there is no alternative funding. In those circumstances, a higher GCO rate may be justified to ensure justice is done and the group members are able to prosecute their claims.

HAVE GCO, WON'T TRAVEL

In *Bogan*, the Victorian Court of Appeal held GCOs are **unable** to 'travel' if the proceeding is transferred to another jurisdiction.[102]

The issue arose in the context of an application by the defendants to transfer the proceeding from the Victorian Supreme Court to the NSW Supreme Court under s1337H of the Corporations Act on the basis that the latter is the more appropriate jurisdiction 'having regard to the interests of justice'. The transfer application was heard after the Victorian Supreme Court granted a GCO with the rate set at 40%, which reflected the high level of risk in the litigation.

In deciding whether the GCO would continue to operate and could be varied by the NSW Supreme Court if the proceeding was transferred, the Victorian Court of Appeal considered factors including:

- the legislative context and the wording of the order (including it being made 'in the proceeding') indicated that the GCO was only to operate in respect of the proceeding in the Victorian Supreme Court[103]
- if the proceedings were transferred to NSW, under s79 of the *Judiciary Act 1903* (Cth), the laws of NSW would be picked up and applied as federal law, and accordingly, s33ZDA of the *Supreme Court Act 1986* (Vic) (which permits the granting of a GCO notwithstanding anything to the contrary in the *Legal Profession Uniform Law (Victoria)*) would not apply[104]
- s183(1) of the *Legal Profession Uniform Law 2014* (NSW) expressly prohibits a law firm entering into a costs agreement where the amount payable is calculated by reference to the award or settlement, and there is no provision in NSW similar to s33ZDA which displaces the prohibition in s183 in the context of a class action,[105] and
- s1337P of the Corporations Act cannot be used to 'extend the powers of the transferee court or to require it to proceed on the fiction that it had made an order that it has no power to make', the purpose is to preserve steps already taken in order to avoid duplication in the forum to which the matter is transferred.[106]

On the issue of whether the transfer should be made, the Victorian Court of Appeal considered that, putting aside the GCO, more factors connected the proceeding to NSW than Victoria.[107] The existence of the GCO in itself would not necessarily require a court to decline to make a transfer, however, given the evidence established that without the funding mechanism under the GCO, the proceeding would likely not continue, the Court placed more weight on this factor.[108] Accordingly, the Court was not persuaded that the NSW Supreme Court was the more appropriate forum, and declined to transfer the proceeding.

Bogan has been removed to the High Court of Australia for further consideration of these questions.[109]

100 *Star Entertainment Group* at [278].
101 *Bogan v Estate of Smedley* [2023] VSCA 256 (**Bogan**) at [5] ; *FleetPartners* at [37].
102 *Bogan* at [146], [151], [156].
103 Ibid at [60].
104 Ibid at [140].
105 Ibid at [61], [146].
106 Ibid at [149]-[152].
107 Ibid at [164], [170].
108 Ibid at [171]-[172].
109 *KPMG (a firm) ABN 51 194 660 183 v Bogan & Ors* [2024] HCASL 55.

TOO EARLY TO TELL FINAL RATES

Most of the GCOs made to date by the Victorian Supreme Court have been in proceedings that are not yet resolved. As the Court retains discretion and can vary the GCO rate at any time during a proceeding, we cannot make a conclusive comparison between the final rates awarded and how they compare to third-party funding commissions.

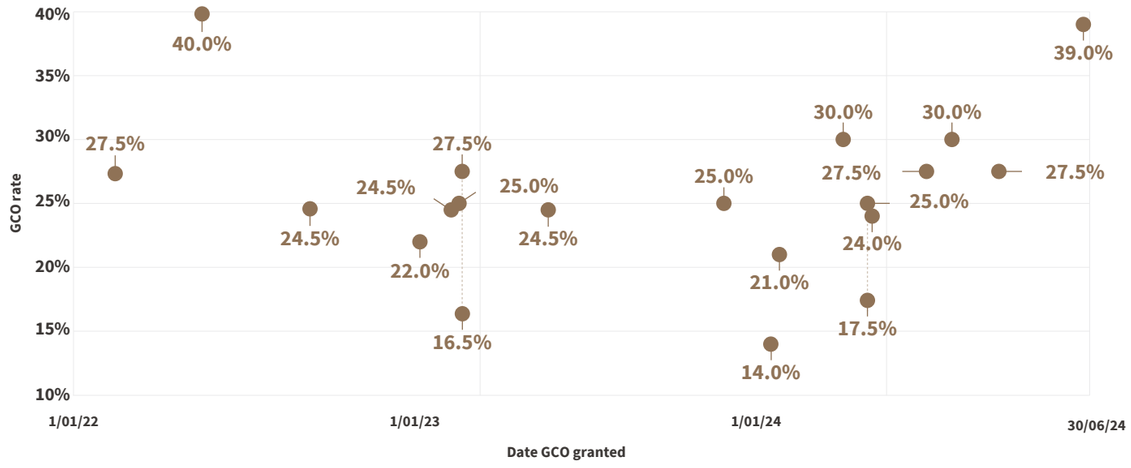
In August 2024, the Court approved the first GCO at settlement in *G8 Education*,[110] with the evidence establishing that there was no reason to vary the existing GCO rate (27.5%). Justice Watson explained that a settlement approval application with an existing GCO 'is not an occasion for a hearing de novo regarding the appropriateness of the group costs order' - the power to amend the order 'only arises in circumstances where the court was satisfied that it was 'appropriate or necessary to ensure that justice is done in the proceeding'. Key factors in that determination may include:

- The reasons for the original GCO.
- Whether the costs payable to the plaintiffs' lawyers remain proportionate – Do the costs 'continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceedings and the risks which were undertaken' under the GCO? The Court emphasised the need to avoid hindsight bias.
- The benefits of certainty and transparency to group members – eg, Was the proposed GCO rate expressly communicated to group members? Were any objections filed to the proposed settlement?
- Whether the GCO rate compares favourably to third-party litigation funding alternatives.

The Court outlined the types of evidence that were (and will be) useful when determining proportionality, including the lawyers' costs on an hourly rate basis, return on investment and internal rate of return. In the circumstances:

- the existing GCO rate was reasonable having regard to the effort and risk undertaken by the plaintiffs' lawyers
- no other factor warranted the exercise of any power of amendment.

GCO rates across GCOs granted



110 *Allen & Anor v G8 Education Ltd (No 4)* [2024] VSC 487.

COMMON FUND ORDERS - 'THINGS HAVE CHANGED'

Three Full Federal Court judgments in the review period have confirmed that the Federal Court is empowered to make a common fund order (**CFO**). *McDonald's*[111] and *7-Eleven*[112] confirmed that the Court has power to make a CFO at the time of settlement or final judgment (**settlement CFO**), and *R&B Investments*[113] held the Court may make a **solicitors' CFO:**

- A settlement CFO requires all group members to pay a percentage of the settlement or judgment sum **to the litigation funder**.
- A solicitors' CFO requires all group members to pay a percentage of the settlement or judgment sum **to the plaintiffs' law firm** (rather than a litigation funder) as payment for the firm's costs and disbursements in relation to the class action.

QUESTIONS OF POWER

(a) CFOs or FEOs

In *McDonald's*, the Full Court concluded that the Court may make a CFO under the settlement approval provisions in Part IVA of the *Federal Court of Australia Act 1976* (Cth) on the following basis:

- While the High Court in *Brewster*[114] determined that a **commencement CFO** (an order made before settlement) could not be made pursuant to the general case management provisions, it did not reject the availability of a settlement CFO.
- The settlement approval provision (s33V(2)) puts before the Court a broad, evaluative enquiry as to whether the distribution of any money paid under a settlement would be '*just*'. There is no reason to read down the breadth of the discretion in s33V(2) by reference to implications or limitations not found in its express words.
- Only one recent decision has suggested that the Court may not have power to make a settlement CFO (by the primary judge in *7-Eleven*) against the consistent trend in the Federal Court authorising settlement CFOs.

Prior to the Full Federal Court's decision in *McDonald's*, Lee J in *Jaguar* (in obiter) did not accept the argument that a solicitors' CFO would infringe the statutory prohibition on solicitors entering contingency fee agreements, noting a CFO is an order of the Court, rather than an agreement between solicitor and client.[115]

In May 2024, the Full Federal Court in *7-Eleven* provided guidance on when the Court should use its discretion to make a settlement CFO as opposed to a funding equalisation order (**FEO**). A FEO is an order providing that the litigation funder be paid a sum by all group members equivalent to the amount it was contractually entitled to recover under its agreements with some group members. The primary judge had made a FEO, an approach that was rejected by the Full Federal Court, which found that:

- Neither the terms of the settlement approval provision (s33V) nor the judgment in *Brewster* provide a basis for concluding that there are strong reasons to prefer a FEO over a settlement CFO. Deciding between the 2 is driven by the circumstances.
- The size of the commission agreed in the funding agreements, and the number of group members who had entered a funding agreement, were factors of minimal significance in exercising the discretion under s33V. This was because the plaintiff had always intended for a CFO to be sought upon settlement, rather than to 'book-build' prior to commencing the proceeding and to then rely on the terms of the funding agreement when applying for settlement approval.
- Where a funder does seek to have group members enter into funding agreements but informs the group members that it nevertheless intends to seek a CFO at the stage of settlement approval, the funding agreement will not usually carry much weight in deciding what constitutes a 'just' funding commission.

The Full Federal Court also indicated in *7-Eleven* that it was a matter for the judge to assess the quantum of the commission proposed to be awarded to a funder under a CFO, rather than a matter for expert evidence.[116]

(b) Solicitors' CFOs

In July 2024, the Full Federal Court held in *R&B Investments* that the Federal Court has the power to make a solicitors' CFO. The plaintiffs had instructed their lawyers to seek a solicitors' CFO on settlement or judgment of the class action, with those instructions reflected in the funding arrangements. The Full Court rejected arguments that a solicitors' CFO would:

- **Give rise to an impermissible conflict of interest.** The Full Court commented that a solicitor acts as a fiduciary for the group members when negotiating the settlement of a proceeding[117] and found that the Court has the ability to identify any conflicts and protect the rights of group members in considering whether to make the solicitors' CFO.
- **Automatically breach the statutory prohibition on entering into a contingency fee arrangement in NSW.** The Court emphasised that the relevant agreement between the solicitor and plaintiffs was simply a promise to make an application for an order.[118]
- **Conflict with principles of public policy against the charging of contingency fees.** In response to this argument, the Full Court's starting point was that if public policy suggests a solicitors' CFO should not be available, on ordinary principles of statutory construction, this relates to the question of whether the Court should exercise its discretion, not whether the Court has power to make a solicitors' CFO. The Full Court noted that '*things have changed*' as concepts of maintenance and champerty are no longer reflected in the law.[119] The Full Court referred to research indicating that GCOs provide better financial returns for group members compared to proceedings that have a litigation funder.[120] Ultimately the Full Court did not accept that it was contrary to public policy for the Court to exercise power 'sanctioning and providing for just remuneration to solicitors for providing services to participants in a class action'.[121]

LOOKING AHEAD – WHAT ARE THE IMPLICATIONS?

The decision in *R&B Investments* has been appealed to the High Court. If granted special leave, the High Court's judgment might clarify the circumstances in which a solicitors' CFO should or should not be made, having regard to matters such as advanced notice to plaintiffs and group members.

Until the Federal Court position on solicitors' CFOs and commencement CFOs is more settled, the relative certainty of the Victorian GCO regime, and the ability of GCOs to be made at an early stage in the proceeding may be more attractive to plaintiff firms and litigation funders.

111 *Elliott-Carde v McDonald's Australia Limited* (2023) 301 FCR 1.
112 *Galactic Seven Eleven Litigation Holdings LLC v Davaria* [2024] FCAFC 54.
113 *R&B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89 (Murphy, Beach and Lee JJ).
114 *BMW Australia Ltd v Brewster; Westpac Banking Corp v Lenthall* (2019) 269 CLR 574.
115 *Jaguar* at [41].
116 Ibid at [76]-[78], [96], [134]-[135].
117 *R&B Investments* at [64]-[65], referring to *Bolitho v Banksia Securities Ltd (No 18) (remitter)* [2021] VSC 666 at [1363]-[1364].
118 Ibid at [85]–[88].
119 Ibid at [99]-[106].
120 Ibid at [115].
121 Ibid at [107].

SETTLEMENT SCRUTINY

Class action settlements need to be approved by the Court. Courts therefore play a crucial role in safeguarding the interests of group members by evaluating the fairness and reasonableness of proposed settlements.

In addition to common fund orders (discussed in the **Common Fund Orders** section of The Review), we have observed Courts closely assessing the following matters in settlement approvals in the review period:

- permitted deductions from the settlement fund, and in particular the cost of After the Event (**ATE**) insurance.
- the impacts of an unknown class size.

RECOVERABILITY OF 'AFTER THE EVENT' INSURANCE COSTS

It is increasingly common in funded class actions for 'After the Event' insurance to be held by the plaintiffs or funders to protect against adverse costs orders and security for costs. The reasonableness of deducting ATE costs out of the settlement sum was considered in at least 3 cases in the review period: *Fordham*[122], *Ghee*[123] and *Reilly*.[124] These decisions highlight that Courts will look closely at the reasonableness of deductions from settlement sums and applicants should not assume that ATE premiums will be recoverable.

(a) Reasonable for applicant solicitors to obtain ATE given risks involved

In *Fordham*, which was funded on a 'no win no fee' basis, Justice O'Bryan was satisfied it was appropriate to reimburse from the settlement fund the cost of an ATE policy taken out by the applicant's solicitors, given the nature of the proceedings and risks faced, including the possibility of all claims failing, and the amount insured was reasonable.[125] His Honour further noted that the requirement for ATE insurance was disclosed in the legal costs agreement and there was no expectation that the risks of an adverse costs order had been factored in to Slater & Gordon's success fee. Slater & Gordon had provided the applicant with an indemnity against an adverse costs order in the proceeding.

For similar reasons, in *Reilly*, also funded on a 'no win no fee basis', O'Bryan J authorised the deduction of ATE costs from the settlement sum.[126] His Honour stated that an adverse costs order is a material risk faced by the representative applicant and the applicant's solicitors, and that the acquisition of ATE insurance to mitigate that risk is reasonable. As in *Fordham*, Slater & Gordon had provided the applicant with an indemnity against an adverse costs order in the proceeding.

The position is different, however, when considering interest amounts accrued on disbursement funding facilities. In *Ethicon Sàrl*,[127] Lee J held that it was not just to allow the deduction in circumstances where the applicant's solicitors, Shine, did not act prudently or reasonably in entering into the disbursement facilities with an exorbitant interest rate. His Honour considered this was a commercial decision made by Shine in the course of conducting its business.

122 *Fordham v Commonwealth Bank of Australia* [2023] FCA 1106.
123 *Ghee v BT Funds Management Limited* [2023] FCA 1553.
124 *Reilly v Australia and New Zealand Banking Group Limited (No 5)* [2023] FCA 896.
125 *Fordham* at [98].
126 *Reilly* at [88].
127 *Gill v Ethicon Sàrl (No 12)* [2023] FCA 902.

(b) Combined amount of funding commission and ATE costs to be considered

Previously, in cases involving litigation funders, Courts have refused to allow a separate reimbursement of ATE insurance costs, on the basis that the funding fees claimed were in an amount that would be expected to cover the entirety of the funder's costs incurred in respect of the risks of an adverse costs order (including ATE insurance costs).[128]

However, in *Ghee*, Murphy J considered whether the totality of the deductions sought by the funder, being the proposed funding commission and ATE insurance costs, were reasonable and proportionate in the circumstances. Justice Murphy held that to disallow the reimbursement of ATE insurance costs would not fairly remunerate the funder for the costs and risks it assumed.

In making the decision, Murphy J did, however, observe that it is undesirable to permit a litigation funder to charge a funding rate based in part on the indemnity it provides to the applicant in relation to the risk of an adverse costs order, and to then allow the funder to be reimbursed the cost of providing that indemnity from the proceeds of the litigation.[129]

Similarly, in *Krieger*,[130] Murphy J allowed a payment to the litigation funder for ATE insurance costs.

CONFIDENTIALITY OVER SETTLEMENT DETAILS

Courts remain reluctant to grant broad confidentiality orders over materials relied upon for settlement approvals, undertaking a balancing exercise between public interest and potential prejudice to the applicant.

Wellard[131] considered the appropriate scope of suppression orders in class action proceedings and reaffirmed the need to 'keep a tight rein'.[132]

The applicant in *Wellard* and its funder attempted to obtain suppression orders twice:

- During the initial attempt, Button J found the applicant's claims conflated a desire to 'keep information private' with the stringent requirement of demonstrating that the requested order is 'necessary' to prevent prejudice to the administration of justice.[133]
- The applicant refined the scope of its claims and its second attempt was more successful. Suppression orders were obtained in respect of a counsel advice, costs report, the names of individual group members, certain details of the funder's ATE policy, and the identities of 2 consulting experts who only assisted the applicant on the condition of maintaining their anonymity.[134]

Much like in *Wellard*, the applicant in *Aveo* was also directed by Murphy J to put on a revised and more 'appropriately calibrated application for confidentiality orders'.[135]

A similar issue arose during the settlement hearing in *Reilly*. There, O'Bryan J observed that the scope and duration of the proposed confidentiality orders sought by the applicant had been narrowed during and after the hearing to extend only to certain privileged material from the applicant's solicitors and counsel, and to a financial formula which was to remain confidential until settlement of a different class action.[136]

A similar approach has been taken by the Courts for non-publication orders regarding settlement sums.

In *Kyle-Sailor*, for example, Horan J recognised a broader public interest in disclosing the 'core details' of the settlement, explicitly including the total amount of the settlement sum to be distributed among group members.[137] This was so notwithstanding the fact that the parties had agreed to seek a non-publication order in relation to the settlement sum.

IMPACTS OF THE UNKNOWN CLASS SIZE

Recent developments in the *Merivale*[138] class action highlights the need for parties to consider closely the scope of the class during settlement negotiations to avoid issues arising between settlement and Court approval.

In *Merivale*, the parties reached a settlement under which the defendant would make a lump sum payment of $18M to cover all damages and costs.[139] At the time that figure was agreed, 2,176 group members had registered. Under the settlement, it was expected that after deducting the costs of the litigation funder and solicitors for the applicant, the group members would receive a total of $9.4m. Following publication of the Notice of Proposed Settlement, a further 788 employees registered to participate in the settlement. The applicant sought to unwind the settlement on the basis that the value to group members has been substantially diluted by late registrations. The applicant argued that there is no utility in running an application for settlement approval when they do not believe the Court will approve the settlement.[140] Justice Thawley made orders requiring the applicant to provide Merivale with further information and modelling relied on by the applicant, in advance of a possible further mediation. The parties subsequently agreed a $19.25m settlement, which is awaiting Court approval.

It remains to be seen whether this course of conduct will be emulated by other plaintiffs. A potential ripple effect may strengthen the determination of defendants to seek soft class closure orders prior to mediation, and highlights the importance of plaintiffs being able to accurately represent the size of the class in settlement discussions.

128 *Kemp v Westpac (No 4)* [2023] FCA 830 at [90] and the cases referred to therein.
129 *Ghee* at [151].
130 *Krieger v Colonial First State Investments Limited*, Federal Court proceedings VID1141/2019, orders made 5 August 2024.
131 *Ewok Pty Ltd as trustee for the E & E Magee Superannuation Fund v Wellard Limited* [2024] FCA 296.
132 As emphasised in *Luke v Aveo Group Ltd (No 3)* [2023] FCA 1665 (**Aveo**) at [159].
133 *Wellard* at [97].
134 Ibid at [101]–[112].
135 *Aveo* at [160].
136 *Reilly* at [100]-[102].
137 Kyle-Sailor v Heinke [2024] FCA 431 at [53].
138 *Boulos v M.R.V.L. Investments Pty Ltd* (NSD2168/2019).
139 Christine Caulfied, 'Class action reneges on $18M settlement with Merivale, says deal no longer fair', *Lawyerly* (7 May 2024), available at <https://www.lawyerly.com.au/class-action-reneges-on-18m-settlement-with-merivale-says-deal-no-longer-fair/>; Bianca Hrovat, ''This is not a good deal': Merivale's $18m class action settlement derailed', *Sydney Morning Herald* (7 May 2024), available at <https://www.smh.com.au/goodfood/eating-out/this-is-not-a-good-deal-merivale-s-18m-class-action-settlement-derailed-20240507-p5fpk1.html>.
140 Christine Caulfied, 'Class action reneges on $18M settlement with *Merivale*, says deal no longer fair', *Lawyerly* (7 May 2024), available at <https://www.lawyerly.com.au/class-action-reneges-on-18m-settlement-with-merivale-says-deal-no-longer-fair/>.

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

ON THE RADAR

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

- **2024 Q4:** Treasury Wine Estates; car loan flex commissions; add-on car insurance; super fees – MLC
- **2025:** CIMIC Group; S&P Global; music festival searches; super fees – Colonial; super fees – AMP; Murray Darling Basin Authority; BHP Brazillian mine disaster
- **2026:** AMP – life insurance fees.

JUDGMENTS AND APPEALS

We await the results of:

- **initial trials:** competition class actions in relation to Queensland electricity generators, and on behalf of app developers against Google and Apple; climate change class action on behalf of Torres Strait Islanders;[141] employment class actions against Coles and Woolworths in relation to alleged staff underpayments; securities class action against Brambles; product liability class action against Bayer in relation to the Essure contraceptive device
- **appeals:** Downer (in relation to the permanent stay of one of the competing actions); Ruby Princess; securities class actions against CBA and Worley; High Court appeals in Toyota and Ford (see **Consumer section** of The Review), Lendlease (see **Class closure section** of The Review); Bogan (see **Group Costs Orders** section of The Review)
- **High Court special leave applications:** R&B Investments (see **Common Fund Orders** section of The Review).

141 Discussed in The Review 2022/2023 (Door still open for a climate change duty of care).

STOP PRESS

Just outside the review period we have seen:

- **Class actions commenced:** at least 13 class actions have been filed, including the first class action in the WA Supreme Court, relating to residential construction contracts; claims against credit ratings agency Fitch Ratings; claims against Isuzu relating to diesel emissions; claims involving alleged leaky pipes; claims against JetStar relating to travel credits; claims involving public housing in remote Aboriginal communities; a securities class action against Domino's Pizza Enterprises; competing actions against Harvey Norman involving the sale of extended warranties.
- **Settlements:** at least 5 settlements have been approved since 1 July 2024, including a $229.8m settlement in relation to junior doctors' working hours in NSW, a $100m settlement of a Colonial First State superannuation fees class action, and the first settlement approval granting a GCO order (see **Group Costs Orders** section of The Review). At least a further 10 settlements are awaiting Court approval. Together, these represent over $1b in potential settlement funds.
- **Judgments:** judgment for the defendants in the Roundup/glyphosate class action; judgment for the defendant (on appeal) in the Sydney light rail class action; the High Court dismissed the plaintiffs' appeal in the shattercane contamination class action; a judgment in ASIC civil penalty proceedings against Noumi Limited considering whether the penalty amount should be paid into Court in circumstances where the admitted contraventions are relevant to an ongoing representative proceeding.
- **Court practice:** an updated NSW Supreme Court class action practice note, which includes a requirement to file a Class Action Summary Statement with an originating process (to be updated if the information changes during the course of the proceeding).

ACKNOWLEDGMENTS

Contributors: Rohan Balani, Libby Barber, Rhiannon Bell, Gemma Butler, Chris Coates, Sophie Crowe, Marcus Frith, Cathy Graville, Avni Gupta, Su-En Hia, Chansa Kalumba, Laura Kiss, Savini Kumaresan, Nick Lehm, Hannah Luxford, Patrick Mackenzie, Juliana Macula, Alana Martini, Jonathon Mifsud, Anirudh Nair, Ashleigh O'Toole, Andrew Parrish, Isabel Philip, Stephanie Puris, Zaynab Raad, Katya Shliapnikoff, Eli Solomon, Sue Soueid, Isabel Waters, Joe Wright.

Design/production: Laura Berendsen, Kate Newson, Emily Xue, Damien Window.

ABOUT KING & WOOD MALLESONS

A firm born in Asia, underpinned by world class capability. With over 3000 lawyers in 29 global locations, we draw from our Western and Eastern perspectives to deliver incisive counsel.

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.

Indigi PRINT

JOIN THE CONVERSATION

SUBSCRIBE TO OUR WECHAT COMMUNITY.
SEARCH: KWM_CHINA

Disclaimer
This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

Asia Pacific | North America
King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See kwm.com for more information.

www.kwm.com

© 2024 King & Wood Mallesons