THE CLASS ACTIONS LAW REVIEW

FOURTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

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PREFACE

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

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

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

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

Camilla Sanger
Slaughter and May
London
April 2020

Chapter 1

AUSTRALIA

Robert Johnston, Nicholas Briggs and Sara Gaertner[1]

I INTRODUCTION TO THE CLASS ACTIONS FRAMEWORK

Australia has one of the better, more well balanced, functioning class action procedures in the world, facilitating appropriate access to justice without the excesses seen by defendants in some other jurisdictions. The balance is struck between, on the one hand, appropriate consumer protection legislation and working, class action rules and processes and, on the other hand, an adverse costs regime, no juries and no punitive or exemplary damages. Class actions in Australia are also known as group (or grouped) proceedings. There are regimes for class actions in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales and Queensland.[2] In 2019, the Parliament of Western Australia also sought to introduce a class action regime in Western Australia.[3] While there are some minor differences, the state regimes generally mimic the regime of the Federal Court, which was the first class action regime introduced in Australia, in 1992.

In general, a class action can be commenced on behalf of all class members by a representative who becomes the named applicant. The threshold requirements are:

a at least seven people have claims against the same person;
b the claims arise out of the same, similar or related circumstances; and
c the claims give rise to substantial common issues of law or fact.[4]

The applicant may bring proceedings against several respondents even if not all class members have a claim against all respondents. As long as seven or more persons have claims against the same respondent, an applicant can join other respondents against whom some class members have claims but some do not.[5]

There is no 'class certification' process in Australia, which is a critical distinction. While there is not that 'threshold' and once commenced a class action or several similar or overlapping class actions can continue, there are a large number of early, interlocutory skirmishes or applications around not dissimilar threshold issues, including deciding which one of multiple class actions should proceed.

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

2 See discussion at Section III.

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

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

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

The class action regimes in Australia operate on an opt-out basis. As Justice Jessup of the Federal Court explained, 'an applicant will define on whose behalf the proceeding is brought and, unless they opt out, all persons who fit within the relevant definition will be part of the class, and bound by any result'.[6] No consent is required from class members who come within the definition to be included in the group. This is a point of distinction between Australia and some other jurisdictions that oblige class members to opt in to a class action.

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

Class actions commenced since 1992 have covered a variety of areas, including mass torts such as defective pelvic mesh implants, damage from extreme weather events such as bushfires and floods, failing buildings, the Volkswagen diesel emissions scandal and responsible lending obligations, and human rights cases such as stolen wages from Aboriginal and Torres Strait Islanders. More recently we have seen a greater number of claims by investors in securities or shareholder class actions and consumer claims concerning financial products or services.

II THE YEAR IN REVIEW

i Developments on common fund orders

Prior to 2016, litigation funders were generally only able to recover their fees from those class members who had entered into funding agreements with the funder. This was one of the primary drivers for closed classes becoming the preferred model for funded class actions (although in open classes, the courts typically approved equalising adjustments to spread the cost of the funder's commission between funded and unfunded class members). In October 2016, in *Money Max,*[8] the Full Federal Court approved an application for a 'common fund' order.

In *Money Max*, the court accepted that all class members must contribute to the litigation funder a percentage of any monies they receive as a result of the proceeding, irrespective of whether they have entered into a funding agreement with the litigation funder. This decision probably encouraged litigation funders to fund more open class actions, as they could safely presume that they would be able to recover monies from all class members, including those who did not execute a funding agreement.[9]

That decision was affirmed on appeal in 2019, at an unprecedented joint hearing of both the NSW state and the federal appeal courts sitting concurrently.

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

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

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

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

However, in an appeal to the High Court of Australia, on 5 December 2019, in *Lenthall*,[10] the High Court delivered a judgment finding that the courts were not empowered to make common fund orders in class actions at the outset or at interlocutory stages (under Section 33M of the Federal Court of Australia Act 1976 (Cth) (the FCA Act). There are likely to be many wide-ranging implications arising from this judgment, including removing the higher levels of certainty of returns that had been developing for funders in the Australian market, a return to book-building, higher numbers of closed class actions being commenced, fewer cases being filed (as smaller funders and some international funders may not have the infrastructure and relationships needed to book-build) and a reduced appetite for funding certain types of class actions, such as consumer-focused actions with high numbers of group members but low-value claims, because of potentially prohibitive book-building costs.

Since *Lenthall*, there have been a number of commentators and judges, including Justice Murphy (one of the judges in the Full Court in *Money Max*) suggesting that common fund orders may still be permitted at the settlement approval stage of a class action (under Section 33ZF of the FCA Act). However, with no case on this issue decided yet, there remains considerable risk for litigation funders when there is no guarantee of a settlement being reached.

In December 2019, the Federal Court updated its Class Actions Practice Note to include the following:

> *Particularly in an open class action, the parties, class members, litigation funders and lawyers may expect that unless a judge indicates to the contrary the Court will, if application is made and if in all the circumstances it is fair, just, equitable and in accordance with principle, make an appropriately framed order to prevent unjust enrichment and equitably and fairly to distribute the burden of reasonable legal costs, fees and other expenses, including reasonable litigation funding charges or commission, among all persons who have benefited from the action. The notices provided to class members should bring this to their attention as early in the proceeding as practicable.*

This tends to suggest that the Federal Court at least considers that orders such as common fund orders can still be made by the courts but using other powers.

ii Market-based causation

One unresolved issue in shareholder class actions in Australia had been whether shareholders were required to prove individual direct reliance on the company's alleged misleading statements prior to purchasing shares on the market or rely upon the indirect market-based theory of causation (known as the 'fraud-on-the-market' theory in the United States). With so many cases settling and not proceeding to trial because of this uncertainty, there was no direct case law on this issue. Some guidance was provided by *HIH Insurance Limited (in liquidation) & Ors*,[11] in which a single judge accepted the 'indirect market-based theory of causation', which enables class members to claim damages for the share price inflation attributable to material non-disclosure or misleading information without needing to prove direct reliance on that non-disclosure or misleading statement by a company when they purchased their shares on-market.

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

11 [2016] NSWSC 482.

In October 2019, a shareholder class action went all the way to trial and a landmark judgment was delivered. In *Myer*,[12] the court accepted market-based causation as a basis for a damages claim and held that the respondent engaged in misleading and deceptive conduct. However, the court also found that the 'hard-edged scepticism of market analysts and market makers at the time of the contraventions' meant the market had already taken into account the lower guidance and no loss had been suffered.

The *Myer* decision, on the one hand, encourages plaintiffs with its acceptance of indirect market-based causation, but, on the other, encourages defendants as a more rigorous analysis of share price movements and causation complicates matters and increases risk for plaintiffs – as it did in *Myer*. The continuing uncertainty means most matters will continue to settle.

iii Scrutiny of litigation funding and contingency fees

The Victorian and federal governments, in 2016 and 2017 respectively, launched inquiries into third-party funding of class actions.

The Australian Law Reform Commission's Report on Class Action Proceedings and Third-Party Litigation Funders (the ALRC Report) was submitted to the Attorney-General on 21 December 2018 and published on 24 January 2019.[13] The ALRC Report proposed 24 recommendations, including a requirement that all class actions be initiated on an open-class basis, providing the court with an express statutory power to make common fund orders and permitting class action solicitors to charge percentage-based or contingency fees to enable medium-sized class actions to proceed and provide a greater return to litigants (with a number of limitations, including that actions funded by percentage-based fees cannot also be directly funded on a contingent basis). At present in Australia, arrangements for payment of damages-based contingency fees are not permitted.

The Victorian Law Reform Commission's Report on Access to Justice: Litigation Funding and Group Proceedings (the VLRC Report) was tabled in the Parliament of Victoria on 19 June 2018.[14] The VLRC Report made a number of recommendations, including national regulation of litigation funders and allowing class action lawyers to charge contingency fees. On 27 November 2019, the Justice Legislation Miscellaneous Amendments Bill 2019 was tabled in the Victorian Parliament. If passed, this Bill will amend the Supreme Court Act 1986 (Vic) to allow lawyers to charge contingency fees in class actions.[15] This would permit costs payable to law firms being calculated as a percentage of any settlement reached or amount recovered in the proceedings, subject to court approval. However, law practices would be liable for any adverse costs and would have to provide any security for costs ordered. The Bill was passed by the Legislative Assembly on 20 February 2020, and the second reading in the Legislative Council was moved on 20 February 2020. At the time of writing, in March 2020, the Bill was still before the Legislative Council.

If the Bill is assented to in Victoria, it is likely that other states and the Commonwealth will follow suit, as otherwise we are likely to see most class actions being commenced in Victoria, a situation the Supreme Courts in NSW and Queensland and the Federal Court

12 *TPT Patrol Pty Ltd v. Myer Holdings Limited* [2019] FCA 1747.

13 Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (ALRC Report 134, 2018).

14 Victorian Law Reform Commission, Access to Justice – Litigation Funding and Group Proceedings (Report, March 2018).

15 Justice Legislation Miscellaneous Amendments Bill 2019 (Vic).

will not want to arise. This will pose a challenge for litigation funders as they will now have law firms competing in their space. However, as we have seen in other jurisdictions, 'funders' will probably become 'financiers' of the law firms that charge contingency fees.

iv Competing class actions

A dominant feature in the recent class action landscape in Australia has been the rapid rise of competing class actions.[16] This occurs where, usually following well-publicised corporate wrongdoing or 'stock drops', numerous lawyers funded by different litigation funders separately commence their own class actions on behalf of a client against the same corporate defendant.

Australian courts do not have a North American-style process of certification of class actions at a pre-commencement hearing. Instead, it has been left to Australian judges to grapple with which action ought to proceed and which actions ought to be stayed, and which principles should be applied in coming to that decision – similar to the 'carriage motions' in Canada. Predicting the outcome of these carriage motions is fraught, makes for great uncertainty and is dissuading funders from investing significant sums in claims preparation when they may only have a one in four or five chance of 'winning'.

The issue has spread to competing jurisdictions, with courts pitted against each other to have cases remain on their docket. To avoid this unseemly court turf war, protocols have been agreed between the Federal Court and the Supreme Courts of New South Wales[17] and Victoria[18] for dealing with similar situations in the future.

III PROCEDURE

Australia's federal class action regime commenced in March 1992 with the introduction of Part IVA of the FCA Act. Some, but not all, Australian states have since followed with regimes that mirror their federal counterpart.[19]

i Types of action available

The Australian class action regimes do not impose limits upon the causes of action that are permitted to found a class action. As long as the criteria for commencing a class action is met (discussed below), then a group of claims may form a class action. Accordingly, class actions encompass a wide variety of claims across a broad range of industries.

That said, and as noted above, shareholder actions have been a dominant feature of the recent Australian class action landscape. This might be explained by an increasing volatility in equity markets, together with the growth of litigation funders. Shareholder claims are attractive to litigation funders because of Australia's strict continuous disclosure regime

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

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

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

19 As noted above, there are there are regimes for class actions in the Federal Court of Australia and the Supreme Courts of Victoria, New South Wales and Queensland.

and because group member losses are usually relatively easy to quantify. The popularity of shareholder class actions among litigation funders has resulted in the recurring spectacle of listed-company wrongdoing followed shortly by numerous 'lead applicants' backed by separate litigation funders competing to be the action chosen to represent shareholders' interests. The growth of shareholder class actions is unlikely to dissipate given the recent, and long-awaited, judicial acceptance of market-based causation in *Myer*.

Aside from shareholder actions, common types of class actions include claims relating to product liability, consumer protection claims and mass tort claims. The authors have also noted a recent rise in class action litigation arising from employment-related claims, in particular based upon allegations of systemic underpayment of wages, as well as actions arising from building defects or the supply of defective building materials.

ii Commencing proceedings

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

a at least seven people must have claims against the same person;
b the claims must arise out of the same, similar or related circumstances; and
c the claims must give rise to substantial common issues of law or fact.[20]

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

The choice of lead applicant is an important feature of a class action, because the trial will generally be a trial of the lead applicant's case, along with issues of fact and law common to the group members. That said, there are no criteria or limits as to which member of a class may act as lead applicant, although once proceedings are under way the court may remove a lead applicant that it believes is not able to adequately represent the interests of group members.[21] There may also be subgroups within a class action, representing particular groups with particular common characteristics within the larger group.

Notably, the Australian class action regimes have no requirement for US-style certification at the time of filing. This was a deliberate choice by legislators, who followed a view by the Australian Law Reform Commission at the time the first class action legislation was being contemplated by legislators that a certification procedure would impose an additional costly procedure 'with a strong risk of appeals involving further delay and expense'.[22] Some commentators believe, however, that the absence of certification criteria has in reality led to high levels of protracted interlocutory disputes after proceedings have commenced.[23]

In any event, the threat of unsuitable class actions is addressed under the Australian regimes, in part, by the power of the court on application, or of its own motion, to order that

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

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

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

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

proceedings no longer continue if it is satisfied that it is in the interests of justice to do so.[24] However, this system arguably shifts the burden from the plaintiff having to prove that a class action is suitable to the defendant having to prove that the class action it faces is unsuitable.

Persons upon whose behalf claims are commenced (termed 'class members' or 'group members') are not parties to the proceedings. They do not need to be named or specified at the time of filing.[25] Nor is the plaintiff (or lead applicant) required to seek the consent of a person before making that person a group member.[26] Frequently, a group member will have no retainer with solicitors acting for the plaintiff, nor any legal representation at all in respect of the matter. Indeed, a group member may be oblivious to the fact that he or she is a group member for a considerable period after proceedings have commenced (in cases where they are not contactable – they may never know).

The opt-out nature of the Australian class action system

As outlined above, the class action regimes in Australia operate on an opt-out basis – meaning that all persons who fall within a pleaded class definition are members of the class and bound by any result unless they opt out. This is a point of distinction between Australia and some other jurisdictions that oblige class members to take a positive step and opt in to a class action. Group members who opt out of a class action cease to be bound by the outcome of the action but also become ineligible to receive any proceeds from it.

The opportunity to opt out is generally facilitated by the distribution of an opt-out notice to all group members, at an appropriate time after the proceedings have commenced.[27] These notices generally provide group members with an explanation of the nature of the claims and class action processes generally. The notices also explain the effect of opting out, and how to opt out (by filing a prescribed notice with the court). Notably, opt-out rates are generally quite low. In the experience of the authors, opt-out rates of approximately 10–20 per cent are common, although they can be much lower.

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

Limitation periods

Upon the commencement of a class action, the running of any limitation period that applies to the claim of group members is suspended or 'tolled'. The limitation period does not begin to run again unless either the group member opts out or the proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim.[28]

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

25 Section 33H of the FCA Act.

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

27 Section 33X of the FCA Act.

28 Section 33ZE of the FCA Act.

iii Procedural rules

The courts have been granted extensive case management powers in relation to the conduct of class action proceedings and the courts almost have a supervisory or guardian role to play in ensuring group members' interests are protected. For example, the Federal Court of Australia has:

a broad powers to discontinue representative proceedings;
b the power to substitute a lead applicant who is not adequately representing the interests of group members;
c the power to order that notice of 'any matter' be given to group members;
d the ability to decline or approve settlements; and
e the power to make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.[29]

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

a an opt-out process to give notice to group members of their status as group members, and their right to opt out of the proceedings;
b a registration process to identify group members who are contactable and willing to engage with the class action process and who wish to be eligible to receive part of any settlement; and
c a settlement approval process, in which a judge reviews a prospective settlement to ensure it is fair and reasonable and in the interests of group members. As part of that process, group members are given notice of the settlement and the opportunity to object and appear before the judge at the settlement approval hearing, if they wish to do so.

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

iv Damages and costs

The costs regime in Australia has a number of significant differences from those in other jurisdictions. First, Australia has a loser-pays or adverse costs system, meaning the unsuccessful litigant is generally ordered to pay the majority of the legal costs of the successful litigant. Group members, but not the lead applicant, are generally immune from adverse costs orders.[30] This difference operates as an obvious disincentive to be the lead applicant, given that it carries serious financial risk of adverse costs liability, which in large class actions is generally

29 See D Grave et al., *Class Actions in Australia* (2nd Edition) at 384.

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

in the millions of dollars. This disincentive, which has been somewhat ameliorated by the proliferation of litigation funding in Australia (discussed below), and difficulty in finding parties willing to act as lead applicants has not, as far as the authors are aware, substantially impeded the growth of class actions.

Plaintiffs must also usually contend with an application that they give security for the defendant's costs. Frequently, the plaintiff in a large class action will be ordered to put up security worth millions of dollars over the course of the litigation, which the defendant may call upon in the event that the plaintiff is ordered to pay the defendant's costs. Such security was traditionally given by way of money paid into court or a bank guarantee from an Australian trading bank. An alternative form of security has arisen whereby a large insurer provides an indemnity directly to the defendant for any adverse costs orders made against the plaintiff in favour of the defendant.[31]

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

The growth in litigation funding has coincided with increased debate as to the traditional doctrines of maintenance and champerty. As noted above, the Justice Legislation Miscellaneous Amendments Bill 2019 (Vic), which provides for the Supreme Court of Victoria to order contingency fees in class action proceedings, has been introduced in response to the VLRC Report. The introduction of contingency fees is intended to increase access to justice by allowing plaintiff law firms to compete with third-party litigation funders, which typically fund class actions on the basis that they will receive a percentage of any amounts recovered in the proceeding.

v Settlement

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

a giving notice to group members of the settlement (this may give information such as the settlement amount or give an indication of the expected returns to group members);[32]

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

c having the court review the proposed settlement to ensure it is fair and reasonable and in the interests of group members.[33] Senior counsel for the plaintiff will generally provide a confidential opinion to the court as to the reasonableness of the settlement given prospects of success, litigation and recovery risks, and the lead applicant's solicitors

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

32 See Section 33X of the FCA Act.

33 See Section 33V of the FCA Act.

> will generally lead evidence as to how much of the settlement sum will go towards the payment of legal costs and litigation funder commissions (if involved), and how much will be paid to group members.

The court has the power to reject settlements outright, and has done so,[34] although it is relatively rare. In the alternative, the court may adjust features of a settlement to make it fairer and more reasonable to group members. For example, in *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland Limited (No. 3)*,[35] the Federal Court approved a settlement between the plaintiffs and the defendants but substantially reduced the entitlement to costs of the lawyers for the plaintiffs and the commission of the litigation funders to be paid out of the settlement proceeds, so that a higher proportion was paid to group members. This approach reflects concerns as to the proportion of settlement sums generally being paid to lawyers and litigation funders, in comparison to the sums received by lead applicants and group members. In that respect, the new Federal Court of Australia Practice Note dated 20 December 2019 warns that:

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

The registration process

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

Registration processes are not contemplated by the legislation but have arisen as a matter of practice. This process has also developed so that defendants have a better idea of the universe of persons who will be bound by any settlement, the value of their claims and those who will not be bound. They are generally (but not always) ordered in advance of a mediation and require group members who wish to be eligible to share in the proceeds of any settlement to take a positive step and register – usually by completing and submitting a paper or online form with registration details. Those who register are eligible to receive a share of any settlement reached at mediation or within a fixed period following mediation, often referred to as the 'settlement period'. Those who do not register (and have not opted out) are not eligible to receive a share of any settlement reached at mediation. However, if the matter does not settle at mediation or during the settlement period, the registration process usually ceases to have effect, meaning those who did not register become once again eligible to receive a share in any settlement.

A registration process allows the parties at mediation to have some certainty as to whose behalf an outcome is being negotiated upon, and between how many group members

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

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

a settlement sum must be shared. This is important because the lawyers for the lead applicant must ensure that any settlement is sufficiently reasonable that the court will grant approval of it.

IV CROSS-BORDER ISSUES

As with conventional commercial litigation, class actions frequently involve cross-border issues. Defendants outside Australia may be, and have been, prosecuted, although court approval is necessary to effect service on overseas defendants. For example, in *Caason Investments Pty Limited v. Cao*,[36] a shareholder class action, the court approved the service of court documents on three former company directors in the United States and one former director in Hong Kong under the Hague Service Convention.[37] Group members may be overseas residents, although in Victoria the court can exclude class members who do not have a sufficient connection to Australia.

Australian courts have the power to decline to exercise jurisdiction when an alternative forum is 'more convenient' to hear the claim. However, that power is exercised with 'extreme caution' and only if it can be demonstrated that the local forum is 'clearly inappropriate' for the determination of the claim.[38]

There are numerous instances where class actions in international jurisdictions have led to or influenced the commencement of class actions in Australia and vice versa. For example, the class actions in the United States against chemical manufacturers 3M, DowDuPont, Chemours and others in relation to allegedly toxic polyfluoroalkyl firefighting foam (or PFAS) has resulted in the institution of similar class action proceedings in Australia against the Australian Department of Defence in relation to its use of the same foam. In other examples, in 2015, class actions in Australia were launched against Volkswagen (and other defendants) following the exposure of the global diesel emissions issue and after a similar class action was launched against Volkswagen in the United States, and class action proceedings are currently under way against Johnson & Johnson in Australia in relation to deficient pelvic mesh products.

V OUTLOOK AND CONCLUSIONS

The pace of development within the class action space in Australia is showing no signs of slowing. There is increased uncertainty around litigation funding following the decision of the High Court in *Lenthall*, which did not permit common fund orders at early or interlocutory stages of cases, but clarity may be provided in the year ahead in light of the recommendations of the Australian Law Reform Commission and the Victorian Law Reform Commission, and judgments that are expected to clarify whether common fund orders may still be made at the time of settlement approval.

The prospect of Australian lawyers being able to charge contingency fees (a percentage of the damages or settlement) for the first time ever in this country will be a game changer. The Victorian Parliament was considering this legislation at the time of writing.

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

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

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

Developments to watch in 2020 include:

a the fallout from the High Court's *Lenthall* decision on funders' commissions;

b whether the proposed legislation allowing contingency fees in Victoria will be assented to, and whether there will be a corresponding legislative response from the federal and other state governments;

c whether reviews of the law on continuous disclosure and misleading or deceptive conduct will be commenced, as recommended by the Australian Law Reform Commission, and which may put a brake on securities class actions;

d whether, in light of the *Myer* decision regarding the availability of market-based causation, on the one hand, more shareholder class actions are brought, but, on the other, they still settle because of the continuing uncertainties around calculating losses;

e how the Australian courts continue to grapple with and resolve competing class actions and whether Australia moves more towards a US certification-type model or a Canadian carriage motion-type model; and

f whether the question of Australian courts having the power to interfere with contracts and alter a funding agreement will be resolved, as this has been the subject of a number of differing decisions.[39] An opportunity did arise for this issue to be resolved late in 2019; however, IMF Bentham Ltd instead gave an undertaking to the court that it would not raise an argument as to the court's power to alter a funding agreement but would instead argue that the funding commission as agreed between itself and each of the group members was in the range of what was fair and reasonable in the circumstances of the case.[40] This may be resolved if the recommendation of the ALRC Report that the Federal Court be given an express statutory power to vary funding agreements is acted upon.

39 *Blairgowrie Trading Ltd v. Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No. 3)* (2017) 343 ALR 476; *Earglow Pty Ltd v. Newcrest Mining Ltd* [2016] FCA 1433; *Mitic v. OZ Minerals Ltd (No. 2)* [2017] FCA 409; *HFPS Pty Ltd (Trustee) v. Tamaya Resources Ltd (In Liq) (No. 3)* [2017] FCA 650; *Melbourne City Investments Pty Ltd v. Treasury Wine Estates Ltd* (2017) 252 FCR 1; *Liverpool City Council v. McGraw-Hill Financial Inc* [2018] FCA 1289; *Clarke v. Sandhurst Trustees (No. 2)* [2018] FCA 511; *Petersen Superannuation Fund Pty Ltd v. Bank of Queensland (No. 3)* [2018] FCA 1842.

40 The undertaking given by IMF Bentham Ltd is reflected in the orders made by Justice Murphy on 15 November 2019 in VID1010/2018.

Appendix 1

ABOUT THE AUTHORS

ROBERT JOHNSTON

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

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

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

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

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

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