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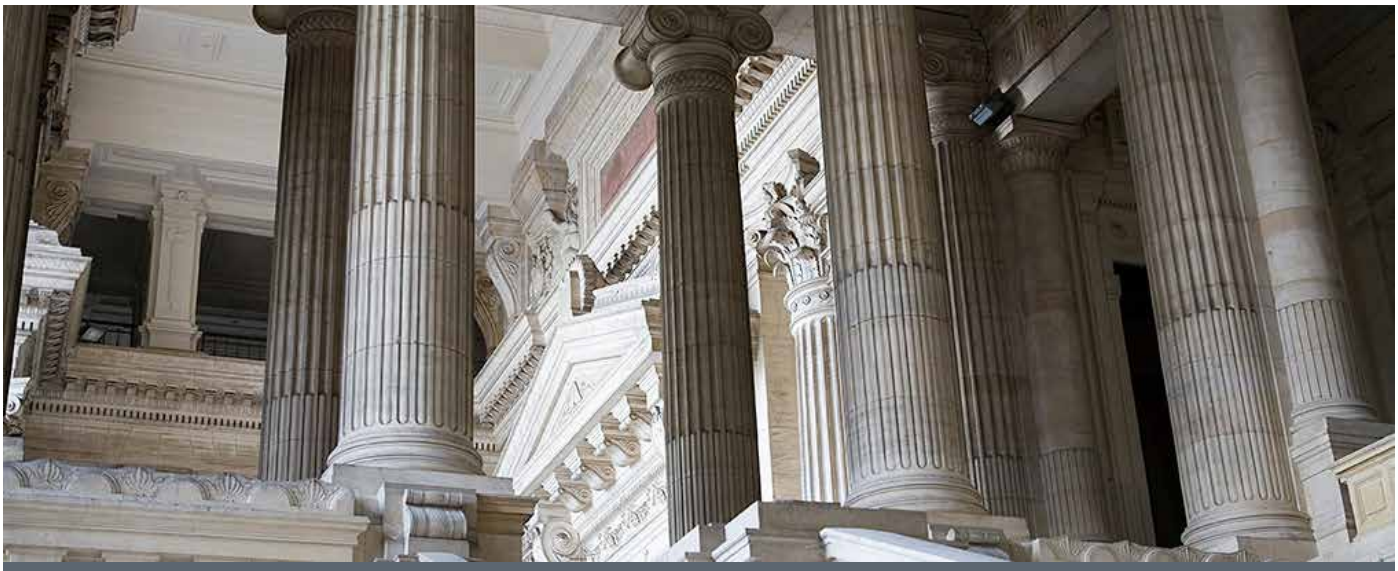

WHITE PAPER

March 2017

Class Actions in Australia: 2016 in Review

2016 saw a number of transformational developments in class action litigation in Australia, providing further evidence of the impact this form of litigation is having in terms of cost and risk for business. While the year provided examples of some major wins for defendants, a number of key court rulings and statutory reforms have set the stage for more and larger class actions in the year ahead and beyond. The 2016 highlights include:

- The bank fee class action, widely publicised as Australia's largest ever consumer class action (involving a challenge over fee-charging practises), ended with the High Court of Australia ruling in favour of the defendant camp.
- The Federal Court, for the first time, cleared the way for litigation funders to obtain common fund rulings — and to do so at the outset of the proceeding. The court also indicated a willingness to more closely supervise funder's fees.
- A number of superior court rulings emerged in favour of market-based causation being available for shareholder class actions in the Australian market.
- The State of Queensland adopted a new class actions regime making the procedure available in one of Australia's largest mining and construction markets.
- The High Court provided guidance on achieving finality in class actions and the importance of identifying the common issues.

We consider these and numerous other highlights in this publication.

2017 marks the 25th anniversary of the class action regime commencing in Australia. While the statutory regime has not been amended over that period, the case for reform or refinement of a number of aspects of the scheme is strong. We will discuss our views on some of the necessary reforms in the next paper in this series.

TABLE OF CONTENTS

Table 1: Key Decisions 2

Federal Court Class Actions Practice Note 4

Queensland Class Actions 4

New Class Actions 4

Judgments and Settlements 5

Table 2: 2016 Class Action Settlements 9

Lawyer Contacts 10

Endnotes 10

2016 was an important year for the development of class action jurisprudence in Australia. The year brought at least 25 new class action lawsuits and substantial settlements that will impact litigation moving forward.

The key decisions of 2016 are summarised in Table 1. The High Court of Australia delivered judgments in relation to two class actions. In *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28 the High Court found that the bank fees, the subject of the class action, were not a penalty, nor did they contravene consumer protection laws. Consequently, the bank fee class action, which had been touted as Australia's largest class action, ended with a decision in favour of the banks. In *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44 the High Court heard an appeal from the Victorian Court of Appeal and determined that a class member in an unsuccessful class action, who later raised individual defences against a claim from a defendant to the original class action, was not precluded from raising them by reason of Anshun estoppel, nor were the defences an abuse of process. The High Court explained that statutory class action regimes in Australia are structured so that a representative party represents class members only with respect to the claim, the subject of the class action, and the common issues, but not with respect to their individual claims. This has important ramifications for identifying the common issues and achieving finality in class actions.

The Full Court of the Federal Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 permitted a common fund order (i.e., a litigation funder could be paid from any fund created as a result of a successful class action settlement or judgment without needing to contract with all class members). However, the fee would be determined by the court. This was followed by *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 where the Federal Court found that it had the power to reduce the funding commission to be deducted under a settlement. Earlier in the year, the court gave guidance on its practice note requiring that any litigation funding agreement, with redactions to avoid conferring a tactical advantage on the opposing party, be served on the respondents. These three developments show an increased willingness by the Federal Court to supervise litigation funding.

There were also two important decisions in relation to shareholder class actions. In the decision of *In the matter of HIH Insurance Limited (in liquidation)* [2016] NSWSC 482, the Supreme Court of New South Wales recognised and applied indirect causation in a shareholder claim. Whilst *HIH Insurance* was not a class action proceeding, the court's application of indirect causation will most likely be transferred to that context with the effect that causation becomes a common issue and easier to prove. As a result, securities class actions that would otherwise not be financially viable due to concerns about demonstrating reliance may become financially viable in the wake of *HIH Insurance* so that there is an increased risk that share price declines will lead to claims by shareholder plaintiffs. The second decision of note is *Foley v Gay* [2016] FCA 273 where a class action was brought against the directors of Gunns Limited as the corporation was in liquidation. This case highlights the possibility of class actions being brought against individual directors, rather than the corporate entity, especially when the company is insolvent. The class action settled in 2016 for an undisclosed amount.

The courts also delivered judgments dealing with competing class actions, utilizing the United States procedure for obtaining evidence for Australian class actions in the United States, respondents making settlement offers to class members, the rejection of a class action settlement for being detrimental to class members, and staying of a class action as an abuse of process. 2016 also saw the introduction of a new Federal Court class actions practice note and the enactment of a class actions regime in Queensland, discussed below.

Each of the new class actions, across a range of areas are outlined below along with the settlements of 2016, which are also summarised in Table 2.

TABLE 1: KEY DECISIONS

Case	Decision
Foley v Gay [2016] FCA 273	The Federal Court of Australia approved the confidential settlement of a shareholder class action against the directors of Gunns Limited (in liquidation). This case highlights the possibility of individual director liability.
Smith v Australian Executor Trustees Limited; *Creighton v Australian Executor Trustees Limited* [2016] NSWSC 17[1]	The Supreme Court of New South Wales addressed the problem of two partially overlapping classes by allowing class members to decide which class action they would opt out of or the court would make orders removing them from the class action they had not affirmatively joined.
Coffs Harbour City Council v Australia and New Zealand Banking Group Limited (trading as ANZ Investment Bank) [2016] FCA 306[2]	The Federal Court of Australia was required to rule on interlocutory applications for disclosure of the redacted portions of litigation funding agreements entered into by the applicants. The court found that certain types of clauses in a funding agreement can be redacted due to confidentiality, if disclosure would confer a tactical advantage on the opposing party.
Jones v Treasury Wine Estates Limited [2016] FCAFC 59[3]	The Full Court of the Federal Court of Australia, by way of anti-suit injunctions against the applicant and a class member in class action proceedings, restrained parties from making applications pursuant to 28 USC § 1782 to gather evidence for Australian class actions through oral discovery in U.S. District Courts.
Kelly v Willmott Forests Ltd (in liquidation) (No 4) [2016] FCA 323[4]	The Federal Court of Australia refused to approve a settlement since the settlement imposed a "significant detriment" on some class members by extinguishing their individual claims or defences, without any benefit in exchange and without adequate notice. The judgment drew attention to conflicts of interest that potentially arise in class actions, including conflicts between registered and nonparticipating class members' interests and between lawyers' interests in receiving legal fees and class members' interests in minimising those legal costs.
In the matter of HIH Insurance Limited (in liquidation) [2016] NSWSC 482[5]	The Supreme Court of New South Wales recognised and applied indirect causation in a shareholder claim. Indirect causation is likely to make shareholder class actions easier to commence and prove. This may place listed corporations and their directors at greater risk of class action litigation.
Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited [2016] FCA 787[6]	Treasury Wine Estates Limited was the subject of shareholder class actions in both the Supreme Court of Victoria and the Federal Court of Australia. The Federal Court held that the proceeding should be stayed as an abuse of process, on the basis that it was brought for the predominant purpose of securing a financial benefit (other than by an award of damages) rather than the vindication of legal rights.
Paciocco v Australia and New Zealand Banking Group Limited [2016] HCA 28[7]	The High Court decided that a payment clause will be an illegal penalty if its purpose is to secure compliance with a primary obligation owed to party A by party B and the amount provided for is "out of all proportion" with party A's legitimate interests. However, if the payment clause is an illegal penalty, then party A will be entitled to recover only the direct losses that were actually suffered through party B's noncompliance.

Case	Decision
IOOF Holdings Ltd v Maurice Blackburn Pty Ltd [2016] VSC 311 and IOOF Holdings Ltd v Maurice Blackburn Pty Ltd (No 2) [2016] VSC 594	These Supreme Court of Victoria decisions concerned claims of privilege and confidentiality over discovered documents by plaintiffs' lawyers and litigation funders. (i) Maurice Blackburn, who was investigating a potential class action against IOOF Holdings Ltd by a class of its shareholders, claimed privilege over documents brought into existence prior to gaining a client. It was held that the fact that Maurice Blackburn did not have a client did not preclude the firm from being the client itself. (ii) Despite authorities to the effect that litigation privilege may be claimed with respect to funding agreements and their related documents, in this case it was held that certain communications between the funder and Maurice Blackburn setting out funding conditions were for a commercial dominant purpose such as the funder's basis for a return on investment.
Capic v Ford Motor Company of Australia Limited [2016] FCA 1020[8]	The Federal Court of Australia declined to restrain the respondent from making settlement offers to individuals on the basis that the offers were neither unfair nor unjust.
Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148[9]	The Full Federal Court of Australia, for the first time, made orders permitting a litigation funder to be paid a court-determined percentage from any fund created as a result of a successful class action settlement or judgment (i.e., a common fund order).
Lam v Rolls Royce PLC (No 5) [2016] NSWSC 1332[10]	Opt out notices and a class closure process had occurred, but 84 class members had neither opted out nor registered their participation in the class action. On the respondent's application, the Supreme Court of New South Wales determined that it would dismiss, finally, the claims of those 84 class members. The decision is novel in terms of its timing—prior to any judgment or settlement.
Timbercorp Finance Pty Ltd (in liq) v Collins [2016] HCA 44[11]	The High Court determined that a class member in an unsuccessful class action, who later raised individual defences against a claim from a defendant to the original class action, was not precluded from raising them by reason of Anshun estoppel, nor were the defences an abuse of process. The High Court explained that statutory class action regimes in Australia are structured so that a representative party represents class members only with respect to the claim, the subject of the class action, and the common issues, but not with respect to their individual claims.
Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433[12]	Previous decisions of the Federal Court held that the court possessed the power to refuse to give a settlement approval where the funding commission was considered excessive, or to make any approval subject to a condition limiting the funding commission. Here the Federal Court went a step further by finding it had power to directly reduce the funding commission to be deducted under the settlement.

FEDERAL COURT CLASS ACTIONS PRACTICE NOTE

In 2016, the Federal Court established a National Court Framework ("NCF") to govern how the court operates. As part of that process, it replaced all of its existing practice notes. For class actions this meant that Federal Court of Australia, Practice Note CM17, *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013 was replaced with Federal Court of Australia, *Class Actions Practice Note* (GPN-CA), 25 October 2016.

The aim of the new practice note is to address some of the practical issues that frequently arise in class actions, to indicate the court's expectations regarding the management of those issues, to ensure that the contested issues are identified at an early stage, and that class actions are not unnecessarily delayed by interlocutory disputes. Consequently, the practice note details matters to be dealt with at the first and subsequent case management hearings, the trial of the common questions, and settlement.

The practice note includes some important changes. In particular, it is envisaged that, depending on the needs of the particular class action, there may be a docket judge, a case management judge, and a class actions registrar. The docket judge will hear the trial of the proceeding, while the role of the case management judge will be to conduct case management hearings and resolve interlocutory disputes. The class actions registrar will assist the judges and parties to the proceeding. The precise demarcation of roles and when they will be employed is something that can be expected to develop over time.

The new practice note also addresses costs agreements and litigation funding agreements in much greater detail. The focus of the practice note is in ensuring that class members are notified of applicable legal costs and funding fees, as well as ensuring that costs agreements and funding agreements include provisions for managing conflicts of interest. The practice note also mandates that costs agreements and funding agreements be provided to the court on a confidential basis. Further, any litigation funding agreement is to be served on the respondents, but may be an example of the standard form of the agreement and may "be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding".

QUEENSLAND CLASS ACTIONS

On 11 November 2016, the *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld) ("Amendment Act") was passed by the Queensland Parliament. The Amendment Act inserts a new Part 13A in the *Civil Proceedings Act 2011* (Qld) ("CPA") to provide for an expanded form of representative proceeding in the Supreme Court. The amendments to the CPA commence on a day to be fixed by proclamation.

Part 13A of the CPA is essentially identical to the class action procedure that exists in the Federal Court, Victoria, and New South Wales. Under Part 13A, a representative party can commence a proceeding on behalf of that party and one or more other persons if seven or more persons (including the representative party) have claims against the same defendant, the claims of all the persons are in respect of, or arise out of, the same, similar or related circumstances, and the claims of all persons give rise to a substantial common issue of law or fact.[13]

The amendments significantly affect the conduct of civil proceedings in Queensland, enabling, for the first time, a class action procedure which is coextensive with the procedure that currently exists in the Federal Court. Notably, plaintiffs who suffer similar harm and seek to commence claims against the same defendant will no longer need to establish a jurisdictional connection in the Federal Court or interstate in New South Wales or Victoria to be able to take advantage of the efficiency and cost savings resulting from the class action procedures in those jurisdictions.

NEW CLASS ACTIONS

At least 25 new class actions were filed in 2016. There were 12 new actions brought on behalf of investors. These included shareholder class actions against the specialist white-collar recruiter Ashley Services Group, the collapsed adult education and training provider Vocation Ltd, the newly listed milk producer Murray Goulburn Co-operative, and the law firm Slater & Gordon and companies in the mining industry, including against the CIMIC Group and the directors of Kagara Ltd. They also included actions relating to the provision of financial services, such as the actions relating to the management of money market accounts and loan facilities against Bank

of Queensland and the Commonwealth Bank of Australia (BankWest) respectively and financial advice provided by the late Anthony Famularo against his estate and Westpac (St George). Additionally, two new actions were brought on behalf of groups of investors in an existing series of class actions relating to Standard & Poor's ratings of synthetic collateralised debt obligations.

Among the 25 new class actions in 2016 were four actions were brought on behalf of consumers. An action was brought on behalf of clients of a rural New South Wales law firm relating to the firm's billing practices and another action was brought against Cash Converters relating to the level of brokerage fees it charged on personal loans and cash advances. A misleading and deceptive conduct claim was brought against the marker and distributor of Nurofen Pain Relief Products in Australia as well as a claim relating to defective transmission systems in certain Ford car models.

2016 also saw three class actions being filed against state and federal governments. An action was brought on behalf of 300 Aboriginal people for loss of wages held on trust by the Queensland government under an arrangement that was in place between the 1800s and 1970s. Another action was brought against the Commonwealth government regarding representations made prior to the enlistment of persons into the Royal Australian Navy concerning engineering training that would be provided. In the final days of 2016, a class action was filed against the government of the Northern Territory for claims of assault, battery, and/or false imprisonment on behalf of those who were detained in youth detention centres in the Northern Territory in the past 10 years. The class action runs in parallel to the federal government's Royal Commission into the Protection and Detention of Children in the Northern Territory and a representative complaint in the Human Rights Commission, brought by one of the two lead plaintiffs of the class action, alleging that the manner in which the class members (the overwhelming majority of whom are indigenous Australians) were treated amounted to racial discrimination under section 9(1) of the *Racial Discrimination Act 1975* (Cth).

An action was brought on behalf of workers treated as independent contractors of the "face-to-face donor" agency Appco Group, alleging sham contracting, underpayment of wages, and other breaches of Australian employment laws. The Appco class action may serve as a test case for "sole trader" or subcontractor arrangements, which have become a popular way of structuring labour relations (in place of a traditional employment relationship) in a number of new industries. Another action was brought on behalf of property owners and occupiers in Chipping Norton, New South Wales, for negligence regarding asbestos soil contamination against the Liverpool City Council.

Two new class actions concerned classes wholly comprised of persons outside of Australia against an Australian respondent. The first was brought on behalf of Indonesian seaweed farmers who had suffered crop poisoning, allegedly as a result of the 2009 oil spill from the Montara Wellhead Platform in the Timor Sea, which was operated by an Australian subsidiary of a Thai state-owned company. The second action concerned a claim brought on behalf of some 46,000 investors in India who represented a subset of some 58.5 million people who had invested a total of more than A$9 billion in an alleged Ponzi scheme in India relating to development of land. The class action was brought against an Australian company, who held property worth some A$82.5 million, to which the funds invested in the scheme could allegedly be traced. The increasing internationalisation of Australian class actions may give rise to new challenges, particularly in identifying overseas class members (in order to comply with notice requirements under Australian class actions legislation) and in binding them to any judgment or settlement given or approved by an Australia court.

JUDGMENTS AND SETTLEMENTS

Environment / Government Claims. The settlement of the equine influenza class action (*Clasul Pty Ltd v Commonwealth* [2016] FCA 1119) was approved in August 2016. This class action involved claims for damages in negligence by entities that suffered loss due to the outbreak of the equine influenza virus in August 2007 from the Eastern Creek Quarantine Station against the Commonwealth, who was the lessee and controller of the station. Under the terms of the settlement each party was to bear its own costs of the proceeding and give mutual releases. The applicants and 587 class members received no compensation as part of the settlement, with the only benefit to the applicants being the avoidance of a potentially significant costs order. The applicants' solicitors and the litigation funder also received no payment.

Provisional approval was given to the proposed settlement in the Springwood fire class action (*Johnston v Endeavour Energy* [2016] NSWSC 1132) in July 2016. The action had been brought on behalf of the occupiers and owners of properties in Springwood, NSW, against Endeavour Energy, which was the owner and operator of live conductors upon which a tree fell and caused a bushfire. Under the settlement terms, Endeavour Energy agreed to pay the class members an amount of $18 million, inclusive of interest and costs without admission of liability (of approximately $200 million originally claimed), which was to be distributed amongst the 779 class members. The class members' lawyers' fees had been assessed by an independent costs assessor and included an uplift of 25 percent. No funders were involved in the proceeding. The class members' insurers intervened in the proceedings and under the settlement received a portion of the distribution amount, depending on the policy, between some one percent and five percent of the relevant category of payment.

In November 2016, the Victorian Supreme Court gave approval for two class actions arising out events during the 2015 Queensland floods (*Laine v Thiess; Beetson v Sunwater Ltd* [2016] VSC 689) to be discontinued. The application for discontinuance was made as a result of revising the actions' prospect of success. The writs for each proceeding had not yet been served. The court gave leave to the lead plaintiffs to discontinue the proceedings with no order as to costs and, additionally, dispensed with the need to notify class members under 33X of the *Supreme Court Act 1986* (Vic).

The Jack River bushfire class action (*Ramsay v AusNet Electricity Services Pty Ltd* [2016] VSC 725) was settled, with court approval given, in December. The action concerned a bushfire in 2014 near Jack River in Gippsland, Victoria, allegedly caused by contact between a power line and a pine tree, for which a class action was brought against the owner and operator of the power line (AusNet) and its vegetation management contractor. The settlement amount was $10.5 million (split equally between AusNet and its contractor), which included $2.3 million in the lead plaintiff's lawyers' legal fees (including an uplift), and represented about 78 percent of the total amount claimed by registered class members. No funder was involved in the class action. The settlement of the Jack River bushfire action is the latest of AusNet's class action settlements. In 2014 and 2015, AusNet and its co-defendants settled class actions involving bushfires in 2009 in Klimore East-Kingslake and Murrindindi-Marysville for $494 million and $300 million, respectively.

The class action against the State of New South Wales for the false imprisonment of young people (*Amom v State of New South Wales*) was settled by the state paying into a fund an amount greater than $3.85 million, inclusive of $2 million in the lead plaintiff's lawyers' fees and disbursements. The settlement was approved in March 2016. The action was brought on behalf of an open class, consisting of young people who had been arrested in the relevant period by NSW police for breach of bail conditions, when in fact no conditions had been breached, due to inaccuracies in the computer database used by police.

Continuous Disclosure / Shareholder Claims. The settlement of the Downer class action (*Camping Warehouse Australia Pty Ltd v Downer EDI Ltd* [2016] VSC 312) was approved in May 2016. The action had been brought on behalf of certain shareholders of Downer in respect of, broadly speaking, breaches of Downer EDI Ltd's statutory continuous disclosure obligations relating to the Waratah train project being conducted by one of its subsidiaries. Under the approved settlement, Downer EDI would pay $11.1 million, which included $2.85 million towards the lead plaintiff's lawyers' legal fees and $825,000 towards the funder's fees, of the $15 million originally claimed. From this fund, amounts were to be distributed to class members who submitted adequate proof. The number of potential class members was estimated to be over 10,700. However, this estimate did not take into account otherwise eligible members who were not part of the class because they had opted out or were relevantly part of another class action that had been settled (with which there was a period of overlap).

A confidential settlement of the shareholder class action against the directors of Gunns Ltd for breaches of statutory continuous disclosure obligations (*Foley v Gay* [2016] FCA 273) was approved in March 2016. Although the settlement amount was undisclosed, it included an amount of $2.3 million for the representative party's lawyers' fees and an unknown amount as fees to the funder.

The Billabong shareholder class action (*Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194) was settled in July 2016 and approved by the court in October 2016. The proceeding was commenced on behalf of all shareholders who acquired securities in Billabong between February and

December 2011— approximately 730 investors in total. It was claimed that Billabong engaged in misleading or deceptive conduct and contravened continuous disclosure obligations in its representations to the market as to its expected financial performance. Under the terms of the settlement, Billabong was to pay $45 million, including interest, litigation costs, and Newstart's expenses. The applicants' legal costs, which were not the costs actually incurred, but a fair and reasonable amount determined by a cost consultant, were to be paid out of the settlement sum prior to distribution. The litigation funder was to receive its commission payments in accordance with its agreements with group members, with a funding equalisation mechanism to be applied.

The Newcrest class action (*Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433) was settled in February 2016 and approved by the court in May 2016. The claim was brought on behalf of investors who purchased shares in the company between August 2012 and June 2013. It was alleged that Newcrest engaged in misleading or deceptive conduct by providing production guidance without reasonable grounds and breached continuous disclosure rules. Under the terms of the settlement, Newcrest was required to pay $36 million inclusive of legal costs and interest, with the settlement sum to be distributed pursuant to a "Settlement Distribution Scheme" to be administrated by Slater and Gordon. The applicant's legal costs ($6,631,856.89, being the amount determined as reasonable by a costs consultant) and expenses and the funder's commission (at rates between 26 percent and 30 percent) were to be deducted from the settlement sum, with a funding equalisation mechanism to be applied. Justice Murphy noted that had the applicants been successful on the pleaded claims they would have recovered damages "significantly greater" than $36 million, though the settlement fell within a reasonable range given the risks on liability and quantum.

The OZ Minerals shareholder class action settled in June 2016 and was approved by the Federal Court pursuant to orders made on 18 July 2016. Former Zinifex shareholders claimed they were misled over the true financial position of Oxiana, which merged with Zinifex in 2008 to create OZ Minerals, a listed company. The settlement sum was $32.5 million (with OZ Minerals contributing $24 million and the remaining $8.5 million to be paid by other respondents related to the merger), including interest, the applicant's legal fees, and the applicant's litigation costs. The applicants originally sought more than $250 million in compensation.

Financial Product Claims. The proposed settlement of four overlapping (but not identical) class actions brought on behalf of investors in failed managed investment schemes in forest plantations managed by the Willmott Forests group against various parties (*Kelly v Willmott Forests Ltd (in liq) (No 4)* [2016] FCA 323; 113 ACSR 584) was not approved due to significant detriment to class members. The rejected settlement involved the payment of $4.5 million from an amount of some $400 million lost, the entirety of which would have gone to lawyers' fees (the proposed settlement amount was, in fact, less than the total amount of the fees charged by the law firm). The Federal Court's decision was analysed in a May Jones Day Commentary.[14]

A class action relating to the collapse of Lehman Brothers Australia brought by three applicants and a group of approximately 90 members including various local government authorities and charities (*City of Swan v McGraw-Hill Companies Inc* [2016] FCA 343) settled and court approval was given in March 2016. The applicants alleged that Standard & Poor's engaged in misleading and deceptive conduct by assigning particular credit ratings to the Lehman Brothers debt obligations they had purchased. The settlement sum was confidential, being inclusive of interest and legal costs (of approximately $4.5 million). Justice Wigney described the settlement sum as "very large" though "considerably less than the estimate of the total amount claimed by the applicants and group members". The settlement was also subject to the withdrawal of two of Standard & Poor's proofs of debt lodged in the winding up of Lehman Brothers Australia, each in the vicinity of $250 million. The settlement sum was to be distributed according to a "Settlement Distribution Scheme", which is mostly confidential, but provided for payments to the funder to be deducted from amounts distributed to group members.

The settlement of a class action concerning an investment scheme to raise funds for the construction and operation of the North-South Bypass Tunnel in Brisbane (*Hopkins v AECOM Australia Pty Ltd (No 8)* [2016] FCA 1096) was approved in August 2016. The applicants, who brought proceedings on behalf of 696 class members who acquired stapled units in the scheme, alleged that the product disclosure statement overestimated traffic forecasts without reasonable grounds

and failed to disclose material information. The settlement sum was $121 million, inclusive of costs and expenses. The total of the claim made by the applicants was said to range between $150 and $250 million, excluding interest and costs. The settlement provides for the payment from the settlement sum of the applicants' legal costs ($19,188,321.81) and payments to the litigation funder in respect of project costs and commissions pursuant to the funding agreements.

Consumer/Contract Claims. The class action against National Australia Bank ("NAB") relating to various fees it charged to customers (Farey v National Australia Bank Ltd [2016] FCA 340) settled and court approval was given in April. The NAB action was the only one of a number of similar class actions against major banks to settle before the High Court gave judgment in favour of the banks in July.[15] Under the terms of the approved settlement, NAB agreed to pay $6.6 million, of which over $500,000 comprised the legal fees and $4.1 million comprised the funder's fee, leaving about $2.5 million for NAB customers.

Product Liability. The settlement of a product liability class action concerning defective hip implants (*Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452) was approved by the Federal Court in June 2016. It was alleged that the DePuy hip implants were defective, not fit for their purpose, and were not of merchantable quality in contravention of the *Trade Practices Act 1974* (Cth) and that DePuy and its parent company that distributed the implants in Australia (Johnson & Johnson) were negligent. The settlement sum was $250 million plus interest and including legal costs. The applicants' costs of the proceeding ($36,856,243.95, being the amount verified as reasonable by an independent costs expert), the applicants' expenses, and the costs of administering the settlement scheme were to be deducted from the settlement sum. The settlement sum was estimated to involve a discount of approximately 30 percent of the estimated likely global compensation amount.

Discrimination Claims. A class action brought by workers with intellectual disabilities (*Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523) settled in February 2016, with the settlement being approved by the Federal Court in December 2016. The applicant, on behalf of 9,735 class members, claimed compensation for underpayment at government-funded workshops that resulted from the application of the Business Service Wage Assessment Tool ("BSWAT"). The BSWAT was found to be discriminatory against people with intellectual disabilities. Part of the settlement required that the Commonwealth use its best endeavours to pass amendments to the Business Service Wage Assessment Tool (BSWAT) Payment Scheme Act 2015 (Cth), which created a scheme to partially compensate employees whose wages were assessed and paid using the BSWAT. The amendments would allow workers to claim a greater proportion (increased from 50 percent to 70 percent) of the difference between the wages they were actually paid and wages that would have been paid if the discriminatory elements of the BSWAT had not been used. The legislation has since been amended in accordance with the terms of the settlement. The terms also provided that the Commonwealth would pay the applicant's costs of the proceeding on a party and party basis, and that the Commonwealth would take steps to promote registration in the scheme.

2016 also saw the class action being used as a vehicle to bring a successful racial discrimination case. In *Wotton v State of Queensland (No 5)* [2016] FCA 1457 a group of applicants brought proceedings claiming contraventions of the *Racial Discrimination Act 1975* (Cth) on their own behalf and behalf of indigenous people, ordinarily resident on Palm Island, between a certain period. The allegations arose out of the conduct of the Queensland Police Service on Palm Island in November 2004, following the death of an Aboriginal man in custody. The applicants were awarded damages resulting from the contraventions, in circumstances where Mortimer J found that the police engaged in the conduct because they were dealing with an Aboriginal community.

TABLE 2: 2016 CLASS ACTION SETTLEMENTS

Class Action	Claim Type	Settlement	Comparison to Original Claim
Springwood fire	Environment / Government—Bushfires	$18 million (inclusive of interests and costs)	Approximately $200 million was originally claimed on behalf of 779 class members.
Jack River bushfire	Environment / Government—Bushfires	$10.5 million (inclusive of $2.3 million in the lead plaintiff's legal fees)	The settlement represented about 78 percent of the total amount claimed by registered class members.
Amom v State of New South Wales	Environment / Government—False Imprisonment	An amount >$3.85 million (inclusive of $2 million in the lead plaintiff's lawyers' fees)	
2015 Queensland floods	Environment / Government—Floods	Proceedings discontinued with no order as to costs	The writs for each proceeding had not yet been served.
Equine influenza	Environment / Government— Negligence	Each party to bear its own costs with no compensation forming part of the settlement	
Downer EDI	Shareholder—Continuous disclosure	$11.1 million (inclusive of $2.85 million towards lead plaintiff's lawyers' legal fees and $825,000 towards the funder's fees)	Approximately $15 million was originally claimed.
Gunns Ltd directors	Shareholder—Continuous disclosure	Confidential settlement sum (inclusive of $2.3 million for the representative party's lawyers' fees and an unknown amount as fees to the funder)	
Billabong	Shareholder—Continuous disclosure	$45 million (including interest, legal costs and the funder's commission payments)	
Newcrest	Shareholder—Continuous disclosure	$36 million (inclusive of interest, the applicant's legal costs ($6,631,856.89) and the funder's commission (26-30 percent))	Had the applicant's been successful significantly more than $36 million in damages would have been recovered.
OZ Minerals	Shareholder—Merger disclosure	$32.5 million ($24 million from OZ Minerals and $8.5 million from other respondents) (inclusive of interest and legal costs)	The applicants originally sought more than $250 million in compensation.
Lehman Brothers	Financial product	Confidential settlement sum (subject to the withdrawal of two of Standard & Poor's' proofs of debt lodged in the winding up of Lehman Brothers Australia, each in the vicinity of $250 million)	The settlement sum was "considerably less than the estimate of the total amount claimed".
AECOM	Financial Product	$121 million (inclusive of costs (applicants' legal costs of $19,188,321.81 and funder's commissions) and expenses)	The original claim was said to range between $150 and $250 million (excluding interest and costs).

Class Action	Claim Type	Settlement	Comparison to Original Claim
NAB	Consumer / Contract Claim—Bank fees	$6.6 million (inclusive of $600,000 for the representative party's costs and disbursements, including $506,000 in legal costs)	
DePuy hip implants	Product Liability	$250 million (inclusive of $36,856,243.95 in legal costs plus interest)	The settlement involved a discount of approximately 30 percent of the likely global compensation amount.
Workers with intellectual disabilities	Discrimination Claim	Amendments to legislation allowing greater recovery of underpaid wages with the Commonwealth to pay the applicant's costs	

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ENDNOTES

1 See Jones *Day Commentary,* "Concurrent Australian Class Actions Allowed to Proceed Due to Different Funding Arrangements and Case Strategy" (March 2016).

2 See Jones *Day Commentary,* "Disclosure of Litigation Funding Agreements in Australian Class Actions" (April 2016).

3 See Jones *Day Commentary,* "Australian Court Stops Class Action from Obtaining U.S. Courts' Assistance for Oral Depositions" (May 2016).

4 See Jones *Day Commentary,* "Australian Class Action Settlements Declined Due to Substantial Detriment to Class Members" (May 2016).

5 See Jones *Day Commentary,* "Indirect Causation Accepted by Australian Court in Shareholder Claim" (July 2016).

6 See Jones *Day Commentary,* "Australian Shareholder Class Action Held to be an Abuse of Process" (September 2016).

7 See Jones *Day Commentary,* "Late Payment Fees Not Penalties: High Court of Australia Rebuffs Bank Fees Class Action" (September 2016).

8 See Jones *Day Commentary,* "Federal Court of Australia Permits Respondents to Settle Individual Claims of Class Action Members" (October 2016).

9 See Jones *Day Commentary,* "Game Changer: Appellate Court Permits Common Fund Orders in Australian Class Action Litigation" (November 2016).

10 See Jones *Day Commentary,* "Australian Court "Closes Class" – Dismisses Claims of Class Action Members Prior to Judgment or Settlement" (November 2016).

11 See Jones *Day Commentary,* "High Court of Australia Determines Extent to which Class Members Are Bound by Class Action Judgment" (January 2017).

12 See Jones *Day Commentary,* "Australian Federal Court Has Power to Reduce Litigation Funder's Commission Payable in a Class Action" (January 2017).

13 Section 103B(1) of the CPA.

14 See *Jones Day Commentary*, "Australian Class Action Settlements Declined Due to Substantial Detriment to Class Members" (May 2016).

15 See *Jones Day Commentary*, "Late Payment Fees Not Penalties: High Court of Australia Rebuffs Bank Fees Class Action" (September 2016).