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WHITE PAPER

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Class Actions in Australia—2017 Year in Review

Twenty-five years after the introduction of Australia's federal class action regime, class action law remains a significant element of the country's litigation landscape. Enhancements to Australia's class action jurisprudence in 2017 included developments in the class closure process, the coordination of competing class actions, and a newly implemented common fund approach to setting litigation funder's fees.

This Jones Day *White Paper* reviews these and other developments and lists the class actions matters that were commenced and resolved in 2017.

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2017 marked the 25th anniversary of the federal class action regime in Australia which is embodied in Part IVA of the *Federal Court of Australia Act 1976* (Cth). 2017 also saw the enactment of a class action regime in the State of Queensland, making it the third state after Victoria and New South Wales to adopt class actions. The class action is an important part of the Australian litigation landscape and consequently a key risk for entities operating in Australia. A clear understanding of class action law and practice is central to understanding the contours of that risk.

Australian class action jurisprudence was further refined in 2017 with developments in:

- the class closure process whereby the group members are required to register to be able to participate in a class action settlement;
- the management of competing class actions, which has become a common occurrence, especially for shareholder claims;
- the newly adopted common fund approach to setting litigation funder's fees;
- discontinuance of class actions; and
- abuse of process.

Each is discussed below. Class actions law may also be set for reform with the Victorian Law Reform Commission due to report on 31 March 2018 on its inquiry concerning access to justice by litigants who seek to enforce their rights using the services of litigation funders and/or through group proceedings (class actions). At the end of 2017, the Australian Law Reform Commission was also tasked with investigating the regulation of legal costs and litigation funding in class actions, conflicts of interest and class action settlement distributions.

This *White Paper* also sets out the class actions that were commenced and settled in 2017.

KEY DECISIONS

Class Closure Process

The Australian class action procedure, like that of many other jurisdictions such as the United States and Canada, adopts an opt out model. The Australian class action legislation provides that a class action can be commenced without the express consent of group members and that all of the claimants who fall within the group definition are part of the class action. However, group members must be given an opportunity to exclude themselves, or opt out, of the class action. Group members who remain within the defined group are bound by the outcome of the proceedings.

To achieve finality in an open class action, where a monetary award or settlement is assessed or distributed, it is necessary to identify the particular class members to whom the monetary award or settlement is to be given. Australian courts, at the request of the parties, have made "class closure" orders which require group members to come forward and register their interest. The orders have frequently had the effect that failure to register means that the group member cannot participate in any recovery, whether by settlement or judgment, and the group member's claim is extinguished or barred. The approach has been criticised as undermining the access to justice goal of an opt out class action but has persisted as a practical necessity to achieve finality.

In *Jones v Treasury Wine Estates Limited (No 2)* [2017] FCA 296, the Federal Court altered the above orders. Registration was required to facilitate a mediation, and group members could participate in any settlement only if they had registered. If a settlement was achieved and approved by the Court, then unregistered group members obtained no recovery and lost their right to claim. However, unlike past orders, if no settlement was reached, then unregistered group members could still participate in any judgment.

The judgment was appealed to the Full Court of the Federal Court of Australia. While the Full Court did not need to expressly address the novel class closure order, it chose to provide guidance as it considered class closure to be an important part of class action procedure: *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98.

The primary judge expressed doubt that the Court had power to make an order, before the initial trial of a class action, to extinguish a group member's right to share in the fruits of a subsequent judgment unless the group member took steps to register in the proceeding. However, the judge did not rule on that question and instead addressed the issue as an exercise of discretion, ruling that it was not necessary or appropriate to make orders extinguishing the unregistered group members' claims at that time.

The Full Court considered the power to make class closure orders. It accepted that requiring group members to take active steps to "register" in order to share in a settlement of a class action undercut to some extent the opt out rationale underpinning the class action regime. However, the Full Court found that there was power to make a class closure order relying on s 33ZF of the *Federal Court of Australia Act 1976* (Cth) which provides: "the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding". If a class closure order facilitates the desirable end of settlement, then it may be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding and therefore appropriate under s 33ZF. Settlement is facilitated because it allows a better understanding of the total quantum at stake in the proceedings. Moreover, the Full Court stated that an important aspect of the utility of the class action was its ability to achieve finality not only for group members but also for the respondent.

The Full Court endorsed the primary judge's remarks in relation to discretion and used them to express a number of cautions. The Full Court warned of the need to be vigilant before making a class closure order that, in the event settlement is not achieved, operates to lock class members out of their entitlement to make a claim and share in a judgment (at [76])—"the facilitation of settlement is a good reason for a class closure order but, if settlement is not achieved, an order to shut out class members who do not respond to an arbitrary deadline is not". Further caution needed to be exercised in relation to the stage at which a class closure order is made. The earlier the order, the greater the opt out rationale was likely to be harmed. The Full Court expressly stated at [77] that "the Court should usually not exercise the discretion to make a class closure order based merely on a respondent's assertion that it is unwilling to discuss settlement unless such an order is made". This was based on a view that it is the nature of opt out class actions that the respondent will be faced with uncertainty regarding the quantum of class members' claims because the number of claimants may be unknown.

After providing the above guidance, the Full Court recognised that (at [79]):

> Whether it is appropriate to order class closure is a question of balance and judicial intuition. The Court must take into account the interests of the class as a whole in requiring class members to take steps to facilitate settlement, and consider the surrounding circumstances including the point the case has reached, the attitude of the parties, and the complexity and likely duration of the case.

The Full Court found that the class action legislation provided Australian courts with the power to make class closure orders. The power may be exercised to facilitate the goal of settlement. The Full Court also endorsed the approach of the primary judge which changed prior practice and provided that if no settlement was reached, then unregistered group members could still participate in any judgment. It is to be expected that this form of class closure order will become the standard procedure.

The use of class closure orders to facilitate settlement was further considered in *Hardy v Reckitt Benckiser (Australia) Pty Limited* [2017] FCA 341 ("*Hardy v Reckitt Benckiser*"), *Kamasaee v Commonwealth of Australia & Ors (No 8) (Class closure ruling)* [2017] VSC 167 ("*Kamasaee*") and *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 2)* [2017] FCA 1231 ("*Petersen Superannuation Fund*").

In *Hardy v Reckitt Benckiser*, a consumer class action in relation to alleged misleading statements about pain relief medication, the respondents sought class closure to facilitate mediation. The respondent argued that it needed to know who was claiming in the class action to be able to determine its maximum theoretical liability to group members. The Court declined to make the orders. The Court regarded the likely size of the group and the possibility that there may be many group members with modest claims who have not yet registered as a consideration that weighed against the making of a class closure order before the initial trial. The trial would be relatively short (two to three days), and a mediation could still be useful as it would allow consideration of how to assess the claims of group members.

In *Kamasaee*, 1,905 asylum seekers detained in the Manus Island Regional Processing Centre sought compensation based on claims of negligence and false imprisonment. The defendants sought class closure orders to determine how many group members will ultimately participate in any settlement so that they could meaningfully quantify the damages sought. The plaintiff objected to the orders based on there being sufficient information already available to the defendants to determine compensation. The Court declined to

make the orders based on a number of characteristics of the group members, including that at least 25 percent of the class reside outside Australia and thus they may not receive the notice or be able to obtain assistance in understanding and complying with it. Additionally, others may harbour apprehensions that in the event that they were to take the positive step of opting in to the proceeding, their prospects of participating in any resettlement may be jeopardised.

These decisions may be contrasted with *Petersen Superannuation Fund*, where the applicant alleged that losses were caused to it and the group members by failures in the operation of a financial product. The respondents sought a registration or class closure process to facilitate a mediation that the Court had indicated it would order. The applicants objected to such a process, including because the group members must have been known to the respondents having completed application forms to obtain the product. The Court referred to *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited* [2017] FCAFC 98 and ordered that a registration process occur as the respondents could not ascertain the likely amount of the losses which the group members might claim.

Competing Class Actions

Competing or multiple class actions addressing the same or similar claims have become a regular occurrence, with courts needing to determine how to choose between or manage the class actions. In 2017, the Queensland Floods and Bellamy shareholder class actions gave rise to this issue.

The Queensland Floods class action was originally brought in the Supreme Court of New South Wales through a closed class that had been commenced in July 2014 ("Rodriguez proceeding"). A second class action was commenced by Philip Hassid as the representative party on 9 January 2017 ("Hassid proceeding"). The Hassid proceeding was commenced in response to amendments to the Rodriguez proceeding that excluded group members' claims for pure economic loss. After the amendments, the Rodriguez proceeding pursued only claims for damage to real and personal property and consequential loss. The Hassid proceeding sought to bring claims for pure economic loss but, through the group definition employed, inadvertently created a situation where group members with both property and pure economic loss claims pursued the property claims in both class actions. Rodriguez sought to strike out that part of the Hassid pleading that created the overlap for three main reasons: it creates conflicting duties for the legal representatives, it will cause uncertainty and the incurring of excessive costs for Rodriguez during the opt out process of the Hassid proceeding, and it is likely to adversely affect the prospects of the Rodriguez proceeding settling. Beech-Jones J agreed with these contentions and struck out the part of the Hassid pleading that created the overlap.

In *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd* [2017] FCA 947, Beach J dealt with two open class actions, the McKay proceedings (which also had 1,500 signed-up group members) and the Basil proceedings (which also had 1,000 signed-up group members) by closing the class in the Basil proceedings so that it was limited to the signed-up group members only and allowing the McKay proceedings to continue as an open class action. This had the result that unsigned group members could be part of the McKay proceedings only, and an overlap in group membership, which could be an abuse of process, was avoided. Both class actions would be jointly case managed with a view to conducting a joint trial. The respondents' application for a permanent stay of either class action was denied, principally because it would interfere with the choice of lawyer and funder by a large number of group members.

Common Fund

A common fund, in broad terms, is where a litigant or a lawyer who recovers a fund for the benefit of persons other than himself or his client, is entitled to a reasonable fee from the fund.

The common fund concept in relation to litigation funding fees was adopted by the Full Court of the Federal Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 ("*Money Max*"). The Full Court held that a litigation funder could be the beneficiary of a "common fund order", meaning that the litigation funder could be paid a fee from the fund created as a result of a successful class action settlement or judgment, but without contracting with all group members. The Full Court stated that upon the funder, the applicant and the applicant's solicitor giving an undertaking to each other and to the Court that they would comply with funding terms set out in annexure A to the judgment, the Court would order that prior to any distribution to

group members the following amounts be deducted from any settlement or judgment and paid to the funder:

- the legal costs incurred by the lawyers and paid by the funder; and
- a percentage of any settlement or judgment to be determined by the Court.

The Full Court reached this determination at an early stage in the litigation and relied on s 33ZF for the power to make the orders. The actual percentage would not be determined until later in the litigation when a settlement or judgment had occurred.

In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In liq) (No 3)* [2017] FCA 330 ("*Allco*") which settled in 2017 an application for a common fund order was sought, being 30 percent of the net settlement sum i.e., the total settlement less legal costs. There were no undertakings or previous orders allowing for the funder to receive a court-determined fee as occurred in *Money Max*. Beach J made the requested order relying on s 33V(2) which states:

> If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.

Beach J was also forthright as to the Court's power to determine the commission that a funder could charge (at [101]):

> I consider that as part of any approval order under s 33V, I have power in effect to modify any contractual bargain dealing with the funding commission payable out of any settlement proceeds. It may not be a power to expressly vary a funding agreement as such. Rather, it is an exercise of power under s 33V(2); for present purposes it is not necessary to invoke s 33ZF. I am empowered to make "such orders as are just with respect to the distribution of any money paid under a settlement". If I make an order that out of monies paid by a respondent, a lesser percentage than that set out in a funding agreement is to be paid to a funder, that is an exercise of statutory power which overrides the otherwise contractual entitlement. That is not an unusual scenario in many and varying contexts. It might also be said that the funding agreement itself contains an implied term reflecting this override in any event; the parties would be contracting in the known setting that the funder's percentage commission entitlement would only operate on a settlement sum if the necessary condition of Court approval had first been given.

In *Allco* the 30 percent of the net settlement sum was put forward by the applicant, agreed to by the funder and ultimately accepted by the Court. A key issue for the effectiveness of the Court's review is how the funder's fee is to be calculated. The Full Court in *Money Max* had previously set out a list of relevant factors that may be summarised as follows:

- the funding commission rate agreed by sophisticated group members and the number of such group members who agreed.
- the information disclosed to group members as to the amount and calculation of the funding commission;
- a comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market;
- the litigation risks of providing funding in the proceeding, including: (i) the quantum of adverse costs exposure that the funder assumed, which may be illustrated by the security for costs provided; and (ii) the legal costs expended and to be expended;
- the amount of any settlement or judgment and that the funding commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder;
- any substantial objections made by group members in relation to any litigation funding charges; and
- group members' likely recovery "in hand" under any pre-existing funding arrangements.

In *Allco*, Beach J applied the factors listed in *Money Max*, including looking at the funding fees charged in the market, including in foreign jurisdictions, the risks faced by litigation funders which would inform the rate of return on equity that a funder locally or globally might reasonably expect given the level of risk for such a business, the proportionality of the funder's recovery compared to the amount sought and recovered in the proceeding in the settlement, and the risks assumed, the information conveyed to group members by the opt-out notices, and the net recovery made by the group members.

Beach J noted that "the rate to be used is largely a forensic question depending upon the material available to the judge at the time the order is sought" and the judge must "do the best he or she can on the evidence available, [even if it is] incomplete

or imperfect" (at [120]-[121]). The central determinant of the reasonableness of a funder's fee is the risk that it takes on when it enters into the litigation funding agreement with the representative party and some or all group members. This is because litigation funding is a business which decides whether to fund cases based on risk and return. In *Allco* reference was made to a review of the financial accounts of the funder and other funders by the judge which led to the conclusion that any concerns that standard commission rates were producing rates of return on equity outside a reasonable range should be allayed. It was also observed that there is "no direct evidence of any market failure in the setting of commission rates" (at [142]).

In conclusion, his Honour identified the following advantages of the common fund in the current case:

- 30 percent was lower than the amounts of 32.5 percent (holdings of $1 million or more) and 35 percent (holdings less than $1 million) in the litigation funding agreement.
- the percentage was applied to the net settlement sum compared to the funding contract which applied to the gross settlement.
- a common fund is superior to a funding equalisation order. A funding equalisation order applies the funder's fee that some group members agreed to in the funding agreement to the group members who had not entered into a funding agreement. From a financial perspective, the amount paid to the funder under a common fund order (using a lower percentage than specified in the funding agreement) is less than under an equalisation order. However, the common fund also allows for an open class which enhances access to justice.

The funding provided by the litigation funder and the potential fee calculations may be summarised as follows:

Total Amount Paid by Funder and at risk if class action lost (legal costs, disbursements and security for costs)	$9,640,513.62
Funder's contractual fee entitlement (1,127 group members with 66% of shareholdings in the class action)	$8,999,221.43
Funder's contractual fee entitlement plus funding equalisation order	In excess of $10 million
Common Fund order—30% of net settlement sum / 22% of the gross settlement sum	$8.85 million

In *Pearson v State of Queensland* [2017] FCA 1096 Mr Pearson brought proceedings on behalf of Aborigines or a Torres Strait Islanders who had his or her wages taken, retained or otherwise paid by the employer to the Protector of Aborigines (including the Protector of Islanders) or to the superintendent of the reserve or mission in which he or she lived. The class action sought to recover those wages. Applying the common fund concept developed in *Money Max* and s 33ZF, the litigation funder would receive 20 percent, or a lesser amount determined by the court, of each group member's recovery.

Discontinuance

The provision enabling discontinuance of a class action despite its meeting the commencement requirements is a key tool for evaluating the efficiency and fairness of a particular class action. Section 33N of the *Federal Court of Australia Act 1976* (Cth) (and *Supreme Court Act 1986* (Vic); *see* also s 166 of the *Civil Procedure Act 2009* (NSW) and s 103K of the *Civil Proceedings Act 2011* (Qld)), provides that the court of its own motion or on application by the respondent may order that the proceeding not continue as a representative proceeding where it is in the interests of justice to do so because:

- the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

Historically s 33N was frequently invoked but with limited success as the courts sought to facilitate the progress of a class action, at least until its utility in resolving common issues had been exhausted. 2017 saw motions for discontinuance of class actions come to the fore.

The operation of s 33N was usefully summarised by Forrest J in *AS v Minister for Immigration (Ruling No 7)* [2017] VSC 137 as follows (at [61]-[67]):

First, the requirements of ss 33C and 33N are not to be conflated. Provided a claim satisfies s 33C (in that it either has not been challenged or any challenge has been defeated), then the provisions of s 33N (if invoked) dictate whether it can proceed to determination as a class action.

Second, it is not necessary for the representative plaintiff's claim to determine all, or for that matter even a substantial amount, of the identified common issues.

Third, in carrying out the analysis under s 33N(1), it is necessary that the Court determine:

(a) whether one of the conditions contained in s 33N(1)(a) to (d) have been satisfied; and
(b) then, whether it is in the interests of justice to make an order of discontinuance in relation to that condition.

Fourth, and this relates specifically to 33N(1)(c), it is necessary to consider whether the determination of the representative proceeding is an effective and efficient mechanism to resolve the common issue(s) relevant to the group members to give some utility or benefit to the case continuing to trial as a representative claim. The inquiry is wide and requires the Court to focus on what are (and are not) the commonality of issues agitated in the representative proceeding with those of the group members.

Fifth, in terms of the analysis under s 33N(1)(c) in most, but not necessarily all, cases, it will be necessary to compare the utility of the representative plaintiff's claim as against that of the prosecution of individual claims by group members.

Sixth, the management of the trial in the context of the agitation of disparate issues which may be irrelevant to the claim of the representative plaintiff is a relevant consideration in determining whether to permit the proceeding to continue as a class action.

Seventh, there is no prescribed time at which an application under s 33N should be made. The authorities, in general, demonstrate that such a determination should not be made until there is a full understanding of the representative plaintiff's case and how it relates to both the common questions and the interests of the group members. It follows that such a determination may be made after the pleadings have closed, or once outlines of evidence have been exchanged (if that be ordered) or, for that matter, during or at the conclusion of the trial. What is important is that the Court is in a position to assess the requirements of s 33N(1) including, of course, that of it being in the interests of justice to terminate the representative proceeding.

In *AS v Minister for Immigration (Ruling No 7)* [2017] VSC 137, the representative party, AS, brought a personal injury claim in relation to her detention as an asylum seeker on Christmas Island and on behalf of all persons (adults, minors and pregnant women) held at the detention centre between 27 August 2011 and 26 August 2014 who suffered personal injury because of the failure of the defendants to provide reasonable care for their health and wellbeing (including education for minors) whilst in detention. Forrest J "declassed" the proceeding relying on s 33N(1)(c) because the claim of AS was individual to her and did not involve "the consideration of a common thread which permeates the claims of other group members" (at [73]). Forrest J contrasted the claim of AS with single event claims such as a bushfire or a product liability claim where the risk giving rise to a duty and breach was common to all group members — "that the failure of an electricity conductor may cause a bushfire, or that a product may produce a particular type of injury" (at [86]).

Discontinuance was also obtained in relation to the second class action brought in relation to the Queensland Floods. The Hassid proceeding was unable to obtain litigation funding and orders for the filing of evidence and provision of security for costs were not complied with. In *Hassid v Queensland Bulk Water Supply Authority t/as Seqwater (No 2)* [2017] NSWSC 1064 the defendants' sought orders that the proceedings, including all of the claims of group members, be dismissed or permanently stayed based on the failure of the representative party to properly prosecute the proceedings, specifically, their failure to provide their affidavit evidence in accordance with the directions, comply with other procedural directions and to provide the agreed security. In the alternative, the Court was asked to discontinue the proceedings as a class action under s 166(1)(d) of the *Civil Procedure Act 2005* (NSW) (which provides an additional ground for discontinuance to that found in s 33N(1)) because the relevant representative party was "not able to adequately represent the interests of group members". Beech-Jones J declined to dismiss the claims of group members on the basis that "it would be unjust for them to have

any rights that they may have to bring a claim extinguished because the person that just happened to bring the proceedings proved unable to prosecute them properly" (at [24]). However, his Honour did discontinue the class action relying on the power in s 166(1)(d) that it was inappropriate that the claims be pursued through a class action due to the extensive defaults of the representative party (at [26]).

In contrast, in *Jenkings v Northern Territory of Australia* [2017] FCA 1263, a case addressing claims by persons detained in a youth detention centre of the Northern Territory and who suffered, one or more of the torts of assault, battery or false imprisonment or substandard conditions, a motion for discontinuance was denied. White J explained that the Territory had not yet filed a defence so that there has been no crystallisation of issues for the Court to assess in the context of s 33N. Consequently, it was premature for the Court to determine that the proceeding not be permitted to continue as a representative action (at [95]).

Abuse of Process

2017 saw further developments in relation to abuse of process in the context of Australian shareholder class actions.

In 2014, the Victorian Court of Appeal, by majority (Maxwell P and Nettle JA) in *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351; 49 VR 585 held that the commencement of litigation for the purpose of generating legal fees, rather than vindicating legal rights, was an abuse of process. The majority stated at [14]:

> The processes of the Court do not exist—and are not to be used—merely to enable income to be generated for solicitors. On the contrary, they exist to enable legal rights and immunities to be asserted and defended. In the common form of class action, that is the sole purpose of the proceedings. The members of the class wish to vindicate their rights. The fact that success will result in the solicitors' fees being paid does not affect the propriety of the proceeding.

An application for special leave to the High Court of Australia was denied.

In *Melbourne City Investments v Myer* [2017] VSCA 187, the Victorian Court of Appeal affirmed the decision to stay a class action brought by MCI against Myer. MCI had paid $700 for 400 shares in Myer and brought a class action against the Company for breaches of the continuous disclosure requirements in the *Corporations Act 2001* (Cth).

Although Mr Elliott did not act as the solicitor for MCI in these proceedings, he gave evidence that if MCI received a favourable outcome in the litigation, it would apply under s 33ZF of the *Supreme Court Act 1986* (Vic) to be reimbursed for acting as the representative plaintiff. Mr Elliott also accepted that MCI's actual damages were limited to only a few hundred dollars, at most. MCI's fundamental contention in the appeal was that it is not an abuse of process for a representative plaintiff to bring a genuine class action for the purpose of generating profit, so long as the profit is properly earned pursuant to a valid legal process.

The Court disagreed and held that MCI brought the proceeding for an improper purpose. Accordingly, it was found to be an abuse of process for MCI to commence and maintain a class action in order to generate income for itself through the proceeding.

A second shareholder class action, *Walsh v WorleyParsons Ltd* [2017] VSC 292, concerned MCI's involvement as neither a named party nor a group member in the proceeding. The key issue was whether MCI was the moving party who instigated the litigation. MCI had previously initiated a class action against WorleyParsons in 2013 for contravening disclosure requirements, but the case was dismissed because MCI lacked standing and had no real interest in bringing the claim. In the subsequent proceeding, WorleyParsons argued that MCI actively recruited and procured Ms Walsh to bring the present claim (as evinced by the Company offering financial incentives and indemnifying her) and that it sought to exert control over the litigation through her as the principle plaintiff.

The Court determined that MCI was the moving party that instituted the proceeding, taking into account the procedural history and the "unusual" nature of the agreement between MCI and Ms Walsh. In doing so, MCI was able to continue its scheme of bringing proceedings against listed companies to obtain financial gain for itself. For this reason, the class action was deemed to have been brought for an improper purpose and constituted an abuse of process and was stayed permanently.

NEW CLASS ACTIONS

2017 saw the continued preference for shareholder class actions amongst plaintiff law firms and litigation funders with claims against Bellamy's Australia Limited, Sirtex Medical Limited, Quintis Limited, Spotless Group Holdings Limited and the Commonwealth Bank of Australia. The shareholder claims also extended to listed law firms Slater & Gordon and Shine Lawyers.

There were also a range of consumer claims, financial product claims and claims against government. 2017 also saw the Takata airbag claims that had been prevalent in the US arrive in Australia with the first class action being brought against Toyota Australia where it had used Takata airbags in its motor vehicles. The Supreme Court of New South Wales was also home to a privacy class action against government in relation to a data breach that affected ambulance employees and contractors.

Proceeding	Date Filed	Summary
Currandooley Bushfire Class Action	2 February 2017	Supreme Court of New South Wales class action in relation to a bushfire that caused damage to personal and real property.
Todd Hayward v Sirtex Medical Limited	9 February 2017	Federal Court shareholder class action against Sirtex, a medical company, alleging misleading or deceptive conduct and breach of its continuous disclosure obligations.
ARJ17 v Minister for Immigration and Border Protection & Ors	19 February 2017	Federal Court class action on behalf of a group of persons in immigration detention against the Minister for Immigration and Border Protection following the introduction of a new policy that permitted the Commonwealth or its agents to confiscate mobile phones and SIM cards in the possession of all persons in immigration detention after 19 February 2017.
McKay Super Solutions Pty Ltd (as trustee for the McKay Super Solutions Fund) v Bellamy's Australia Limited	23 February 2017	Federal Court shareholder class actions against Bellamy, a baby food and formula company, alleging misleading or deceptive conduct and breach of its continuous disclosure obligations.
Kelvin Turner v Mybudget Pty Ltd	2 March 2017	Federal Court class action against debt management company MyBudget to obtain the interest earned on funds deposited into MyBudget accounts.
Peter Anthony Basil v Bellamy's Australia Limited	7 March 2017	Federal Court shareholder class actions against Bellamy, a baby food and formula company, alleging misleading or deceptive conduct and breach of its continuous disclosure obligations.
Casey Cheryl Simpson v Thorn Australia Pty Ltd T/AS Radio Rentals ACN 008 454 439	29 March 2017	Federal Court class action claiming compensation in relation to Radio Rentals' Rent, Try $1 Buy leases, which contrary to Radio Rentals' advertising did not entitle the customers to buy the rented goods for $1.
Shattercane Class Action	24 April 2017	Supreme Court of Queensland class action against Advanta Seeds in which farmers claim they purchased bags of MR43 Elite sorghum seed contaminated with the weed shattercane. The weed competes vigorously with sorghum and significantly reduces yield.
Carwoola Bushfire Class Action	28 April 2017	Supreme Court of New South Wales class action in relation to a bushfire that caused personal injury and damage to property.

Proceeding	Date Filed	Summary
John William Cruse Webster as Trustee for the Eclar Pty Ltd Super Fund Trust v Murray Goulburn Co-operative Co Limited & Ors	9 May 2017	Federal Court class action against MG Responsible Entity (MGRE), Murray Goulburn and its respective directors' alleged failure to comply with their relevant obligations pertaining to the publication of the Product Disclosure Statement on 29 May 2015 (particularly with respect to the financial forecasts for FY2015 and FY2016), MGRE's alleged failure to comply with continuous disclosure obligations and alleged breached of its fiduciary duties arising as trustee of the MG Unit Trust.
Nakali Pty Ltd v SurfStitch Group Ltd	22 May 2017	Shareholder class actions commenced in the Supreme Court of Queensland and the Supreme Court of New South Wales alleging misleading or deceptive conduct, breach of its continuous disclosure obligations and failure to prepare financial accounts in accordance with accounting standards.
Alison Court v Spotless Group Holdings Limited	25 May 2017	Federal Court shareholder class action against Spotless Group, a cleaning and facilities management company alleging misleading or deceptive conduct and breach of its continuous disclosure obligations.
Sadie Ville Pty Ltd (as Trustee for Sadie Ville Superannuation Fund) v Deloitte Touche Tohmatsu (a Firm) and Anor	13 June 2017	Federal Court shareholder class action against entities involved in the preparation of a prospectus lodged by Hastie Group related to the reliability and accuracy of Hastie's financial statements and earnings forecast.
Babscay Pty Ltd v Slater & Gordon	20 June 2017	Federal Court shareholder class action against Slater & Gordon, a listed law firm alleging misleading or deceptive conduct and breach of its continuous disclosure obligations.
TW McConnell Pty Ltd v SurfStitch Group Ltd	28 June 2017	Shareholder class actions commenced in the Supreme Court of Queensland and the Supreme Court of New South Wales alleging misleading or deceptive conduct, breach of its continuous disclosure obligations and failure to prepare financial accounts in accordance with accounting standards.
DBE17 (By his Litigation Guardian Marie Theresa Arthur) v the Minister for Immigration and Border Protection	7 July 2017	Federal Court class action on behalf of individuals seeking asylum between 27 August 2011 and 7 July 2017 who were unlawfully detained by the Commonwealth Government.
Oakey Contamination Class Action	11 July 2017	Federal Court of Australia class action brought against the Department of Defence in relation to land contamination alleged to have occurred from the use of firefighting foam.
Susan Margaret Lloyd v Belconnen Lakeview Pty Ltd	14 August 2017	Federal Court class action against Belconnen Lakeview, which allegedly charged and collected GST on the sale of 352 units in Altitude Apartments when no GST was payable.
John Smith v Sandhurst Trustees Limited	28 August 2017	Federal Court class action against Sandhurst as trustee of the GR Finance Note Scheme, for failure to exercise reasonable diligence to determine whether GR Finance adhered to the terms of the trust deed and its obligations under the *Corporations Act 2001* (Cth).
Andrew John Wyma v Quintis Ltd	7 September 2017	Federal Court shareholder class action against Quintis, a sandalwood grower, for allegedly breaching its continuous disclosure obligations.
The Cosmetic Institute Class Action	14 September 2017	Supreme Court of New South Wales class action against The Cosmetic Institute (TCI) alleging that TCI was negligent during breast augmentation procedures.

Proceeding	Date Filed	Summary
Robert Michael Luke (In his Capacity as the Co-executor of the Estate of Robert Colin Luke, Deceased) & Anor v Aveo Group Limited	18 September 2017	Federal Court class action against the retirement village operator, Aveo Group Limited by current and former residents alleging that new management contracts depressed the resale value of the units in the Aveo retirement villages.
Allen Dodd, as trustee for the Dodd Superannuation Fund v Shine Corporate Ltd	27 September 2017	Supreme Court of Queensland shareholder class action against Shine Corporate Ltd, a listed law firm alleging misleading or deceptive conduct and breach of its continuous disclosure obligations.
Zonia Holdings Pty Ltd v Commonwealth Bank of Australia	9 October 2017	Federal Court shareholder class action against Commonwealth Bank of Australia alleging that failure to disclose alleged contraventions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to the Australian Securities Exchange amounted to misleading and deceptive conduct and a breach of its continuous disclosure obligations
Haselhurst v Toyota Motor Corporation Australia Limited	10 October 2017	Supreme Court of New South Wales class action on behalf of consumers who acquired in Australia a Toyota or Lexus motor vehicle fitted with an airbag manufactured or supplied by Takata Corporation, and which has been the subject of an airbag-related product safety recall.
NSW Ambulance Class Action	20 November 2017	Supreme Court of New South Wales class action on behalf of all ambulance employees and contractors whose sensitive health and personal information was the subject of a mass data breach in 2013. The statement of claim alleges breach of confidence, breach of contract, misleading and deceptive conduct and invasion of privacy.

CLASS ACTION SETTLEMENTS

Environment / Tort Claims

The Mikleham-Kilmore bushfire class action against AusNet, its contractor and the Hume City Council settled in February 2017 for $16 million inclusive of costs with no admission of liability. The class action claimed losses suffered as a result of a bushfire in Mickleham, Victoria, caused by a sugar gum tree falling on to power lines operated by AusNet. The class members alleged that AusNet was negligent, breached statutory duties and committed nuisance by failing to implement reasonable systems for the identification and removal of hazard trees in the vicinity of its overhead network. The settlement deed was substantially approved by the Victorian Supreme Court in August 2017 (*Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 474), except the amount for costs, which was set by the Court at $6.6 million in October 2017 (*Williams v AusNet Electricity Services Pty Ltd* [2017] VSC 619). The Mikleham-Kilmore bushfire class action is the second of AusNet's class action settlements arising out of the 2014 bushfires in Victoria and the fourth including the class actions brought for bushfires in 2009.

In August 2017, the plaintiff and the defendants settled a class action brought by property owners in Snake Valley, Victoria, claiming losses allegedly caused by the defendants' negligently starting a fire. The settlement, which was arrived at a mediation a month before the trial, was on a "walk away" basis with each party bearing the party's own costs. In October, the Victorian Supreme Court approved the settlement on the basis that it would also bind the registered class members (*Jackson v GP & JM Bruty Pty Ltd (Ruling No.2)* [2017] VSC 622).

Government Claims

A class action brought by former residents of a 'licensed residential centre' (now known as Assisted Boarding Houses) in regional New South Wales against the State of New South Wales and the licensed operators of the centre settled in August 2016, a month before a trial set down for more than three months. Licensed residential centres housed two or more people with additional needs and were subject to licensing, monitoring and enforcement powers by the State. The class action alleged several instances of negligence and breaches of statutory licensing conditions including from physical and psychological

abuse, improper retention of pension monies and failure adequately to supervise and look after residents, especially older and high care residents. Under the terms of the settlement approved in September 2016 by the Federal Court of Australia (for which reasons were published in February 2017), more than $7.05 million was to be paid to the class members (including an amount of some $3 million in legal costs) (*McAlister v State of New South Wales (No 2)* [2017] FCA 93).

In May and July 2017, the Manus Island class action was settled for $70 million subject to a rateable reduction if the number of class members participating in the settlement was fewer than 1,000, and costs (including an amount of $20 million for legal costs, which was to be paid separately from the $70 million). The class action was brought by the asylum seekers at the Manus Island Regional Processing Centre and claimed damages for negligence and false imprisonment against the Commonwealth Government and its contracted service providers. The Victorian Supreme Court approved the settlement in September 2017 (*Kamasaee v Commonwealth of Australia & Ors (Approval of settlement)* [2017] VSC 537).

Continuous Disclosure / Shareholder Claims

A shareholder class action brought against Tamaya Resources Limited, six of its directors and its auditors settled, in two rounds, in March and June 2016 (the latter on the first day of the trial) for a combined sum of $6.75 million (of which $3.4 million was to be paid as legal costs and some $707,622 in other higher ranking payments, including a project management fee to the litigation funder), to be paid without any admission of liability. The class action, which primarily related two capital raisings by the company, claimed that the company and its directors misrepresented the true value of the company's shares and the purpose of the capital raisings. The company's auditors were alleged to have made misrepresentations in its audits of the company. The Federal Court of Australia approved the settlements in June 2017 (*HFPS Pty Limited (Trustee) v Tamaya Resources Limited (in Liq) (No 3)* [2017] FCA 650).

In *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 a settlement of $40 million was achieved. However, to be deducted from that amount was $10.5 million in legal costs and $8.85 million in litigation funding fees. The court saw the recovery of $20.6 million "in hand" by the applicants and group members so that they obtained slightly more than 50 percent of the gross settlement as supporting approval of the settlement. Another perspective is that almost half of the recovery went in transaction costs.

A shareholder class action against Spotless Group Holdings Limited was voluntarily discontinued. The class action alleged contraventions of continuous disclosure obligations and misleading or deceptive conduct in relation to an undeclared change in accounting policy by the company. At an early case management conference, the company indicated that there had been no change in accounting policy and expressed its view that the claim was based on mistaken facts. The applicants' litigation funder subsequently withdrew support and the applicants applied to discontinue the proceeding. The Federal Court of Australia approved the application (which would not affect class members' right to bring further proceedings) in September 2017 with no order as to costs (*Simonetta v Spotless Group Holdings Limited* [2017] FCA 1071).

In December 2017, it was announced that the shareholder class action against QBE had settled for $132.5 million. The class action alleged that QBE had breached its continuous disclosure obligations, engaged in misleading or deceptive conduct in relation to its announcement in 2013 that it was not going to meet earlier profit and financial performance guidance and instead was expecting to incur significant write downs and post a loss of $250 million; QBE's share price had plummeted as a result. The settlement, which has not yet been approved by the Federal Court of Australia, would be the third-largest shareholder class action settlement in Australia to date, after the Centro and Aristocrat class actions in 2012 and 2008, respectively.

Financial Product Claims

In June 2017, the Federal Court of Australia published its reasons for approving the settlement in the Willmott Forests class actions (*Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689. This represented the second attempt to settle the four class actions that had been brought on behalf of investors in a forest plantation managed investment schemes against the Willmott Forests group, which operated the schemes, and financial institutions that provided loans to the investors. The total settlement amount ($4.5 million) was unchanged from the previous proposed settlement but the binding loan enforcement admissions in favour of the lenders by the class members, which were the subject of most controversy, were

removed and a further opt out opportunity was provided. A finding was also made in relation to the legal costs allowance.

In April 2016, a class action brought in the aftermath of the collapse of Banksia Securities Limited on behalf of 16,000 debenture-holders was partially settled. The class action, which was one among a number of proceedings arising out of the collapse, claimed the outstanding principal in the debentures against the company, its directors, its auditors and the trustee company for the debenture fund and others. The original damages claimed were $133 million but some 80 cents in the dollar had subsequently been received for the debenture-holders during a receivership. The class action (except insofar as it concerned the company and the trustee company) and a related action brought by the receivers were settled for a total of $13.25 million (of which $5.2 million was for the class action, out of which $858,000 and $2.55 million were to be paid to the litigation funder and for legal costs, respectively). The Victorian Supreme Court approved the settlement in August 2016 and gave its reasons in March 2017 (*Bolitho v Banksia Securities Limited (Receivers and Managers Appointed) (In Liquidation*) [2017] VSC 148). In December 2017, it was announced that the class action had been settled in relation to the trustee company for $64 million and certain releases. The settlement was approved by the Court on 30 January 2018. The class action technically remains outstanding as against Banksia Securities Limited.

In December 2017, it was announced that the class action brought against Sandhurst Trustees Limited arising out of the collapse of the Wickham group, had settled on undisclosed terms. The class action, which was brought on behalf of some 300 self-managed superannuation funds whose investments were managed by the Wickham group, alleged that a trustee acting properly would have detected that the Wickham group was operating a Ponzi scheme. The settlement is subject to approval by the Federal Court of Australia.

Consumer Claims

The Nurofen class action settled in July 2017 for $3.5 million (of which 20 percent would go to the litigation funder), reasonable legal costs and $515,419 to the insurer. The class action alleged contraventions of the misleading or deceptive conduct provisions of the Australian Consumer Law for the statements such as "FAST TARGETED RELIEF FROM PAIN" for four Nurofen-branded products, in circumstances where these products were no more or less effective than other Nurofen-branded products at relieving pain. The Federal Court approved the settlement in September 2017 (*Hardy v Reckitt Benckiser (Australia) Pty Limited (No 3)* [2017] FCA 1165).

Industrial Relations Claims

The applicants in a class action brought against Chubb Insurance Australia Limited on behalf of 39 individuals applied for court approval to discontinue the proceeding. The class action was brought alleging failure to pay minimum rates of pay, overtime and penalties as prescribed by the *Banking, Finance and Insurance Award 2010* (which governs employment conditions and entitlements for persons employed in the relevant industry). The application to discontinue was brought because the applicants could not secure litigation funding. The Federal Court of Australia approved the application, to which the respondent consented, (which would not affect any class member's right to bring further proceedings), with no order as to costs (*Tutton v Chubb Insurance Australia Limited* [2017] FCA 1113).

CLASS ACTION JUDGMENTS

While settlement is the main manner in which class actions resolve, 2017 also saw two important judgments in class actions.

In May and June 2017, judgments were entered against some of the defendants in the Sports Trading Club Class Action. The proceeding, which was brought by the plaintiff on behalf of himself and 153 class members in the NSW Supreme Court, alleged that the sports betting and trading scheme run by some of the defendants was fraudulent. Hammerschlag J gave an undisclosed judgment against the seventh and eighth defendants in May and Ball J gave judgment in favour of the plaintiff against the sixth, tenth and eleventh defendants in June in the amount of $7.9 million plus $1.8 million interest. Neither decision has been published. The proceeding against the balance of the defendants was set down for hearing in early 2018. The case is of interest as the class action was used to facilitate the recovery of funds lost through fraud.

In August 2017, Garling J of the Supreme Court of New South Wales delivered judgment in *Moore v Scenic Tours Pty Limited (No.2)* [2017] NSWSC 733. The lead plaintiff, Mr Moore, had paid for Scenic Tours to provide a European river cruise, but instead received bus-rides after the cruise's cancellation. The claimant group was described in the pleadings as persons who had

booked and paid for river cruises and acquired the services of Scenic Tours in Europe between May and June in 2013. Justice Garling found that Scenic Cruises had breached the statutory guarantees implied by the Australian Consumer Law to provide services with due skill and care, in a way that is reasonably fit for purpose, and that achieve the consumer's desired result. However, those aspects of Mr Moore's claim which relied on extra-territorial application of the *Civil Liability Act 2002* (NSW) failed, as Garling J was not satisfied that the words of that statute evinced an intention to extend to conduct abroad. Mr Moore was ultimately awarded $12,990 in damages, for both the loss of the value of his holiday and his disappointment and distress. After determining Mr Moore's liability, his Honour found that it would be appropriate for the parties to make submissions on how the common questions should be answered, and the matter has been relisted for case management in June 2018. Justice Garling's decision serves as a reminder that the Australian Consumer Law provides for causes of action in contract that are relatively untested in the class action environment and that may, in certain circumstances, lead to mass liability for companies engaged in trade or commerce.

REFERENCES TO LAW REFORM COMMISSIONS

Looking forward, 2018 may be the year of class actions law reform.

On 16 December 2016 the Victorian Law Reform Commission received a reference from the Victorian Attorney-General concerning access to justice by litigants who seek to enforce their rights using the services of litigation funders and/or through group proceedings (class actions). The VLRC issued a discussion paper in 2017 which raised a number of issues including:

- Regulation of legal costs, including whether to legalise contingency fees;
- Regulation of litigation funding;
- Certification of class actions; and
- Settlement of class actions.

The VLRC is due to report on 31 March 2018.

At the end of 2017 the Australian Law Reform Commission was also tasked with investigating the regulation of legal costs and litigation funding in class actions, conflicts of interest and class action settlement distributions. The ALRC is due to report by 21 December 2018.

LAWYER CONTACTS

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