



WHITE PAPER

August 2019

2018–2019 Australian Class Actions Review

This is Jones Day's fifth review of Australian class actions developments. The *White Paper* reviews the class actions that were commenced and settled in 2018–2019. The *White Paper* also examines the types of novel claims that may be commenced as class actions in the future. This analysis aims to assist readers in identifying both current and potential areas of risk for class actions.

The 2018–2019 *White Paper* also discusses the important topics of competing class actions, common fund applications, class action settlement practices and litigation funding fees.

TABLE OF CONTENTS

Class Actions Commenced in 2018–2019	1
Shareholder Class Actions	1
Claims Against Government	1
Personal Injury/Product Liability	1
Employment Law	1
Superannuation	2
Novel Class Actions on the Horizon	2
Climate Change	2
Privacy	3
Financial Services Industry Royal Commission	3
Further Royal Commissions	4
Return of Cartel Class Actions	4
Competing Class Actions	4
Common Fund Applications	5
Class Action Settlement Practices	6
Settlements and Judgments	6
Litigation Funding Fees	7
Law Reform Reports	8
Lawyer Contacts	9
Endnotes	9
Appendix 1—Class Actions Commenced in 2018	10
Appendix 2—Class Action Settlements in 2018	13

CLASS ACTIONS COMMENCED IN 2018–2019

Shareholder Class Actions

Shareholder class actions attracted the most attention in 2018, as their numbers continued to grow and the Australian Law Reform Commission (“ALRC”) put them under the microscope.

Shareholder claims, frequently through multiple class actions, were commenced against AMP, BHP, Brambles, Commonwealth Bank of Australia, Dick Smith, GetSwift, Quintis and Woolworths in 2018, relying on alleged contraventions of Australia’s continuous disclosure regime for listed corporations. Similar shareholder class actions were launched against Vocus Group and Lendlease in April 2019.

The ALRC found that for all finalized shareholder claims between 2013–2018, the median percentage of the settlement used to pay legal fees was 26%, and litigation funding fees was 23%. As a result, the median percentage of a settlement that was paid to group members was 51%.

The combination of shareholder class action frequency and the large transaction costs saw the ALRC recommend that the Australian government commission a review of the legal and economic impact of the operation, enforcement and effects of the continuous disclosure regime. However, this type of claim shows no sign of abating at present.

Claims Against Government

Class actions against various levels of government also continued to be pursued. This included a class action commenced in 2018 against the Department of Defence over firefighting foam used in Katherine in the Northern Territory. An earlier class action was commenced for contaminated soil and groundwater in and around Oakey in Queensland due to the use of firefighting chemicals. Similar claims in relation to other firefighting materials and methods employed elsewhere in Australia are expected to follow.

Class actions have also been brought over the charging of public hospital fees and losses due to delays in the construction of a light rail project in New South Wales.

Personal Injury/Product Liability

2018 saw three types of product liability or personal injury class actions commenced. Each is an example of a recognised category of class action that has been brought in the past.

A class action alleging negligence and breach of consumer guarantees against the manufacturer of medical implants for the purpose of treating pelvic organ prolapse and stress urinary incontinence was commenced in 2018. A similar case went to trial in 2017. Pharmaceutical and medical device class actions have been a feature of Australian class actions since the commencement of class actions legislation.

Takata airbags class actions continued to be filed in 2018, with seven carmakers now defendants in the Supreme Court of New South Wales. Faulty consumer products have also been a staple of the Australian class action environment. In addition, 2018 saw bushfire class actions against power companies persist. Since the Black Saturday bushfire class actions in Victoria resulted in record-breaking settlements, this type of class action has become more prevalent.

In February 2019, a product liability class action was commenced in the Federal Court of Australia in relation to combustible cladding. The Melbourne Lacrosse Tower fire in 2014 (liability for which was recently decided in *Lacrosse Tower Fire case: Owners Corporation No.1 PS613436T v LU Simon Builders Pty Ltd & Ors* [2019] VCAT 286) first highlighted the prevalence of the issue in Australia, and this class action was a likely progression. The class action was against Alucobond-branded polyethylene cladding manufacturers. However, further proceedings may be brought against manufacturers of other brands of combustible cladding.

Employment Law

Class actions alleging sham contracting, where an employer misrepresents an employment relationship as an independent contracting arrangement, are underway in the Federal Court. These cases are discussed in our *Commentary*, “[Australian Workplace Class Actions on the Rise](#)”.

A further class action was commenced in 2018 over the legal right of coal companies to use casual labour in their mines and seeks the recovery of alleged unpaid benefits.

Where findings are made that individuals who have been treated as independent contractors are actually employees, then class actions on behalf of similarly situated individuals may follow. The finding of the Fair Work Commission in *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836, that a delivery rider was an employee in an unfair dismissal case, may give rise to future class actions.

Superannuation

Slater and Gordon, as part of its “Get Your Super Back” campaign, filed a class action against the Commonwealth Bank and Colonial First State. It is alleged that Colonial First State invested the retirement savings of its members with its parent bank, the Commonwealth Bank, where it received uncompetitive bank interest rates. In doing this, it is alleged that Colonial First State, as a superannuation fund trustee, did not act in the best interests of its members. In 2019, Maurice Blackburn launched a class action against AMP claiming that fees on superannuation accounts had been incorrectly charged to customers.

A summary of all class actions filed in Australia in 2018 is set out in Appendix 1.

NOVEL CLASS ACTIONS ON THE HORIZON

The growth in the number of litigation funders and plaintiff law firms active in the Australian market has seen attention turn to the types of novel claims which may be commenced in the future.

Climate Change

A new wave of climate change litigation through securities law causes of action focussed on corporate disclosure requirements (including directors’ duties) has been identified as an area requiring the attention of Australian corporations and boards.

The possibility of such litigation is illustrated by Commonwealth Bank shareholders who commenced proceedings against the bank for failing to disclose climate change risks in its annual reports (*Abrahams v Commonwealth Bank of Australia*). The bank subsequently included an acknowledgement of climate change risks in its 2017 annual report, resulting in the discontinuation of the proceedings. Nonetheless, the case illustrates

how climate change litigation might be pursued as a shareholder class action.

There are a range of climate change risks that could impact corporate performance and share price which securities laws may require to be disclosed—for example, the risks of extreme weather conditions that damage infrastructure or access to a key input needed for the operation of the business. There are also political or regulatory risks where changes to laws and regulations in relation to the environment arguably should have been foreseen and guarded against. There may also be reputational risks that arise from not responding to environmental concerns. Indeed, the last year has seen growing pressure on companies from institutional investors, including superannuation funds, to minimise and offset their carbon footprint and provide transparency to investors of the environmental impact of operations. This trend of increased investor scrutiny is expected to continue.

Notably, in a recent landmark decision *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, the Chief Justice of the New South Wales Land and Environment Court ruled against the development of an open cut, 2.5 million tonne per year coking coal mine. One of the reasons cited for the decision was that the mine’s greenhouse gas emissions would be contrary to the urgent need for a significant decrease in such emissions in order for climate targets to be met. The Court’s recognition of the impact of the proposed mine on greenhouse gas emissions and, in turn, the ability to meet climate targets, is likely to have implications for future mining, resources and energy projects throughout Australia. Across a number of industries, climate change considerations will impact disclosure obligations with which corporations and officers are required to comply.

In addition to shareholder class actions based on nondisclosure, it is anticipated that a second type of climate change-related class action might also be brought in Australia whereby claimants seek damages for loss suffered as a result of alleged climate impacts caused by the conduct of the defendants. Indeed, in May 2019, a group of Torres Strait Islanders lodged a complaint with the United Nations Human Rights Committee against the Australian government. The group claims that climate inaction has resulted in rising seas, tidal surges and coastal erosion of the low-lying islands inhabited by the claimants. It is the first such legal action taken

by inhabitants of low-lying islands against a nation state. The prospective defendants to such actions include:

- Governments and public authorities which face public law actions arising from constitutional, human rights, administrative and planning laws for failing to address climate change or meet climate targets; and
- Companies in the mining, resources, energy, transport and manufacturing industries which are vulnerable to claims that they have caused or contributed to climate change through their carbon outputs.

Such actions will involve a number of challenges for claimants, including proof of causation and, in particular, attribution among multiple defendants.

Climate change litigation has been brought with varying degrees of success in a number of jurisdictions outside Australia, including in the Netherlands, the European Union and the United States. The most prominent of these cases is *Urgenda Foundation v Kingdom of the Netherlands* (2015), in which the Hague District Court held that the Dutch government owes a duty of care to its citizens to protect them from climate change under the European Convention on Human Rights. The Dutch government was ordered to reduce carbon emissions by at least 25% by 2020 (compared to 1990 levels). The decision was upheld by the Dutch Court of Appeal in late 2018. The trend of such litigation is on the rise.

Other claims which are likely to have a climate change aspect and are likely to become more common in the coming years involve the issue of water management. Over recent years, large parts of Australia have suffered devastating droughts and floods. There have been numerous claims and recriminations in the public arena as to who bears responsibility for those events and the management of water throughout the country.

In April 2019, the issue of multimillion-dollar water buy backs by the Federal government was referred to the Federal Auditor-General for investigation. In May 2019, a group of irrigators in southeastern Australia filed a class action in the Supreme Court of New South Wales claiming \$750 million in damages from the Murray-Darling Basin Authority, which is responsible for the management of the Murray-Darling river system. In the face of such claims and increasing calls for a Royal

Commission into the issue of water management, the circumstances appear to be ripe for further class action claims by farmers, agribusiness, landowners and local councils.

Privacy

Data breach class actions have been brought outside of Australia but have not yet been pursued in Australia. This is primarily due to the lack of a specific actionable right dealing with privacy and providing for compensation. Other causes of action such as breach of contract, negligence or contravention of consumer protection laws may be relied on. Even then, identifying and quantifying loss may be difficult.

However, a complaint against Facebook was lodged with the Office of the Australian Information Commissioner as part of preliminary steps to see if a class action was warranted. The complaint, which is related to the Cambridge Analytica scandal, alleges breaches of the Australian Privacy Principles in the *Privacy Act 1988* (Cth). The data of some 300,000 Australians is thought to have been used improperly.

A class action has also been filed in the Supreme Court of New South Wales against NSW Ambulance on behalf of ambulance employees and contractors whose sensitive health and personal information was the subject of a mass data breach in 2013. The claimants have alleged that NSW Ambulance is liable for breach of confidence, breach of contract, misleading and deceptive conduct and invasion of privacy as a result of its failure to protect adequately the personal records of its employees.

Data breach class actions are discussed in more detail in our *White Paper*, "[Data Breach Class Actions in Australia](#)".

Financial Services Industry Royal Commission

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was conducted throughout 2018, with the Commissioner's Final Report tabled in Parliament on 4 February 2019. A number of class actions in connection with the Financial Services Industry Royal Commission have been commenced already. Such actions include:

- Shareholder class actions for breach of continuous disclosure obligations. For example, in June 2018, a class action was filed against AMP Limited for its failure to

disclose to the market that it allegedly had knowingly charged clients fees for no service in various contexts, and that it misled the Australian corporate regulator, the Australian Securities and Investments Commission, or ASIC, in relation to such conduct.

- Consumer class actions brought on behalf of customers who suffered loss due to, for example, the alleged breach by financial institutions of responsible lending laws, or who were sold insurance policies that they were ineligible to claim under.

In addition to the above class actions, it is anticipated that less orthodox consumer class actions may be brought in connection with the Financial Services Industry Royal Commission by customers claiming to have suffered loss due to the lack of, or perceived deficiencies with, customer compensation and redress schemes put in place by relevant financial institutions.

Further Royal Commissions

More recently, Royal Commissions have been established into Aged Care Quality and Safety (in October 2018) and Violence, Abuse, Neglect and Exploitation of People with a Disability (in April 2019).

The public hearings and final reports relating to those Royal Commissions may well provide fertile ground for further class actions, including consumer class actions for negligent care, inadequate systems of safety and supervision and regulatory failures.

Return of Cartel Class Actions

Cartel class actions have not been commenced for a number of years due to their complexity, cost and inability of private plaintiffs to access documents from the Australian Competition and Consumer Commission (“ACCC”) containing protected cartel information.

However, there have been a number of developments which may reinvigorate cartel class actions. Section 83 of the *Competition and Consumer Act 2010* (Cth) previously allowed for the proving of a fact in subsequent litigation where there was a finding of fact by a court and was interpreted as applying only to a judgment. This section has been expanded to apply to an admission of any fact, which could include civil penalty settlements and criminal pleas of guilt. When this is coupled with the ACCC’s increased pursuit of criminal action

for cartel contraventions, then the possibility of follow-on compensation claims may increase.

In his 2019 Compliance and Enforcement Policy speech, the Chairman of the ACCC, Rod Sims, announced that the ACCC expected “to have two to three criminal cartel investigations come to conclusion and prosecutions commence each year”. Further, the Chairman announced that there would be a focus on: (i) the financial services sector following on from the Financial Services Industry Royal Commission; and (ii) the commercial construction sector. The more actions brought by the ACCC that lead to settlements or judgments, the greater the pool of possible class action claims.

In May 2019, a class action was filed in the Federal Court of Australia against five investment banks in relation to alleged illegal cartel conduct in the foreign exchange market. It is alleged that the conduct resulted in the manipulation of foreign exchange benchmark rates, the pricing of “spreads” and the triggering of stop loss and limit orders. The cartel has been the subject of class actions in the United States and Canada, resulting in the payment of US\$2.3 billion and C\$107 million respectively.

COMPETING CLASS ACTIONS

The Full Court of the Federal Court in the GetSwift shareholder class action appeal in 2018 (*Perera v GetSwift Limited* [2018] FCAFC 202) identified five “realistic options ... to deal with the potential overlap between competing class proceedings”.

1. Consolidating competing proceedings into a single class action, although reservations were expressed.
2. Staying (stopping) all class actions but one.
3. A joint trial of all proceedings, which the Full Court called the “wait and see” approach, as it effectively involves making no choice.
4. Altering the group definitions so that there was one open class and all other proceedings use closed classes. The open class includes all persons who meet the group definition regardless of whether they sign up with a lawyer and/or funder, but it excludes persons in a closed class. A closed class is limited to those group members who have signed up with the lawyer/funder running that particular class action.

5. A declassing order which has the effect that one or more class actions cannot continue as a class action. The Federal Court went on to doubt that a declassing order could be made to address competing class actions.

The choice between different approaches to competing class actions is treated as a procedural decision that requires an exercise of discretion by the judge. The Federal Court determined that the judge must decide the best way to deal with competing class actions, taking account of the particular circumstances of the case and weighing various considerations. The Federal Court concluded that “there can be no one right answer to such questions and different judges may weigh the relevant considerations differently”.

This multiple-choice approach to competing class actions plays out in practice. The GetSwift shareholder class actions were dealt with through the use of a stay. The court in the Diesel emissions product liability class action adopted the wait-and-see approach. The court in the Bellamy’s shareholder class action closed one class and let the other proceed as an open class. In May 2019, the Supreme Court of New South Wales addressed five competing class actions brought against AMP through consolidating two class actions, with the resulting action continuing, and staying the other three class actions.

The judiciary’s current approach to competing class actions is to permit a range of procedural options. The problem with this approach is that it creates uncertainty as to how claims will ultimately proceed. Further appeals in relation to competing class actions are expected in 2019, which may provide further guidance. However, it is unlikely that certainty will be achieved absent legislative reform.

COMMON FUND APPLICATIONS

The common fund is a court order that requires all group members to contribute to the litigation funder’s fee, regardless of whether they have signed a funding agreement, in return for the funder financing a class action. The Federal Court first affirmed its ability to grant a common fund order under s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (“FCAA”) in the 2016 decision of *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148 (“*Money Max*”). Since

the *Money Max* decision, class action litigants have been increasingly willing to make common fund applications.

Issues around the legality of the common fund order in Australia has continued to be topical in 2019 as a result of the historic joint hearing conducted before the Full Federal Court and the New South Wales Court of Appeal relating to two class actions:

- A proceeding in the Federal Court against Westpac pursuant to Part IVA of the FCAA in relation to allegations of the misselling of insurance policies (*Westpac Banking Corporation v Lenthall* [2019] FCAFC 34 (“Lenthall case”)).
- A proceeding in the Supreme Court of New South Wales against BMW Australia pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) for loss allegedly caused by the installation of faulty airbags in BMW vehicles (*Brewster v BMW Australia Ltd* [2019] NSWCA 35 (“Brewster case”)).

Although the two cases involved unrelated claims, the Chief Justice of the Federal Court, the Chief Justice of the New South Wales and the President of the Court of Appeal of New South Wales agreed that both matters would be heard jointly due to the considerable overlap in the issues. Both appeals gave rise to a question regarding the ability of the courts to make common fund orders. In the Lenthall case, the judge at first instance made a common fund order at the request of the applicant, which the respondent appealed to the Full Court of the Federal Court. In the Brewster case, the plaintiff sought a common fund order which the defendant opposed. The judge at first instance referred to the New South Wales Court of Appeal a separate question as to whether the court had power to make a common fund order.

In the separate decisions handed down on 1 March 2019, both the Full Court and the New South Wales Court of Appeal affirmed that the class action legislation provided courts with a power to make common fund orders. More specifically, the following conclusions were made:

1. Section 33ZF of the FCAA and s 183 of the *Civil Procedure Act 2005* (NSW) authorised the making of a common fund order. The text of both provisions permit the making of “any order the Court thinks appropriate or necessary to ensure that justice is done in the proceedings” and

a common fund order is permitted if the criteria in the legislation is met.

2. The making of a common fund order under s 33ZF and s 183 is a valid exercise of judicial power.
3. Neither of the provisions at issue could be characterised as an acquisition of property for the purposes of s 51(xxxi) of the Australian Constitution, thus the requirement to provide “just terms” does not apply. Rather they are concerned with the terms on which contested legal rights and liabilities in a matter are to be determined and enforced.
4. The Federal Court rejected the argument that the primary judge’s discretion in granting the common fund order had miscarried.

On 15 May 2019, the High Court granted the defendants in the Lenthall case and the Brewster case special leave to appeal against the decisions of the appeal courts arising from the joint sitting. The High Court’s ruling on this point has been highly anticipated since the *Money Max* decision and is expected to resolve the uncertainty around the ability of the courts to make common fund orders.

CLASS ACTION SETTLEMENT PRACTICES

A number of decisions of the Federal Court of Australia in 2018 saw the adoption or suggestion of law reforms that are resulting in significant changes to the mandatory approval process for class action settlements required under Part IVA of the FCAA. The reform topics are as follows:

- The application of the overarching purpose in the FCAA, which includes concerns about efficiency, to the powers under the class actions regime in Part IVA.
- The court’s assessment of legal costs, in particular how they may be assisted by the appointment of an independent referee, rather than a costs expert retained by the applicants’ lawyers.
- The appropriateness of appointing the applicants’ lawyers as administrators of a settlement distribution scheme.
- The basis upon which payments may be made to applicants in addition to the compensation they receive as group members.
- The court’s power to vary a funding agreement while simultaneously approving a settlement, which is discussed further below.

The aim of the reforms is to reduce the cost of class actions for group members and therefore ensure that class action proceedings are brought for the benefit of group members and not lawyers and litigation funders. These reforms are discussed in more detail in our *White Paper, “Australian Federal Court Reforms Class Actions Settlement Practice”*.

SETTLEMENTS AND JUDGMENTS

The class action settlements in 2018 are set out in Appendix 2. The largest settlement was \$215 million in *Liverpool City Council v McGraw-Hill Financial, Inc*, which covered six separate class actions. The class actions involved claims relating to the credit ratings assigned to financial products. The court provided a breakdown of the total value of the claim and the various costs that were deducted, including legal fees and funding fees.

Total Claims		
1.	Total principal damages claim	\$132,217,293.08
2.	Total interest claim	\$85,222,053.98
3.	Total costs estimated at mediation	\$20,783,851.15
4.	TOTAL CLAIM as estimated at mediation	\$238,223,198.21
Distribution of Settlement		
5.	Total amount payable under all Settlement Deeds	\$215,000,000.00
6.	Total legal costs (incl. anticipated costs of approval)	\$20,363,855.75
7.	Total amount payable to funder	\$92,031,922.99
8.	Estimated Representative Payments	\$140,000.00
9.	NET RECOVERY (after deductions but before scheme costs), i.e., item 5 – (items 6 + 7 + 8)	\$102,464,221.26
10.	Estimated Scheme Costs	\$342,281.50
11.	NET RECOVERY (after deductions but before scheme costs), i.e., item 5 – (items 6 + 7 + 8)	\$102,121,939.76
12.	PERCENTAGE RECOVERY OF TOTAL CLAIMS OF CLAIMANTS, i.e., item 11/item 4 x 100	42.87%

The settlement illustrates that large funding fees can redirect compensation payments to the financiers of class actions rather than to the claimants.

The QBE Insurance class action resulted in an in-principle settlement agreement on 28 December 2017 which was approved by the Federal Court on 4 May 2018. The class action against QBE was in relation to alleged contraventions of the continuous disclosure regime. This regime is the main source of shareholder class actions in Australia.

The QBE settlement of \$132.5 million illustrates the risk that shareholder class actions pose for Australian listed corporations. The QBE class action was the first time that a common fund approach to litigation funder's fees was permitted. The Full Court of the Federal Court made orders in November 2016 that, upon any successful settlement or judgment in the proceeding, the applicant and class members must pay a reasonable court-approved funding commission from any monies received, prior to distribution of those monies.¹ The Full Court's judgment is discussed in more detail in our *Commentary*, "[Game Changer: Appellate Court Permits Common Fund Orders in Australian Class Action Litigation](#)".

The advantage of the common fund to the litigation funder can be seen from the funder having contracted with 1,292 persons out of 2,501 registered class members. The common fund order allowed the funder to recover a funding fee from 1,209 persons who had not contractually agreed to pay a funding fee.

The QBE settlement approval provided the opportunity for the court to consider the funding commission. The court approved a funding commission of \$30.75 million, which represented 23.2% of the gross settlement of \$132.5 million (or 27.75% of the net settlement after deduction of \$21.8 million in approved legal costs). The court accepted that the funding commission was large but found that "the Funder took on substantial obligations and significant risks in agreeing to fund this large, complex and expensive proceeding, doing so at a time when the risks could not be accurately assessed and the outcome was far from certain".² Further, the 23.2% funding rate was lower than what had been contractually agreed with some group members, namely 32.5% or 35%. The fee was also seen

as consistent with other funding rates in the market at the time, although rates had subsequently fallen. Funding fees are discussed further below.

While class action judgments are not common, in *Roo Roofing Pty Ltd v The Commonwealth of Australia* [2019] VSC 331, the Federal government successfully defended a class action brought by plaintiffs claiming damages for losses said to arise out of the Home Insulation Program, which was a fiscal stimulus program implemented by the defendant early in 2009 in response to the global financial crisis. Evidence in the proceeding was given by former Prime Minister Rudd, former Finance Minister Tanner and Treasury Secretary Henry. Claims based on breach of contract, negligence and misleading conduct were unsuccessful.

LITIGATION FUNDING FEES

Previous Federal Court judgments have addressed the issue of whether litigation funding fees can be altered by the court, with reliance being placed on FCAA ss 33V(2) (if the court makes an order approving a settlement, "it may make such orders as are just with respect to the distribution of any money paid under a settlement") and 33ZF ("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").³

In *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511, Lee J expressed some concern about the amount of the settlement sum and the amount actually disbursed to group members. In doing so, his Honour raised the prospect of reducing the amount payable to the funder. His Honour resolved that this was not a necessary course to take, but noted that this might be an area of future reform.⁴

In *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289, Lee J accepted that in an appropriate case, the court may refuse to approve a settlement because a funding commission is excessive or disproportionate. However, after reviewing the heads of power, his Honour stated:

I very much doubt power does presently exist for the Court to interfere and vary funding agreements in the context of a settlement by altering the contractual promises of group members to pay commission, except where, because of individual circumstances, there is an established legal or equitable basis to interfere with those contractual rights.

In contrast, where a litigation funding fee is to be determined through the making of a common fund order, the funder's fee

is set by the court. For example in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland (No 3)* [2018] FCA 1842, Murphy J declined to award the funding fee of 25% that was sought and instead reduced the fee to 8.3%.

However, a power for the courts to review litigation funding fees would undeniably act as a protection for group members, especially those who lack bargaining power. Given this potential, an amendment to the FCAA to expressly grant the court power to review and set a litigation funder's fee may be required.

Table 1—Examples of Funding Fees in Class Action Settlements

No.	Case	Percentage of Gross Settlement in Funding Agreement or Requested	Percentage Approved by Court of Gross Settlement	Outcome
1.	<i>Liverpool City Council v McGraw-Hill</i> [2018] FCA 1289	Approximately 43%	Approximately 43%	Settlement approved
2.	<i>Botsman v Bolitho</i> [2018] VSCA 278	Approximately 40% of the plaintiff's part of the gross settlement	N/A	Remitted to lower court
3.	<i>Clarke v Sandhurst Trustees Ltd (No 2)</i> [2018] FCA 511	Entitled to 40% + management fees but requested for 30%	30%	Settlement approved
4.	<i>Petersen Superannuation Fund Pty Ltd v Bank of Queensland</i> [2018] FCA 1842	25%	8.3%	Fee reduced by the court
5.	<i>Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd</i> [2018] FCA 1030	23.2%	23.2%	Settlement approved
6.	<i>Hall v Slater & Gordon Ltd</i> [2018] FCA 2071	21.92%	21.92%	Settlement approved
7.	<i>Caason Investments Pty Ltd v Cao (No 2)</i> [2018] FCA 527	30%	30%	Common fund order granted

LAW REFORM REPORTS

2018 was the year of class action and litigation funding law reform recommendations. The Victorian Law Reform Commission received terms of reference in January 2017, issued a consultation paper in July 2017 and tabled its [final report](#) in the Victorian Parliament on 19 June 2018.

The Australian Law Reform Commission received terms of reference in December 2017. On 31 May 2018, the ALRC released a discussion paper. The [final report](#) was tabled in Parliament on 24 January 2019.

A summary and discussion of the main recommendations are set out in our *White Paper*, "[Australian Law Reform Commission Releases Class Action and Litigation Funding Report](#)".

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus.

John M. Emmerig

Sydney
+61.2.8272.0506
jemmerig@jonesday.com

Jennifer Chambers

Sydney
+61.2.8272.0706
jchambers@jonesday.com

Michael J. Legg

Sydney
+61.2.8272.0720
mlegg@jonesday.com

Law clerks Jessica Sidi and Vanessa West, and summer clerks Alexander Hagan and Sophie Rolph, all in the Sydney Office, assisted in the preparation of this White Paper.

ENDNOTES

- 1 *Money Max Int Pty Ltd v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148.
- 2 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2018] FCA 1030, [8].
- 3 See *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433; *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330, [101]; *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409, [26]-[32].
- 4 *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511, [11].

APPENDIX 1—CLASS ACTIONS COMMENCED IN 2018

No.	Proceeding	Date Filed	Summary
1.	Pelvic Mesh class action (<i>Jodie Philipsen v Amercian Medical Systems LLC</i>)	16 January 2018	Federal Court class action against American Medical Systems alleging negligence and breach of consumer guarantees in relation to medical implants manufactured by American Medical Systems for the purpose of treating pelvic organ prolapse and stress urinary incontinence. Application for international service granted.
2.	Dick Smith Holdings class actions (<i>Findlay v DSHE Holdings Ltd; Mastoris v DSHE Holdings Ltd</i>)	16 February 2018	NSW Supreme Court shareholder class action. Second class action (Mastoris Proceeding) filed against Dick Smith.
3.	GetSwift class actions (<i>Dwayne Cavan Shanahan Perera v GetSwift Ltd & Anor; Shaun McTaggart & Anor v GetSwift Ltd & Ors; Raffaele Webb v GetSwift Ltd & Anor</i>)	20 February 2018, 26 March 2018, 13 April 2018	Federal Court shareholder class action. Subject of three competing class actions. The Webb proceeding will proceed.
4.	7-Eleven class actions (<i>Pareshkumar Davaria & Anor v 7-Eleven Stores Pty Limited & Anor; Davaria Pty Ltd v 7-Eleven Stores Pty Ltd & Ors</i>)	20 February 2018	Two Federal Court class actions alleging breach of contract, unconscionable and misleading or deceptive conduct in relation to the sale of 7-Eleven franchises.
5.	<i>Joe Cachia v DPG Services Pty Ltd</i>	2 March 2018	NSW Supreme Court class action against a nursing home burnt down by an employee, alleging that its duty of care over the residents was breached. It is alleged that DPG Services is liable by reason of negligence, breach of contract and/or breach of the Australian Consumer Law.
6.	<i>Rachael Abbott v Zoetis Australia Pty Ltd</i>	16 March 2018	Federal Court class action against the manufacturers of a vaccine for horses, alleging that they breached the regulations granted under the Australian Pesticides and Veterinary Medicines Authority's "minor use permit" and misled horse owners and veterinarians about the side effects of the drugs.
7.	St Patrick's Day Bushfire class actions (<i>Francis v Powercor Australia Limited; Lenahan v Powercor Australia Limited; Hawker v Powercor Australia Limited; Block v Powercor Australia Limited</i>)	28 March 2018, 10 April 2018, 17 May 2018, 7 June 2018	Four Victorian Supreme Court class actions against an electricity supplier, Powercor, alleging breach of duty of care.
8.	<i>James Bonham as Trustee for Aucham Super Fund v Iluka Resources Ltd</i>	11 April 2018	Federal Court shareholder class action against Iluka alleging breaches of Iluka's continuous disclosure obligations and misleading and deceptive conduct in relation to disclosures Iluka made to the market. It is alleged that these disclosures misled the market and created false expectations as to its prospects.
9.	AMP Limited class actions	9 May 2018	Five competing NSW Supreme Court shareholder class actions after four class actions were transferred from the Federal Court to the NSW Supreme Court.
10.	<i>Geoffrey Peter Davis & Anor v Quintis Limited (Receivers And Managers Appointed) (Voluntary Administrators</i>	23 May 2018	One of a number of Federal Court shareholder class actions against Quintis. This action alleges that Quintis made misleading or deceptive representations regarding the company's financial position and performance in its Financial Reports for 2015 and 2016.
11.	BHP class actions	31 May 2018	Three competing Federal Court shareholder class actions filed following the Fundão tailings dam collapse in Brazil.

continued on next page

No.	Proceeding	Date Filed	Summary
12.	<i>Bolem Investments Pty Ltd v Settlers Investment Management Limited & Ors</i>	27 June 2018	Federal Court class action involving a failed managed investment scheme.
13.	<i>BHP Mount Arthur class action (Simon Alexander Turner v Tesa Mining (NSW) Pty Limited & Ors; Simon Alexander Turner v Ready Workforce (A Division Of Chandler Macleod) Pty Ltd & Ors)</i>	27 June 2018	Consolidated Federal Court class action against BHP-operated mines alleging breaches of employment law. It is alleged that the mine workers were hired as “casual” workers but were asked to work under the same conditions as permanent staff.
14.	<i>Philip Anthony Baron & Anor v Commonwealth Bank Of Australia</i>	29 June 2018	Federal Court shareholder class action against the Commonwealth Bank of Australia alleging that the bank breached its continuous disclosure obligations and engaged in misleading or deceptive conduct by failing to make disclosures to investors in relation to alleged widespread breaches of anti-money laundering and counter terrorism financing rules.
15.	<i>Matthew Hall v Pitcher Partners (A Firm)</i>	31 July 2018	Federal Court shareholder class action against Pitcher Partners alleging that it engaged in misleading and deceptive conduct. It is alleged that, as the auditor for Slater & Gordon during the relevant time, Pitcher Partners wrongly signed off on Slater & Gordon's 2015 Financial Report. It is alleged that the report was not prepared in accordance with relevant accounting standards and did not give an accurate view of the financial position of Slater & Gordon, thus misleading shareholders.
16.	Katherine contamination class action (<i>Kirsty Jane Bartlett & Anor v Commonwealth Of Australia</i>)	2 August 2018	Federal Court class action brought against the Department of Defence over firefighting foam used in Katherine, Northern Territory, which is alleged to have contaminated the soil and waterways.
17.	Brambles class actions (<i>Holly Southernwood v Brambles Limited; William Vincent Kidd and Mary Agnes Collum as Trustees for the Magness-Bennett Superannuation Fund v Brambles Limited</i>)	8 August 2018, 14 August 2018	Two Federal Court shareholder class actions against Brambles alleging that it breached its continuous disclosure and misled investors in relation to the profit downgrade announcements it released to the ASX in 2017.
18.	<i>Brett William Evans v Davantage Group Pty Ltd</i>	10 August 2018	Federal Court class action alleging misleading and deceptive conduct in the sale of extended car warranties.
19.	Murray Goulburn class action	18 August 2018	Federal Court shareholder class action against Murray Goulburn and its subsidiary alleging breaches of the continuous disclosure obligations and misleading or deceptive conduct in relation to disclosures it made to the market through a Product Disclosure Statement and three corrective disclosures. By engaging in the alleged conduct, it is alleged that Murray Goulburn caused the units issued by the Murray Goulburn Unit Trust to trade at a price significantly above their “true value”.
20.	Morris Property Group/Doma Group class action	24 August 2018	Federal Court class action against entities associated with the joint venture between Morris Property Group and Doma Group, seeking restitution of GST said to have been paid wrongly by first-home buyers in Canberra, damages for breach of contract and damages for alleged violations of the Australian Consumer Law.

continued on next page

No.	Proceeding	Date Filed	Summary
21.	<i>Fernandez v State of NSW</i>	27 August 2018	NSW Supreme Court class action against the State of NSW over particular public hospital fees, alleging unconscionable conduct and misleading or deceptive conduct under the Australian Consumer Law.
22.	<i>Rosa Maria Colagrossi v Transport for NSW</i>	28 August 2018	NSW Supreme Court class action against Transport for NSW claiming nuisance to businesses during delayed light rail construction.
23.	Woolworths class action	10 September 2018	Federal Court shareholder class action against Woolworths alleging breaches of its continuous disclosure obligations and misleading and deceptive conduct in relation to a profit downgrade announcement it released to the ASX in 2015.
24.	NAB and MLC credit card insurance class action	27 September 2018	Federal Court class action against NAB and MLC alleging that by selling insurance to card holders who were ineligible to claim under the terms of the policy, NAB and MLC engaged in unconscionable conduct in contravention of the <i>Australian Securities and Investment Commission Act 2001</i> (Cth).
25.	Colonial First State class action	10 October 2018	Federal Court class action against Colonial First State and the Commonwealth Bank claiming that Colonial First State invested the retirement savings of its members with its parent bank, the Commonwealth Bank, from which it is said to have received uncompetitive bank interest rates.
26.	Redland City Council class action	18 October 2018	Queensland Supreme Court class action by ratepayers of Redland City Council alleging that a canal maintenance levy the council imposed was contrary to the requirements of the Local Government Act.
27.	Takata Airbag class action	22 October 2018	NSW Supreme Court class action commenced against Volkswagen in NSW alleging the supply of defective vehicles in breach of the acceptable quality guarantee, unconscionable conduct and misleading or deceptive conduct under the Australian Consumer Law. This is the seventh class action pertaining to Takata airbags.
28.	RCR Tomlinson class action	16 November 2018	NSW Supreme Court shareholder class action against RCR Tomlinson alleging breaches of its continuous disclosure obligations and misleading and deceptive conduct in relation to its alleged failure to disclose operational issues relating to its solar farm projects. It is alleged that senior management was aware or should have been aware of the risks and issues within the company's solar project portfolio before the company went into voluntary administration.
29.	Tandem class action	21 November 2018	Federal court class action against a workforce management company, Tandem, alleging that subcontractors engaged by the company were legally entitled to be treated as employees.
30.	CoreStaff class action	28 November 2018	Federal Court class action against CoreStaff, a labour on-hire and recruitment company, alleging that it lured foreign workers to Australia with misleading job offers.
31.	NSW councils class action	3 December 2018	NSW Supreme Court class action against a multinational insurance broker, Jardine Lloyd Thompson Pty Ltd, on behalf of local councils across NSW, alleging those local councils have been paying excessive premiums on their insurance, in breach of the broker's contractual obligations and fiduciary duties.

APPENDIX 2—CLASS ACTION SETTLEMENTS IN 2018

No.	Class Action	Claim Type	Settlement
1.	<i>Caason Investments Pty Ltd v Cao (No 2)</i> [2018] FCA 527	Shareholder class action	\$19.25M (inclusive of legal costs of \$7.5M)
2.	<i>Lifepan Australia Friendly Society Limited v S&P Global Inc</i> [2018] FCA 379	Financial product claim	Confidential settlement sum (inclusive of legal costs of up to \$4.9M) Applicants' reimbursement of \$250,000 as part of the Settlement Distribution Scheme
3.	<i>Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd (2018)</i> [2018] FCA 1030	Shareholder class action	\$132.5M (inclusive of legal costs of \$21.8M and \$30.75M to the litigation funder, being 23.208% of the gross settlement)
4.	<i>Petersen Superannuation Fund Ltd v Bank of Queensland Limited (No 3)</i> [2018] FCA 1842	Investor class action	\$12M (inclusive of legal costs of \$2.7M and \$1M to the litigation funder) Note: Murphy J reduced amounts to be paid to funder and solicitor
5.	<i>Palm Island Riots (Wotton v State of Queensland (No 10))</i> [2018] FCA 915	Racial discrimination class action	\$30M (inclusive of legal costs of \$7M)
6.	<i>Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)</i> [2018] FCA 1289	Investor class action	\$215M (inclusive of legal costs of \$20M and \$92M to the litigation funder)
7.	<i>Hodges v Sandhurst Trustees Limited</i> [2018] FCA 1346	Investor class action	\$39M—\$28.1M for LKM Capital (inclusive of \$3.8M of legal costs and \$8.5M to the litigation funder) and \$11M for GR Finance Limited (inclusive of \$1.8M of legal costs and \$2.75M to the litigation funder)
8.	<i>Clarke v Sandhurst Trustees Ltd (No 2)</i> [2018] FCA 511	Breach of trust deed	\$16.85M (inclusive of legal costs of \$4.9M and \$5M to the litigation funder)
9.	<i>Banksia Securities Ltd (Recs and Mgrs Apptd) (In Liq) (No 2)</i> [2018] VSC 47	Investor class action	\$64M (inclusive of legal costs of \$4.75M and \$12.8M to the litigation funder)
10.	<i>Hopkins as Trustee of David Hopkins Super Fund v Macmahon Holdings Ltd</i> [2018] FCA 2061	Shareholder class action	\$6.7M (inclusive of legal costs of \$1.6M and \$1.4M to the litigation funder)
11.	<i>Santa Trade Concerns Pty Ltd v Robinson (No 2)</i> [2018] FCA 1491	Shareholder class action	\$3M (inclusive of legal costs of \$1.5M and \$0.5M to the litigation funder)
12.	<i>Dillon v RBS Group (Australia) Pty Ltd (No 2)</i> [2018] FCA 395	Investor class action	\$12.58M (inclusive of approximately \$5M of legal costs)
13.	<i>Hall v Slater and Gordon Ltd</i> [2018] FCA 2071	Shareholder class action	\$36.5M (inclusive of legal costs of \$4M and \$4.5M to the litigation funder)
14.	<i>Smith v Australian Executor Trustees Ltd; Creighton v Australian Executor Trustees Ltd (No 4)</i> [2018] NSWSC 1584	Investor class action	\$44.25M (inclusive of legal costs of \$5.27M and \$4.25M to the litigation funder in the Smith Proceeding and legal costs of \$12.8M in the Creighton Proceeding)

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.