

**AN EMPIRICAL STUDY OF AUSTRALIA'S CLASS
ACTION REGIMES**

FIFTH REPORT

***THE FIRST TWENTY-FIVE YEARS OF CLASS
ACTIONS IN AUSTRALIA***

By

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2. V Morabito and V Waye, "Seeing Past the US Bogey – Lessons from Australia on the Funding of Class Actions" (2017) 36 *Civil Justice Quarterly* 213-243.
3. V Waye and V Morabito, "When Pragmatism leads to unintended consequences: a Critique of Australia's unique closed class regime" (2017) 18 *Theoretical Inquiries in Law* (forthcoming).
4. V Morabito and J Ekstein, "Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study" (2016) 35 *Civil Justice Quarterly* 61-89.
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BOOK CHAPTERS

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2. V Waye and V Morabito, “Financial arrangements with litigation funders and law firms in Australian class actions” in WH van Boom, *Litigation, Costs, Funding and Behaviour – Implications for the Law* (Routledge; 2017) 155-200.

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CHAPTER 1

THE EVOLUTION OF CLASS ACTIONS OVER THE LAST 25 YEARS

As many commentators have noted, most recently in the context of the 25th anniversary of the commencement of the federal legislative class action regime, Australia's current class action landscape is fundamentally different from what was envisaged or expected by the drafters of this regime (the country's first class action regime) and by the members of the Australian Law Reform Commission that, in 1988, recommended a grouped proceeding regime for the Federal Court. But the following comments, made a couple of months ago by counsel for Ford Motor Company of Australia Ltd, during a hearing in the federal class action brought against this car manufacturer, shows that some things have remained the same over the last 25 years:

Class actions have had a very sorry history, it's fair to say ... We are saying let's this not be another disaster that goes on for several years and, in the end, achieves nothing for its members and only benefits the lawyers and funders.¹

If the reference to litigation funders is removed from the comments above, they bear some similarity to several comments that were made in 1991, when the Bill that contained the class action regime - Part IVA of the *Federal Court of Australia Act 1976* (Cth) - was debated in the Commonwealth Parliament, by members of the Opposition in outlining the likely impact of the proposed class action regime.

The data that I have collected so far, with respect to the allocation of class action settlement proceeds between class members, plaintiff solicitors and litigation funders, reveals the existence of a scenario that is somewhat different from that depicted by the comments outlined above.² But discovering differences, between the perceived operation of Australia's class action regimes and their actual operation, has been a regular occurrence during my empirical work over the last 10 years or so. The data collected in this report continues this "trend".

Before providing the latest data with respect to various important dimensions of Australia's class actions landscape, I provide a description of what *I regard as some of the most important and/or interesting class actions, developments, steps and/or events that have been witnessed in Australia over the last 25 years.* The italicised words in the preceding sentence serve the important purpose of drawing attention to the subjective and incomplete nature of this narrative.

¹ *Capic v Ford Motor Company of Australia Ltd ACN 004 116 223* (Transcript of Proceedings; 19 May 2017), p. 4 (Charles Scerri QC).

² See, for instance, V Morabito and V Waye, "Seeing Past the US Bogey – Lessons from Australia on the Funding of Class Actions" (2017) 36 *Civil Justice Quarterly* 213, 242 ("[t]he average proportion of settlement funds secured in funded Pt IVA proceedings, destined for class members, is approximately 58 per cent").

19 March 1986

A Private Member's Bill, the *Judiciary Amendment (Class Actions) Bill 1986* (Cth), was presented in the Senate by Senator David Vigor.³ It contained a class action regime that envisaged, among other things, an opt out regime, a certification device, a class action fund and a requirement that, where it was not possible to make payments to some of the class members, the class representative apply to the Court "for further directions of the money in court and shall serve on the Attorney-General a copy of that application".⁴

December 1988

The Australian Law Reform Commission's ("ALRC") report on grouped proceedings in the Federal Court was tabled in Parliament.⁵

11 December 1989

Senator Janine Haines, the then Leader of the Australian Democrats, adopted the ALRC's proposed legislation and introduced it in the Senate as a Private Member's Bill.⁶

12 September 1991

The *Federal Court of Australia Amendment Bill 1991* (Cth) was unveiled in the Senate. It contained a new Part IVA to be inserted into the *Federal Court of Australia Act 1976* (Cth). The Part IVA regime is substantially based on the recommendations put forward by the ALRC. The most significant departures from the model proposed by the ALRC are: (1) the rejection by the drafters of Part IVA of the authorisation of, and close judicial supervision over, no win - no fee agreements entered into by plaintiff solicitors and lead plaintiffs; (2) the rejection by the drafters of Part IVA of the establishment of a public fund for class actions; and (3) the adoption of an American class action model (with members of the groups of claimants not being formal parties to the litigation) whilst the ALRC recommended - strictly for constitutional reasons - a model pursuant to which all the claimants would be formal parties with respect to their own individual claims. The Bill was passed without any amendments despite numerous objections and amendments advanced by, among others, the Opposition.⁷

4 March 1992

The Part IVA regime came into operation.

17 June 1992

Australia's first class action was filed in the NSW Registry of the Federal Court on behalf of a group of borrowers and guarantors against the relevant lenders. This matter went all the way to the High Court. On 13 December 1996, Australia's highest court refused to

³ *Hansard*, Senate, 19 March 1996, p. 1198.

⁴ *Judiciary Amendment (Class Actions) Bill 1996* (Cth), cl 85J(4).

⁵ Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no 46; 1988).

⁶ See V Morabito, "Class Actions: The Right to Opt Out under Part IVA of the *Federal Court of Australia Act 1976* (Cth)" (1994) 19 *Melbourne University Law Review* 615, 617 n9.

⁷ See V Morabito, "Statutory Limitation Periods and the Traditional Representative Action Procedure" (2005) 5 *Oxford University Commonwealth Law Journal* 113, 139.

grant special leave to appeal from a judgment handed down by the Full Federal Court in this matter.⁸ Clearly a sign of things to come!

14 October 1992

The *Law and Justice Legislation Amendment Bill (No 4) 1992* (Cth) was tabled in the Senate. It added a new provision, section 43(1A), to the *Federal Court of Australia Act 1976* (Cth). This provision conferred on class members immunity from costs orders in Part IVA proceedings. The insertion of this provision has raised a number of challenging questions on matters such as (a) the liability of lead plaintiffs, who are appointed during the course of the class action, for the costs incurred in the litigation when they were class members;⁹ and (b) the extent to which class members can be excluded from the class action and/or from sharing the benefits of a successful class action if they fail to help the lead plaintiff in complying with security for costs orders.¹⁰

19 November 1992

The third Part IVA proceeding was filed in the NSW Registry of the Federal Court. It was brought against the Minister for Immigration and Ethnic Affairs on behalf of a group of applicants for recognition as refugees.¹¹ It was the first of a substantial number of class actions that have been filed over the last 25 years against Ministers, Governments, their agents and instrumentalities etc.¹²

1 March 1993

The extensive power of the Federal Court to order that a Part IVA proceeding no longer continue as a class action was exercised for the first time by Justice Hill in the second proceeding filed pursuant to Part IVA.¹³

9 July 1993

Australia's first shareholder class action was filed in the Queensland Registry of the Federal Court. It was dismissed for want of prosecution seven years later.¹⁴ The first success, with respect to a shareholder class action, was not witnessed until 26 August 2003 when Justice Moore of the Federal Court approved a \$112 million settlement in the class action brought by Maurice Blackburn on a no win - no fee basis against GIO Australia Holdings Ltd, one of its advisers and its directors.¹⁵

31 March 1994

⁸ See *Metcalfe v NZI Securities Australia Ltd S80/1996* [1996] HCA Trans 515 (13 December 1996).

⁹ See V Morabito, "Liability for Costs when Class Representatives Change in Australia's Federal Class Actions" (2015) 15 *Oxford University Commonwealth Law Journal* 1.

¹⁰ See V Morabito and N Hatcher, "Security for Costs in Unfunded Federal Class Actions - Back to the Future" (2017) 91 *Australian Law Journal* (forthcoming).

¹¹ See *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* [1994] FCA 926.

¹² The precise number will be revealed once a study of class action respondents in federal class actions, made possible thanks to the financial support of Herbert Smith Freehills, is completed.

¹³ *Soverina Pty Ltd v Natwest Australia Bank Limited* [1993] FCA 65; (1993) 40 FCR 452.

¹⁴ See *National Mutual Association of Australasia Ltd v Reynolds* [2000] FCA 267.

¹⁵ See *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980.

A class action was filed on behalf of Indigenous people who: (a) were serving sentences of imprisonment in NSW prisons; (b) were facing imprisonment in NSW prisons; or (c) had served sentences in NSW prisons. It was claimed that the NSW sentencing regime was discriminatory against Indigenous people. It was Australia's first class action filed on behalf of Indigenous people. It was dismissed for lack of jurisdiction.¹⁶

2 July 1994

Cashman & Partners filed a class action on behalf of the victims of faulty breast implants in the NSW Registry of the Federal Court.¹⁷ It was the country's first product liability class action. It was discontinued by the class representatives.

23 December 1994

Within three months, two class actions were filed in the NSW Registry of the Federal Court by different lawyers with respect to the involvement of thousands of NSW residents in the HomeFund housing loan scheme, "a scheme created by the New South Wales Government to provide home finance for persons who would not satisfy the criteria of ordinary lending institutions".¹⁸ This was the country's first instance of competing class actions.¹⁹ The proceedings were settled.²⁰

24 April 1996

The Australian Competition and Consumer Commission ("ACCC") filed a Part IVA proceeding on behalf of the clients of a foreign exchange trader. It secured damages for the class members of more than \$800,000.²¹ This was the first of a total of six Part IVA proceedings filed by the ACCC. In 1998 the ACCC was also on the receiving end of a Part IVA proceeding which was not allowed to proceed as a class action.²² For reasons which have not been publicly revealed, the ACCC has not availed itself of the Part IVA regime since April 2003.

9 July 1996

A class action was brought in the NSW Registry of the Federal Court on behalf of persons who suffered injury or illness as a consequence of eating peanut butter manufactured, supplied and/or distributed by Kraft Foods Pty Ltd.²³ It was the country's first class action filed with respect to harmful/contaminated food as well as the first class

¹⁶ See *Glass v New South Wales* [1994] FCA 1224.

¹⁷ NSD458/1994 *Bates v Dow Corning (Australia) Pty Ltd*.

¹⁸ *Woodlands v Permanent Trustee Co Ltd* (1995) 58 FCR 139, 142.

¹⁹ See V Morabito, "Clashing Classes Down Under - Evaluating Australia's Competing Class Actions through Empirical and Comparative Perspectives" (2012) 27 *Connecticut Journal of International Law* 245, 284-285.

²⁰ In B Slade and J Ekstein, "Class Actions and Social Justice: Achievements and Barriers" in D Grave and H Mould, *25 Years of Class Actions in Australia 1992 - 2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law; 2017) 281, 285 it was revealed that "it is estimated that decisions of the HomeFund Ombudsman's office, a dispute resolution distribution scheme that was set up in response to the HomeFund class actions, resulted in debt reductions of almost \$250 million".

²¹ *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250.

²² *Giraffe World Australia Pty Ltd v Australian Competition and Consumer Association* [1998] FCA 1560.

²³ VID393/1996 *Butler v Kraft Foods Pty Ltd*.

action filed by Slater & Gordon. In June 1997 the Federal Court approved a settlement agreement executed by the class representative and the respondent.

4 November 1996

The country's first cartel class action (which concerned pre-mixed concrete) was filed in the Queensland Registry of the Federal Court. The Court subsequently ordered its discontinuance as a class action.²⁴ The first success in a cartel class action did not occur until October 2006 when the Federal Court approved the settlement executed in the so-called vitamins class action, conducted by Maurice Blackburn on a no win - no fee basis.²⁵ The last of a total of only five cartel class actions was filed in September 2007. A unique aspect of this category of class actions is that all the successful class actions were conducted by just one law firm, Maurice Blackburn.

6 May 1997

A class action was filed in the NSW Registry of the Federal Court by Coleman & Greig on behalf a group of patients (and their parents and spouses) who underwent surgical procedures during a period of less than two months in a NSW hospital. It was subsequently discovered that the surgical instruments utilised in these procedures had not been properly sterilised. In this class action, compensation was sought for the mental or nervous shock suffered as a result of being put in peril by the respondent's neglect and default.²⁶ It was the first class action where all of the harm, with respect to which compensation was sought, was of a psychological or mental nature. Other class actions, where this type of harm was alleged to have been caused by the defendants/respondents, have included proceedings brought: (a) with respect to air crashes and incidents;²⁷ (b) on behalf of persons who were left hanging in mid-air for several hours following the collapse of a scenic chairlift;²⁸ and (c) on behalf of persons who recently sued the Victorian Building Authority with respect to defects in their properties at the Rangeview Estate in Diamond Creek, Victoria.²⁹

24 June 1997

Justice Wilcox of the Federal Court handed down a ruling largely in favour of a group of cattle owners in a class action filed in the NSW Registry with respect to financial losses they suffered when an insecticide called Halix was consumed by their cattle.³⁰ After this

²⁴ *Council for the City of the Gold Coast v Pioneer Concrete (Qld) Pty Ltd* [1998] FCA 791.

²⁵ *Darwalla Milling Co Pty Ltd v Hoffman-La Roche Ltd (No 2)* [2006] FCA 915.

²⁶ NSD347/1997 *Jakes v Hospital Corporation of Australia Pty Ltd*.

²⁷ See, for instance, *Lam v Rolls Royce PLC* [2013] NSWSC 805; and *Magnus v South Pacific Air Motive Pty Ltd* [2001] FCA 465.

²⁸ See V Morabito and J Ekstein, "Class Actions Filed for the Benefit of Vulnerable Persons – An Australian Study" (2016) 35 *Civil Justice Quarterly* 61, 86.

²⁹ See SCI 2017 02057 *Power Systems v Victorian Building Authority*, Statement of Claim, 22 May 2017, para 5(a): class members are defined to include "all those persons who suffered personal injury (whether physical injury, or psychiatric injury ...) as a result of the inaction of the VBA to ensure compliance measures".

³⁰ *McMullin v ICI Australia Operations Pty Ltd* (1997) 72 FCR 1.

judgment, “[o]nly about 20 court days were spent in resolving ... 499 damages claims, ultimately allowed at a total of nearly \$100 million”.³¹

June 1998

Under the leadership of Bernard Murphy (now Justice Murphy of the Federal Court), a class actions department was created in the Melbourne office of Maurice Blackburn. With the merger of Cashman & Partners with Maurice Blackburn in June 1999 the department began to operate from both the Melbourne and Sydney offices.

9 September 1999

In its first ruling on the procedural aspects of the Part IVA regime, the High Court construed in a fairly liberal manner Part IVA’s s 33C, the provision that sets out the three conditions that must be satisfied in order to avail oneself of this class action regime.³²

1 January 2000

The Supreme Court of Victoria added a new Order 18A to the *Supreme Court (General Civil Procedure) Rules 1996*. Order 18A contained a new class action regime largely based on Part IVA. In the first class action filed under this new regime, the validity of these rules was challenged. This challenge was rejected by a narrow majority (three to two) of Victoria’s Court of Appeal.³³ An application for special leave to appeal this decision was filed in the High Court. This step prompted the Victorian legislature to enact a legislative class action regime - Part 4A of the *Supreme Court Act 1986 (Vic)* - which was also based on Part IVA. This legislative regime was deemed to come into operation on 1 January 2000.

January 2000

The ALRC released a detailed review of the federal civil justice system. The ALRC concluded that Part IVA “appear[s] to be working well and in accordance with legislative intentions”.³⁴ At the same time, it made a number of recommendations, with respect to several dimensions of Part IVA such as closing the class devices, security for costs and competing class actions. None of these recommendations were implemented.

13 March 2000

In *Philip Morris (Australia) Ltd v Nixon*³⁵ the Full Federal Court explained why it agreed with the concession (inexplicably) made by counsel, for the class representatives in a class action filed on behalf of tobacco smokers, that where there are multiple respondents a Part IVA proceeding can only proceed if each class representative and each class

³¹ Hon Murray Wilcox AO QC, “Class Actions in Australia: Recollections of the Early Days” in D Grave and H Mould, *25 Years of Class Actions in Australia 1992 – 2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law; 2017) 5, 10.

³² *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255.

³³ *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* [2000] VSCA 103.

³⁴ Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System* (Report no 89; 2000), 530.

³⁵ [2000] FCA 229.

member makes a claim against each respondent. In September 2014, a different approach was (thankfully) adopted by a differently constituted Full Federal Court.³⁶

11 April 2000

A class action was filed in the Supreme Court of Victoria with respect to the discharge into the Ok Tedi and Fly Rivers in Papua New Guinea of ore-tailings, waste products and harmful substances emanating from the mining operations of Broken Hill Proprietary Co Ltd and Ok Tedi Mining Ltd at the Ok Tedi copper mine.³⁷ It was the first instance of a class action filed in an Australian court on behalf of non-Australian claimants with respect to events that took place outside Australia.

19 April 2000

The Full Federal Court unanimously rejected a constitutional challenge to the validity of Part IVA.³⁸

10 August 2000

In a class action filed in the NSW Registry of the Federal Court, the Application sought an order that “any remaining amount from payments mentioned in clause 5.5 the Attorney General make special ‘Cypres [sic] Order’ in favour of L’Amer-Aussies MRF (Multinational Refugees Foundation) Inc with a condition that such money be used only for the purposes and objectives of the Foundation”.³⁹ To my knowledge, this was the first time that pleadings in class actions expressly referred to cy-pres remedies although the order sought could not be regarded as a cy-pres remedy given that the payments in question were to be made by the class members! More recently, in the Nurofen class action, the amended pleadings sought an order that in the event that there was any money left in a fund - into which the respondent had paid an amount comprising the aggregate amount of damages awarded - “such money is [to] be paid to such organisation or body concerned with the relief of pain (such as the Australian Pain Relief Association or the Australian Pain Society) as may be nominated by the President of the Australian Medical Association and approved by the Court”.⁴⁰

October 2001

The *Migration Act 1958* (Cth) was amended to prohibit the employment of the Part IVA regime in proceedings concerning visas, deportations or removal of non-citizens.⁴¹

December 2001

A company in the IMF Bentham Ltd group agreed to provide financial support for the continued running of two existing Part IVA proceedings that had been filed in 1998 and

³⁶ *Cash Converters International Limited v Gray* [2014] FCAFC 111.

³⁷ See *Gagarimabu v Broken Hill Proprietary Company Limited* [2001] VSC 304.

³⁸ *Femcare Ltd v Bright* [2000] FCA 512.

³⁹ NSD869/2000 *Giraldo v Minister for Immigration and Multicultural Affairs*.

⁴⁰ NSD273/2016 *Hardy v Reckitt Benckiser (Australia) Pty Ltd*, Second Further Amended Originating Application, 4 April 2017.

⁴¹ *Migration Act 1958* (Cth), s 486B(4). For an empirical analysis of the justification provided by the Commonwealth Government for this drastic step, see Morabito and Ekstein, above n 28, 66-67.

2000 with respect to the so-called Waterfront industrial dispute. This was the first involvement of litigation funders in class action litigation anywhere in the world.

1 May 2002

The Victorian Government's decision to contract out psychiatric services from stand alone psychiatric hospitals into general hospitals and other community services led to the filing by Slater & Gordon of 19 class actions in the Victorian Registry of the Federal Court against Victorian hospitals on behalf of the relevant psychiatric nurses, seeking lost pay and conditions.⁴² This constitutes the largest number of class actions filed in Australia with respect to the same legal dispute. Next on this list are the 16 class actions filed in the Supreme Court of Victoria in 2010 and 2011 by Macpherson Kelley on behalf of investors in the Great Southern managed investment schemes.

26 June 2002

The High Court unanimously rejected a constitutional challenge to the validity of the Victorian Part 4A regime.⁴³

26 August 2003

As noted above, the GIO shareholder class action was the country's first successful shareholder class action. It was also the first class action settlement where a contradictor was appointed to assist the Court.⁴⁴ The GIO settlement was also, to my knowledge, the first class action settlement to authorise a cy-pres measure. It provided that some of the undistributed residue of the settlement fund could be paid to the Australian Shareholders' Association or the Australian Institute of Management (for the purposes of training its corporate officers and directors).⁴⁵ I am only in the early stages of an empirical study of provisions in class action settlement distribution schemes, or orders made after the judicial approval of class action settlements, that deal with the "destination" of the residue of settlement funds. But I have already discovered that in at least 18% of all settled class actions, the relevant agreements or orders envisaged the payment of the residue of the settlement fund to persons or entities other than the defendants/respondents including (in addition to the two organisations mentioned above) the class members, the Salvation Army, the Exodus Foundation, the Australian Thyroid Foundation, the Public Interest Advocacy Centre and the class representative's solicitors (for unpaid legal costs).

23 May 2006

The Federal Court approved the settlement agreement executed by the lead plaintiff with the remaining respondents in a class action filed on behalf of persons who purchased redeemable preference shares in the capital of Terranora Leisuretime Resort Management Limited.⁴⁶ It was filed on 25 August 1995. No other Australian class action has lasted as long as this class action.

⁴² See J Caruana and V Morabito, "Australian Unions – The Unknown Class Action Protagonists" (2011) 30 *Civil Justice Quarterly* 382, 389.

⁴³ *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

⁴⁴ See *King v AG Australia Holdings Ltd (formerly GIO Australia Holdings Ltd)* [2003] FCA 980.

⁴⁵ See V Morabito, "The Victorian Law Reform Commission's Class Action Reform Strategy" (2009) 32 *University of New South Wales Law Journal* 1055, 1069.

⁴⁶ *Milful v Terranora Lakes Country Club Ltd* [2006] FCA 801.

30 August 2006

The High Court held, by a majority, that the fact that the representative proceeding before the Court was funded by a commercial litigation funder, that exercised a significant level of control over the way the litigation was conducted, did not justify the conclusion that the litigation in question was contrary to public policy or an abuse of process.⁴⁷

18 December 2006

A class action was filed by Maurice Blackburn in the Victorian Registry of the Federal Court against Brookfield Multiplex Limited and Brookfield Multiplex Funds Management Limited.⁴⁸ The litigation was funded by 2117980 Ontario Inc and subsequently International Litigation Funding Partners Pte Ltd. This marked the first involvement in an Australian class action of overseas-based litigation funders.

15 October 2007

Australia's 250th class action was filed in the NSW Registry of the Federal Court.⁴⁹

18 December 2007

The Australian Securities & Investments Commission ("ASIC") filed a class action in the NSW Registry of the Federal Court on behalf of clients of a financial services business, conducted by Masu Financial Management Pty Ltd, who suffered losses as a result of following Masu's advice to invest in certain financial products issued by entities within the Western Group.⁵⁰ It was the first of a total of 10 class actions filed by ASIC. Despite achieving significant success in most of its class actions,⁵¹ ASIC has not filed a class action since October 2009. It was involved though in another federal class action filed in December 2014 but this time ... as a respondent.⁵²

21 December 2007

The Full Federal Court unanimously held that restricting the represented group in a class action to only those claimants who signed, at the outset of the litigation, a litigation funding agreement with the funders that supported the litigation and/or a fee and retainer agreement with the lead plaintiff's solicitors did not contravene any provisions of Part IVA.⁵³

May 2008

The Victorian Law Reform Commission ("VLRC") completed its detailed review of the Victorian civil justice system.⁵⁴ Some of its recommendations concerned class actions. The most ambitious of these recommendations was that the Supreme Court of Victoria

⁴⁷ *Campbells Cash & Carry Pty Ltd v Postif Pty Ltd* (2006) 229 CLR 386.

⁴⁸ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCA 1420, para 15 (per Moore J).

⁴⁹ NSD2050/2007 *Hanne v Village Life Ltd*.

⁵⁰ See *Stoyef v Masu Financial Management Pty Ltd* [2008] FCA 897.

⁵¹ See Morabito and Wayne, above n 2, 222.

⁵² *Lock v Australian Securities and Investments Commission* [2016] FCA 31.

⁵³ *Multiplex Funds Management Limited v P Dawson Nominees Pty Ltd* (2007) 244 ALR 600.

⁵⁴ Victorian Law Reform Commission, *Civil Justice Review* (Report no 14; 2008).

should be empowered to order cy-pres remedies where: (a) there has been a proven contravention of the law; (b) a financial or other pecuniary advantage has accrued to the person or entity contravening the law as a result of such contravention; (c) the loss suffered by others, or the pecuniary gain by the person contravening the law, is capable of reasonably accurate assessment; and (d) it is not possible, reasonably practicable or cost effective to identify some or all of those who have suffered the loss.⁵⁵ None of the recommendations that concerned or were relevant to class actions were implemented by the Victorian Government but, ironically, a couple of years later two of these recommendations were implemented by the NSW Government. Originally, the NSW Government expressed a desire to adopt the VLRC's cy-pres recommendation as well but following strong pressure from, among others, the business community the Bill that was presented in the NSW legislature did not include any provisions with respect to cy-pres remedies.

10 October 2008

For the first time ever, Maurice Blackburn and Slater & Gordon were not able to reach an agreement as to how to proceed with respect to the competing class actions that these leading firms had filed. When faced with this unprecedented scenario (in class actions filed against companies in the Centro Group), Justice Finkelstein of the Federal Court proposed a ground-breaking strategy, based on US class actions: establishing a litigation committee comprising some of the class members and holding a sealed-bid auction.⁵⁶ But the following month Justice Finkelstein recused himself. His Honour's unique proposals were not embraced by the "new" judge or by any of the parties. Indeed, to my knowledge, they have not been considered, let alone embraced, in any of the subsequent instances of competing class actions.

24 December 2008

A class action was filed in the Supreme Court of Victoria on behalf of the victims of bushfires in 2003 in Northern Victoria. This class action will be remembered for two reasons. First, it was the country's first class action brought on behalf of the victims of bushfires. Second, it was the country's first class action to be dismissed as an abuse of process. The abuse stemmed from the fact that the lead plaintiff in question knew nothing about being named as class representative until October 2010.⁵⁷

September 2009

The Access to Justice Taskforce of the Commonwealth Attorney-General's Department released a report which included a number of recommendations that were intended to enhance the ability of the Part IVA regime to deliver access to justice.⁵⁸ None of these recommendations were implemented by the Commonwealth Government.

20 October 2009

⁵⁵ Ibid 559-560 (recommendation 101).

⁵⁶ *Kirby v Centro Props Ltd* [2008] FCA 1505.

⁵⁷ See *Cohen v State of Victoria (No 2)* [2011] VSC 165.

⁵⁸ Commonwealth Attorney-General's Department, Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009), recommendation 8.11.

As a consequence of a decision handed down by a majority of the Full Federal Court in the Multiplex class action,⁵⁹ funded (and many unfunded) class actions were placed on hold because the arrangements that were employed to fund them probably constituted unregistered management investment schemes. The Commonwealth Government intervened to address this problem. It justified its intervention on the basis that it “supported class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes”.⁶⁰

July 2010

A practice note on Part IVA proceedings was released by the Federal Court. It was the country’s first practice note on class actions. The current federal practice note envisages, among other things, the use of case management judges in class actions.

4 March 2011

The Supreme Court of New South Wales became the country’s third superior court to have a legislative class action regime as a result of Part 10 of the *Civil Procedure Act 2005* (NSW) coming into operation. This regime, like the Victorian regime, is largely based on the federal regime.

16 March 2012

A class action was filed by Slater & Gordon in the Victorian Registry of the Federal Court on behalf of the employees and potential employees of Thiess Pty Ltd and Degremont Pty Ltd with respect to the alleged wrongful collection, use and disclosure by the respondents of confidential information relating to the employees in question. The proceeding was subsequently settled.⁶¹ It is the country’s first (and only) class action with respect to data security and inappropriate use of confidential data.

15 October 2012

A class action was filed by Shine Lawyers in the NSW Registry of the Federal Court on behalf of women who suffered injury from pelvic mesh implants.⁶² The continued use of these implants in Australia prompted Senator Derryn Hinch to say that “this is the biggest medical scandal for Australian women since thalidomide in the 1950s and 1960s”.⁶³

24 December 2012

A class action filed in the Supreme Court of Victoria, on behalf of holders of debentures in Banksia Securities Limited, was the first class action that saw the involvement of Mark

⁵⁹ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 (per Sundberg and Dowsett JJ).

⁶⁰ See Explanatory Statement to the *Corporations Amendment Regulation 2012* (No 6) (Cth), 1 as cited in Hon Justice Bernard Murphy and V Morabito, “The First 25 Years: Has the Class Action Regime Hit the Mark on Access to Justice?” in D Grave and H Mould, *25 Years of Class Actions in Australia 1992 – 2017* (Ross Parsons Centre of Commercial, Corporate and Taxation Law; 2017) 13, 18.

⁶¹ *Brannaghan v Thiess Pty Ltd and Degremont Pty Ltd trading as Thiess Degremont Joint Venture* [2013] FCA 790; and *Brannaghan v Australian Security and Investigations (Tas) Pty Ltd* [2015] FCA 415.

⁶² NSD1590/2012 *Davis v Ethicon Sarl*.

⁶³ See G McArthur, “Controversial implant approved by medicine watchdog accused butchering Australian women”, *Herald Sun*, 2 February 2017, p 7.

Elliott. As at 31 May 2017, Elliott was involved⁶⁴ in a total of 18 class actions. These 18 class actions have resulted in two settlements and a significant number of judgments.

14 June 2013

In three class actions brought on behalf of investors in the Willmott Forests forestry plantation schemes that failed, the Full Federal Court directed the trial judge to make security for costs orders in favour of the respondents despite knowing that the ordered security could only be furnished through contributions from class members.⁶⁵ As noted elsewhere, this decision has the potential to deny, in many cases, access to justice to similarly-situated claimants who have not been able to secure, or are not interested in securing, the support of a litigation funder.⁶⁶

12 August 2013

The Full Federal Court set aside the order made by the trial judge approving the settlement in one of the class actions filed by Levitt Robinson Solicitors on behalf of Storm Financial investors.⁶⁷ This was the first (and only) time that the intervention of an appellate court was sought, in Australia, to set aside the approval by the trial judge of a class action settlement. And the appeal was filed, not by an unhappy class member, but by ASIC instead.

7 February 2014

The Supreme Court of Victoria approved a \$89 million settlement secured in two class actions run on a no win - no fee basis by Gordon Legal, with the assistance of Slater & Gordon, on behalf of persons: (a) who were born in Australia and New Zealand between 1958 and 1970; (b) suffered since birth from a congenital malformation; and (c) whose mothers, while pregnant with them, consumed thalidomide drugs.⁶⁸ To my knowledge, this was (and still is) the largest settlement secured in class actions filed with respect to the harmful effects of prescribed drugs.

23 December 2014

The Supreme Court of Victoria approved the settlement of the first, and biggest, of the six class actions filed on behalf of the victims of the 2009 Victorian Black Saturday bushfires.⁶⁹ It was run by Maurice Blackburn on a no win - no fee basis. The settlement envisaged the payment of a sum, inclusive of costs, of just under \$500 million. It was (and still is) the country's largest class action settlement. The trial ran for almost 16 months.

⁶⁴ This involvement has entailed being the solicitor of the class representative or through the involvement (as class representative or litigation funder) of two companies that Elliott has an interest in.

⁶⁵ *Madgwick v Kelly* (2013) 212 FCR 1.

⁶⁶ See Murphy and Morabito, above n 60, 31-32; S Isaacharoff and T Eagles, "The Australian Alternative: A View from Abroad of Recent Developments in Securities Class Actions" (2015) 38 *University of New South Wales Law Journal* 179, 200; Slade and Ekstein, above n 20, 293-294; and Morabito and Hatcher, above n 10.

⁶⁷ *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89.

⁶⁸ See Morabito and Ekstein, above n 28, 79.

⁶⁹ *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663.

21 August 2015

The Supreme Court of NSW approved a \$24 million settlement in a class action brought by Slater & Gordon on behalf of persons who, as children, were allegedly physically and/or sexually assaulted whilst they were residents of the Fairbridge Farm School at Molong in regional NSW between 1937 and 1974.⁷⁰ It was reported in the media that this was the “largest payment for survivors of institutional child abuse in Australian legal history”.⁷¹

21 October 2015

The report of the Law Reform Commission of Western Australia on class action reform was tabled in the Western Australian Parliament. The Commission recommended the introduction of a class action regime for the Supreme Court of Western Australia based on Part IVA.⁷² When tabling this report, the Western Australian Attorney-General revealed the Government’s intention to implement this recommendation.⁷³ But, to date, no class action Bill has been brought before the Western Australian Parliament.

27 July 2016

The High Court found in favour of Australia and New Zealand Banking Group Limited in one of the 11 so-called bank fees class actions filed by Maurice Blackburn.⁷⁴ As a result, what promised to be a very profitable new category of class actions - which would have extended well beyond the banking sector - was brought to an abrupt end.

26 October 2016

The Full Federal Court unanimously endorsed the employment of a common fund doctrine in federal class actions pursuant to which litigation funders are able, in the early stages of the litigation, to seek judicial approval of their funding agreements.⁷⁵ The practical effect of a common fund order is to render these agreements binding on all members of the represented group and not simply those who have executed the agreements.

9 November 2016

The High Court handed down a judgment, in *Timbercorp Finance Pty Ltd (in liquidation) v Collins*,⁷⁶ which increased significantly the anxiety levels of class action defendants and their legal representatives. In fact, the Court held that class members - who had not opted out of an unsuccessful class action and who had not attempted to persuade the Court to include these individual defences within the matters that were to be canvassed in the class action trial - could rely on these defences in subsequent recovery proceedings brought against them.

⁷⁰ [2014] NSWSC 83, para 11 (per Garling J).

⁷¹ R Browne, “These kids, they went through hell”, *The Age*, 30 June 2015, p 13.

⁷² Law Reform Commission of Western Australia, *Representative Proceedings* (Project 103 – Final Report), 59-61.

⁷³ Western Australia, *Parliamentary Debates*, Legislative Council, 21 October 2015, p 7658 (M Mischin – Attorney-General).

⁷⁴ *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28.

⁷⁵ *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148.

⁷⁶ [2016] HCA 44.

28 November 2016

Justice Murphy of the Federal Court held that if, in reviewing a proposed class action settlement, “the Court considers the proposed settlement is fair and reasonable except that the funding commission is excessive or exorbitant, the Court has power to approve the settlement and reduce the funding commission to be deducted pursuant to the terms of the settlement”.⁷⁷ This was the first clear judicial recognition of the existence of this power.

1 December 2016

The Federal Court approved a \$250 million settlement agreement executed by the parties to a class action run by Maurice Blackburn and Shine Lawyers on a no win - no fee basis with respect to defective hip implants.⁷⁸ This is the country’s third biggest class action settlement and the biggest settlement in federal class actions and product liability class actions.

5 December 2016

Justice Mortimer of the Federal Court ruled in favour of the class representatives, and awarded damages to them, in a class action brought by Levitt Robinson Solicitors in which it was claimed that the conduct of certain officers of the Queensland Police Service, towards people who were ordinarily resident on Palm Island in November 2004, constituted unlawful racial discrimination.⁷⁹ This judgment constitutes the first major success in a class action filed on behalf of Indigenous people.⁸⁰

16 December 2016

The Federal Court approved a settlement agreement, believed to be worth more than \$100 million, in a class action filed on behalf of intellectually disabled workers who claimed that they had been underpaid by the Commonwealth Government.⁸¹ It is the biggest settlement fund secured in class actions filed on behalf of persons with an intellectual disability.⁸²

1 March 2017

From this day class actions were permitted in the Supreme Court of Queensland through a legislative regime substantially based on the federal regime. It is fascinating to note that, unlike the reasoning that had been advanced in favour of the federal, Victorian and NSW regimes, the justification for this Queensland regime focused more on the need to ensure that the legal profession in Queensland did not lose, to lawyers in Victoria and

⁷⁷ *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433, para 157 (per Murphy J).

⁷⁸ *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452.

⁷⁹ *Wotton v State of Queensland (No 5)* [2017] FCA 1457.

⁸⁰ See also *Eatock v Bolt* [2011] FCA 1103; and *Eatock v Bolt (No 2)* [2011] FCA 1180.

⁸¹ *Duval-Comrie v Commonwealth of Australia* [2016] FCA 1523.

⁸² See also *McAlister v State of New South Wales (No 2)* [2017] FCA 93 and Morabito and Ekstein, above n28, 70 (a \$4.05 million fund was secured in a Part IVA proceeding brought on behalf of 50 persons with intellectual disabilities and psychiatric impairments who were residents of a licensed residential care facility and who claimed that over a period of 10 years they were, among other things, physically assaulted).

NSW, litigation work relating to disputes in Queensland than about the need to secure access to justice and judicial economy.

2 March 2017

Australia's 500th class action was filed in the NSW Registry of the Federal Court.⁸³

20 April 2017

In the already-mentioned Palm Island class action against the State of Queensland, Justice Mortimer made an order which, for the first time in federal class actions, embraced an online social media network as the main vehicle for contacting and communicating with class members.⁸⁴ Daniel Meyerowitz-Katz, from Levitt Robinson Solicitors, has advised me that, to the best of his knowledge, this is also the first class action notice that has been designed by a professional designer or has been drafted with the assistance of an expert socio-linguistic.

⁸³ NSD297/2017 *Turner v MyBudget Pty Ltd*.

⁸⁴ *Wotton v State of Queensland (No 7)* [2017] FCA 406. With respect to State class actions, see *Matthews v SPI Electricity and SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 13)* (2013) VR 255; [2013] VSC 17; *Amom v State of NSW* (2011/187125; Supreme Court of NSW; 12 September 2014), Order 7(e); and Morabito and Ekstein, above n 28, 72.

CHAPTER 2

VOLUME OF CLASS ACTION LITIGATION IN AUSTRALIA

I. NUMBER OF CLASS ACTIONS AS AT 3 MARCH 2017

As in previous empirical reports, I provide (in this chapter) data with respect to the annual filings of class actions starting from 4 March 1992, the commencement date of the federal regime. But in order to provide data which is as current as possible, in the remainder of the report I provide data with respect to class actions filed on or before 31 May 2017 and, in relation to the phenomenon of competing class actions, data on class actions filed on or before 30 June 2017.

I have identified a total of 500 class actions filed on or before 3 March 2017. This constitutes an average of 20 class actions every 12 months since 4 March 1992. These class actions may be divided as follows with respect to the Federal Court, the Supreme Court of Victoria and the Supreme Court of New South Wales:

- Federal class actions 395 (79%)
- Victorian class actions 80 (16%)
- NSW class actions 25 (5%)
- Queensland class actions 0 (0%)

The next three tables divide this data into 25 periods of 12 months each starting from 4 March 1992 with respect to all the Australian class actions, federal class actions and State class actions that were filed during this period.

Table 1 - All Australian class actions

Year	Number of class actions filed in Australia
Year 1 (from 4/3/1992 to 3/3/1993)	8
Year 2 (from 4/3/1993 to 3/3/1994)	7
Year 3 (from 4/3/1994 to 3/3/1995)	14
Year 4 (from 4/3/1995 to 3/3/1996)	7
Year 5 (from 4/3/1996 to 3/3/1997)	11
Year 6 (from 4/3/1997 to 3/3/1998)	19
Year 7 (from 4/3/1998 to 3/3/1999)	31
Year 8 (from 4/3/1999 to 3/3/2000)	28
Year 9 (from 4/3/2000 to 3/3/2001)	20
Year 10 (from 4/3/2001 to 3/3/2002)	13
Year 11 (from 4/3/2002 to 3/3/2003)	33
Year 12 (from 4/3/2003 to 3/3/2004)	15
Year 13 (from 4/3/2004 to 3/3/2005)	10

Year 14 (from 4/3/2005 to 3/3/2006)	7
Year 15 (from 4/3/2006 to 3/3/2007)	7
Year 16 (from 4/3/2007 to 3/3/2008)	26
Year 17 (from 4/3/2008 to 3/3/2009)	19
Year 18 (from 4/3/2009 to 3/3/2010)	17
Year 19 (from 4/3/2010 to 3/3/2011)	25
Year 20 (from 4/3/2011 to 3/3/2012)	29
Year 21 (from 4/3/2012 to 3/3/2013)	24
Year 22 (from 4/3/2013 to 3/3/2014)	24
Year 23 (from 4/3/2014 to 3/3/2015)	38
Year 24 (from 4/3/2015 to 3/3/2016)	38
Year 25 (from 4/3/2016 to 3/3/2017)	30
Total	500

A decrease in the total number of class actions in the March 2016 - March 2017 period should be noted together with the fact that the total number of class actions filed in that period (30) was less than the total number of class actions filed in the March 1998 - March 1999 period; a period when commercial litigation funders were not involved in class actions and when the Federal Court was the only Australian court with a class action regime.

Given that, as revealed below, I identified the filing of 13 class actions in the period from 4 March 2017 to 31 May 2017, it is reasonable to expect that in the remaining nine months more than 17 class actions will be filed; thus, taking the overall number of Australian class actions for the March 2017 - March 2018 period above 30.

Table 2 – Federal class actions

Year	Number of federal class actions filed
Year 1 (from 4/3/1992 to 3/3/1993)	8
Year 2 (from 4/3/1993 to 3/3/1994)	7
Year 3 (from 4/3/1994 to 3/3/1995)	14
Year 4 (from 4/3/1995 to 3/3/1996)	7
Year 5 (from 4/3/1996 to 3/3/1997)	11
Year 6 (from 4/3/1997 to 3/3/1998)	19
Year 7 (from 4/3/1998 to 3/3/1999)	31
Year 8 (from 4/3/1999 to 3/3/2000)	27
Year 9 (from 4/3/2000 to 3/3/2001)	16
Year 10 (from 4/3/2001 to 3/3/2002)	10
Year 11 (from 4/3/2002 to 3/3/2003)	30
Year 12 (from 4/3/2003 to 3/3/2004)	9
Year 13 (from 4/3/2004 to 3/3/2005)	8
Year 14 (from 4/3/2005 to 3/3/2006)	4
Year 15 (from 4/3/2006 to 3/3/2007)	7

Year 16 (from 4/3/2007 to 3/3/2008)	26
Year 17 (from 4/3/2008 to 3/3/2009)	16
Year 18 (from 4/3/2009 to 3/3/2010)	13
Year 19 (from 4/3/2010 to 3/3/2011)	19
Year 20 (from 4/3/2011 to 3/3/2012)	11
Year 21 (from 4/3/2012 to 3/3/2013)	18
Year 22 (from 4/3/2013 to 3/3/2014)	19
Year 23 (from 4/3/2014 to 3/3/2015)	20
Year 24 (from 4/3/2015 to 3/3/2016)	20
Year 25 (from 4/3/2016 to 3/3/2017)	25
Total	395

Table 3 – Class actions in Victoria, NSW and Queensland combined

Year	Number of State class actions filed
Year 8 (from 4/3/1999 to 3/3/2000) ⁸⁵	1
Year 9 (from 4/3/2000 to 3/3/2001)	4
Year 10 (from 4/3/2001 to 3/3/2002)	3
Year 11 (from 4/3/2002 to 3/3/2003)	3
Year 12 (from 4/3/2003 to 3/3/2004)	6
Year 13 (from 4/3/2004 to 3/3/2005)	2
Year 14 (from 4/3/2005 to 3/3/2006)	3
Year 15 (from 4/3/2006 to 3/3/2007)	0
Year 16 (from 4/3/2007 to 3/3/2008)	0
Year 17 (from 4/3/2008 to 3/3/2009)	3
Year 18 (from 4/3/2009 to 3/3/2010)	4
Year 19 (from 4/3/2010 to 3/3/2011)	6
Year 20 (from 4/3/2011 to 3/3/2012)	18
Year 21 (from 4/3/2012 to 3/3/2013)	6
Year 22 (from 4/3/2013 to 3/3/2014)	5
Year 23 (from 4/3/2014 to 3/3/2015)	18
Year 24 (from 4/3/2015 to 3/3/2016)	18
Year 25 (from 4/3/2016 to 3/3/2017)	5
Total	105

II. NUMBER OF CLASS ACTIONS AS AT 31 MAY 2017

As at 31 May 2017, I identified the filing of 513 class actions:

- Federal class actions 402 (78%)
- Victorian class actions 82 (16%)
- NSW class actions 27 (5.2%)

⁸⁵ It will be recalled that class actions became available in Victoria, Australia's first State class action jurisdiction, in 2000.

- Queensland class actions 2 (0.3%)

These 513 class actions were brought with respect to a total of 335 legal disputes. This means that, on average, only 13 legal disputes have led to class action litigation every year. Data with respect to these 513 class actions are presented below in periods of five years each starting from 1 June 1992:

- First period = 1 June 1992 - 31 May 1997.
- Second period = 1 June 1997 - 31 May 2002.
- Third period = 1 June 2002 - 31 May 2007.
- Fourth period = 1 June 2007 - 31 May 2012.
- Fifth period = 1 June 2012 - 31 May 2017.

First period

- Federal class actions 53
- Total number of class actions **53**
- Average number per year 10.6

Second period

- Federal class actions 105
- Victorian class actions 9
- Total number of class actions **114**
- Average number per year 22.8

Third period

- Federal class actions 64
- Victorian class actions 13
- Total number of class actions **77**
- Average number per year 15.4

Fourth period

- Federal class actions 77
- Victorian class actions 30
- NSW class actions 2
- Total number of class actions **109**
- Average number per year 21.8

Fifth period

- Federal class actions 103
- Victorian class actions 30
- NSW class actions 25
- Queensland class actions 2
- Total number of class actions **160**
- Average number per year 32

III. AUSTRALIA'S LEADING CLASS ACTION JURISDICTION

In Table 4 I provide data with respect to the registries of the Federal Court in which Part IVA proceedings have been filed while in Table 5 I add to this data the number of class actions filed in the Victorian, NSW and Queensland Supreme Courts to determine the country's leading class action jurisdiction.

Table 4 – Part IVA Proceedings filed in each registry of the Federal Court

Registry of the Federal Court	Number of Part IVA proceedings filed
New South Wales	202 (50.2%)
Victoria	133 (33%)
Queensland	30 (7.4%)
Western Australia	15 (3.7%)
South Australia	10 (2.4%)
Australian Capital Territory	7 (1.7%)
Northern Territory	4 (0.9%)
Tasmania	1 (0.2%)
Total	402

We see from Table 5 below that combining data from the registries in which federal class actions were filed with data from State class action regimes does not result in Victoria taking the top spot despite the fact that the Victorian regime came into operation 11 years before the NSW regime.

Table 5 – Federal and State class actions combined

States and Territories	Number of class actions filed
New South Wales	229 (44.6%)
Victoria	215 (41.9%)
Queensland	32 (6.2%)
Western Australia	15 (2.9%)
South Australia	10 (1.9%)
Australian Capital Territory	7 (1.3%)
Northern Territory	4 (0.7%)
Tasmania	1 (0.1%)
Total	513

CHAPTER 3

SUBSTANTIVE CLAIMS AND AVERAGE DURATION OF SETTLED CLASS ACTIONS

I. TYPES OF CLAIMS PURSUED IN CLASS ACTIONS

The next two tables provide statistics with respect to the types of substantive claims that have been pursued in Australian courts from 1 June 1992 to 31 May 2017.

Table 6 – Substantive claims advanced in class actions filed from 1 June 1992 to 31 May 2017

Types of claims	Number of class actions
Claims by investors	99 (19.2%) : [Fed = 69] [State = 30]
Claims by shareholders	81 (15.7%) : [Fed = 66] [State = 15]
Product liability claims	70 (13.6%) : [Fed = 60] [State = 10]
Claims by employees	56 (10.9%) : [Fed = 55] [State = 1]
Mass tort claims	54 (10.5%) : [Fed = 15] [State = 39]
Consumer protection claims	47 (9.1%) : [Fed = 39] [State = 8]
Claims by persons wishing to reside in Australia	34 (6.6%) : [Fed = 31] [State = 3]
Claims by real estate owners	15 (2.9%) : [Fed = 13] [State = 2]
Claims by franchisees, agents &/or distributors	13 (2.5%) : [Fed = 13] [State = 0]
Miscellaneous claims	11 (2.1%) : [Fed = 10] [State = 1]
Claims by borrowers &/or guarantors	10 (1.9%) : [Fed = 8] [State = 2]
Claims by lessees	6 (1.1%) : [Fed = 6] [State = 0]
Claims by alleged victims of racial discrimination in non-migration proceedings	6 (1.1%) : [Fed = 6] [State = 0]
Claims by alleged victims of cartels	5 (0.9%) : [Fed = 5] [State = 0]
Claims by native title holders	3 (0.5%) : [Fed = 3] [State = 0]
Claims by taxpayers	3 (0.5%) : [Fed = 3] [State = 0]
Total	513 [Fed = 402] [State = 111]

It is not surprising to see that the top six categories of class actions in Australia encompass claims by investors, shareholders, users of products and employees and mass tort and consumer protection claims.

Another interesting matter that emerges from the data set out above is the fact that mass tort class actions constitute the only category of class actions where the State regimes dominate over the federal regime. This reflects, to some extent, the fact that many of

these types of claims, such as proceedings filed on behalf of victims of bushfires, have usually been filed in State courts.

The next table divides the data with respect to substantive claims into two halves: the first half covers the period from 1 June 1992 to 30 November 2004 whilst the second half encompasses the period from 1 December 2004 to 31 May 2017.

Table 7 – Substantive claims advanced in class actions filed from 1 June 1992 to 31 May 2017 divided into two periods of 12 and a half years each

Types of claims	Number of class actions
Claims by investors	99 [First half = 15 (7%)] [Second half = 84 (28%)]
Claims by shareholders	81 [First half = 11 (5.1%)] [Second half = 70 (23.4%)]
Product liability claims	70 [First half = 48 (22.4%)] [Second half = 22 (7.3%)]
Claims by employees	56 [First half = 45 (21%)] [Second half = 11 (3.6%)]
Mass tort claims	54 [First half = 15 (7%)] [Second half = 39 (13%)]
Consumer protection claims	47 [First half = 14 (6.5%)] [Second half = 33 (11%)]
Claims by persons wishing to reside in Australia	34 [First half = 30 (14%)] [Second half = 4 (1.3%)]
Claims by real estate owners	15 [First half = 6 (2.8%)] [Second half = 9 (3%)]
Claims by franchisees, agents &/or distributors	13 [First half = 6 (2.8%)] [Second half = 7 (2.3%)]
Miscellaneous claims	11 [First half = 7 (3.2%)] [Second half = 4 (1.3%)]
Claims by borrowers &/or guarantors	10 [First half = 7 (3.2%)] [Second half = 3 (1%)]
Claims by lessees	6 [First half = 3 (1.4%)] [Second half = 3 (1%)]
Claims by alleged victims of racial discrimination in non-migration proceedings	6 [First half = 1 (0.4%)] [Second half = 5 (1.6%)]
Claims by alleged victims of cartels	5 [First half = 2 (0.9%)] [Second half = 3 (1%)]
Claims by native title holders	3 [First half = 1 (0.4%)] [Second half = 2 (0.6%)]
Claims by taxpayers	3 [First half = 3 (1.4%)] [Second half = 0 (0%)]

Total	513 [First half = 214] [Second half = 299]
-------	--

It is useful to set out, with respect to each of the five periods of five years used in the preceding chapter, the top two categories of substantive claims.

First period

- | | |
|---|------------------|
| 1. Claims by persons wishing to reside in Australia | 16 class actions |
| 2. Product liability claims | 14 class actions |

Second period

- | | |
|-----------------------------|------------------|
| 1. Product liability claims | 28 class actions |
| 2. Claims by employees | 22 class actions |

Third period

- | | |
|-------------------------------|------------------|
| 1. Claims by employees | 24 class actions |
| 2. Consumer protection claims | 12 class actions |

Fourth period

- | | |
|---------------------------|------------------|
| 1. Claims by investors | 42 class actions |
| 2. Claims by shareholders | 20 class actions |

Fifth period

- | | |
|---------------------------|------------------|
| 1. Claims by shareholders | 43 class actions |
| 2. Claims by investors | 29 class actions |

The dominance, in recent years, of investor and shareholder class actions has been highlighted in my previous empirical reports and by many commentators. But there are a number of factors which suggest that we are not witnessing the proverbial opening of the floodgates with respect to these two categories of class actions.

On a general level, the widespread phenomenon of multiple class actions filed with respect to the same legal disputes - that, as explained in Chapter 2 above, has resulted in the total number of filed class actions exceeding by 53% the number of legal disputes litigated in these class actions - has applied with particular force to investor and shareholder class actions. For instance, as explained in Chapter 1 above, Macpherson Kelley has filed 21 investor class actions with respect to just three legal disputes. I return to this dimension of class action litigation below, in discussing the real impact of shareholder class actions on the corporate world.

With respect to investor class actions, it is also important to draw attention to the 30% decrease in the fifth period relative to the total number of investor class actions filed in the preceding five years. Furthermore, this decrease in the number of investor class actions is likely to continue in the future, as claims stemming from the global financial crisis may no longer be litigated as a result of the operation of statutes of limitations.

With respect to shareholder class actions, on the other hand, the figures set out above reveal an increase of 115% in the total number of filings in the last five years compared with the total volume of shareholder class action litigation witnessed in the preceding five years. It is therefore important to explore some additional data with respect to this type of group litigation.

A number of comments have been made in recent years which create the impression that the filing of shareholder class actions constitutes the most effective means of securing a settlement for class members (and their solicitors and litigation funders); or to put it differently, that the vast majority of shareholder class actions settle. As the data on settlement rates set out below shows, this is definitely not the case.

Settlement rates in the six most popular categories of class actions

1. Investor class actions	73%
2. Mass tort class actions	70%
3. Industrial class actions	64%
4. Shareholder class actions	64%
5. Product liability class actions	58%
6. Consumer protection class actions	26%

I have also seen several references to all or the vast majority of shareholder class actions being funded by litigation funders. According to my data, “only” 71% of all the shareholders class actions filed in Australia on or before 31 May 2017 were supported by litigation funders.

It is also interesting to compare data with respect to how long it takes to secure a judicially-approved settlement in the six categories of class actions mentioned above.

Average duration of settled class actions - six most popular categories of class actions

1. Product liability class actions	1,149 days
2. Mass tort class actions	1,123 days
3. Investor class actions	1,101 days
4. Shareholder class actions	962 days
5. Consumer protection class actions	931 days
6. Industrial class actions	332 days

Whilst settled shareholder class actions are “shorter” than investor, product liability and mass tort class actions, the difference is not significant. In Part II below it is revealed that the average duration of all settled class actions is 978 days. Thus, the average duration of settled shareholder class actions has been only 16 days less than the overall average.

A crucial question concerns the total number of companies whose shareholders have resorted to class action litigation with respect to the losses they have suffered. The 81

shareholder class actions that have been filed in Australia were brought on behalf of shareholders of 47 companies; as a result, the total number of shareholder class actions that have been filed has exceeded by 72% the total number of companies whose conduct has led to the class action litigation on behalf of their shareholders. It will be recalled that the total number of class actions has exceeded by 53% the total number of legal disputes that were litigated in these proceedings.

This means that over the last 25 years shareholder class actions have been filed with respect to, on average, 1.88 companies every year. Looking at the last five years, the 43 shareholder class actions filed during this period concerned the conduct of a total of 27 companies, two of which had been the subject of shareholder class actions in the fourth period. This means that over the last five years, class actions were filed every year with respect to the conduct of, on average, five companies. Symbolic of this scenario are the shareholder class actions, filed over this five year period, that saw the involvement of Mark Elliott: 15 class actions on behalf of the shareholders of 8 companies. It should also be noted that if one person, albeit a very active and creative one such as Mark Elliott, was able to “generate” just over one-third of the country’s shareholder class actions over the last five years, then the shareholder class action industry cannot be as vibrant as we have been led to believe.

In conclusion, whilst there has been an increasing level of activity on the shareholder front in recent years, that activity has concerned the conduct of a very small number of companies and a miniscule proportion of all publicly listed companies.

II. AVERAGE DURATION OF SETTLED CLASS ACTIONS

Data is presented below, with respect to the average duration of settled class actions in federal and State courts overall as well as for each of the five periods. These figures reveal no particular trends as increases in one period have been followed by decreases in the next period followed by increases in the subsequent period.

Overall average duration of settled class actions

- Federal class actions 940 days
- State class actions 1,101 days
- All settled class actions **978 days**

First period

- Federal class actions **347 days**

Second period

- Federal class actions 1,354 days
- State class actions 1,263 days
- All settled class actions **1,343 days**

Third period

- Federal class actions 663 days

- State class actions 918 days
- All settled class actions **706 days**

Fourth period

- Federal class actions 1,066 days
- State class actions 1,224 days
- All settled class actions **1,808 days**

Fifth period

- Federal class actions 848 days
- State class actions 778 days
- All settled class actions **826 days**

CHAPTER 4

PLAINTIFF SOLICITORS AND LITIGATION FUNDERS

As noted by many commentators and several courts, the filing of many class actions would not have been possible without the support of litigation funders or the willingness of solicitors to represent the class on a no win - no fee basis. In this chapter some of the data that I have collected with respect to these two categories of class action protagonists will be provided, starting with litigation funders.

I. LITIGATION FUNDERS

I have been able to identify the support of litigation funders with respect to 116 (22%) of the 513 class actions filed on or before 31 May 2017. Twenty-nine companies and one individual provided the funding in these 116 funded class actions.

Ninety-six (82.7%) of these funded class actions were filed in the Federal Court while the remaining 20 (17.2%) funded class actions were brought in State courts. This means that approximately 23.8% of all federal class actions and 18% of State class actions have seen the involvement of litigation funders. Information, as to the filing of these 116 funded class actions, is provided below divided into the five periods employed throughout this report.

First period

- No funded class actions

Second period

- Funded federal class actions 2 out of 105 (1.9%)
- Funded State class actions 0 out of 9 (0%)
- All funded class actions **2 out of 114 (1.7%)**

Third period

- Funded federal class actions 6 out of 64 (9.3%)
- Funded State class actions 1 out of 13 (7.6%)
- All funded class actions **7 out of 77 (9%)**

Fourth period

- Funded federal class actions 31 out of 77 (40.2%)
- Funded State class actions 2 out of 32 (6.2%)
- All funded class actions **33 out of 109 (30.2%)**

Fifth period

- Funded federal class actions 57 out of 103 (55.3%)
- Funded State class actions 17 out of 57 (29.8%)
- All funded class actions **74 out of 160 (46.2%)**

A significant statistic is that 63% of all the class actions, supported by litigation funders since December 2001, were brought in the last five years. The other striking figure is that over the last five years there were, for the first time ever, more funded than unfunded class actions brought in the Federal Court.

At the same time, the settlement rate for funded class actions has decreased substantially since my last report; largely as a result of the High Court's unfavourable ruling on bank fees. But what is fascinating is that, as the figures set out below reveal, there is a significant difference between the settlement rates in federal class actions (in both funded and unfunded litigation) compared with the settlement rates in funded and unfunded State class actions. We see that having the support of a funder increased significantly the chances of securing a settlement in federal class actions but not in State class actions. Conversely, the employment of alternative funding models was associated with significant success in securing settlements in State courts but not in the Federal Court.

Overall settlement rates

- Settled federal class actions 49%
- Settled State class actions 63%
- All class actions **52%**

Settlement rates in unfunded class actions

- Unfunded federal class actions 43%
- Unfunded State class actions 70%
- All unfunded class actions **48%**

Settlement rates in funded class actions

- Funded federal class actions 79%
- Funded State class actions 30%
- All funded class actions **69%**

The data with respect to the types of substantive claims that have been advanced in funded class actions is far less surprising. There have been 58 (50%) funded shareholder class actions followed by 27 (23.2%) funded investor class actions and 14 (12%) funded consumer protection class actions. The remaining 17 (14.6%) funded class actions concerned mass torts; products; employees; franchisees. agents &/or distributors; cartels; racial discrimination in non-migration litigation and miscellaneous claims.

Equally unsurprising is the fact that companies in the IMF Bentham Ltd group have supported more class actions than any other group of litigation funders: 40 or approximately one out of every three funded class actions filed in Australia. What is surprising is that 17 or 62% of all the law firms that have represented class representatives in funded class actions had no prior experience in running class actions.

More information about the impact of litigation funders in Australia's class action landscape is provided in the next chapter in discussing the impact of the Full Federal Court's ground-breaking common fund judgment.

II. LEGAL REPRESENTATIVES OF CLASS REPRESENTATIVES

Maurice Blackburn and Slater & Gordon continue to be the two firms with the greatest number of class actions on the plaintiff side although, as we see below, their combined presence in the class actions landscape has decreased over the last three years.

Five plaintiff law firms with involvement in the biggest number of class actions

- | | |
|----------------------|-------------------|
| 1. Maurice Blackburn | 90 class actions. |
| 2. Slater & Gordon | 85 class actions. |
| 3. Macpherson Kelley | 21 class actions. |
| 4. Maddens Lawyers | 17 class actions. |
| 5. Piper Alderman | 14 class actions. |

This means that over the last 25 years one out of every three class actions saw the involvement of Maurice Blackburn or Slater & Gordon. But over the last 3 years - the period from 1 June 2014 to 31 May 2017 - “only” 23% of all filed class actions saw the involvement of either of these two firms. Maurice Blackburn was nevertheless the plaintiff firm with the greatest number of class actions over this three-year period with 20 class actions.

With respect to Macpherson Kelley, it needs to be borne in mind that the 21 actions filed by this firm concerned only three disputes. But a common feature of the class actions filed by Macpherson Kelley and Maddens Lawyers is that they were all unfunded (that is, no litigation funder provided financial support). Until recently, these two firms shared another common characteristic - concentrating on one type of claim: investor class actions and bushfire class actions, respectively. But since 2015, Maddens Lawyers has also filed class actions on behalf of victims of other types of mass torts such as, for instance, the victims of floods.

Another interesting feature of class action litigation over the last few years is that a number of law firms have represented class representatives only in funded class actions. These firms include Squire Patton Boggs and ACA Lawyers.

Maurice Blackburn leads in the federal sphere with a total of 72 class actions and, jointly with Maddens Lawyers, in the Supreme Court of NSW with five class actions each while Macpherson Kelley is the leader in Victoria with a total of 17 class actions.

I have also collected data to test the accuracy of observations that in the last few years there has been the involvement of more lawyers acting for class representatives (with no prior experience in running class actions) than at any other period over the last 25 years. I present below this data pursuant to periods of three years starting from 1 June 2005.

1 June 2005 – 31 May 2008

- A total of 11 legal representatives⁸⁶ acted for class representatives. Six of them had no prior experience in running class actions.

1 June 2008 – 31 May 2011

- A total of 24 legal representatives acted for class representatives. Seventeen of them had no prior experience in running class actions.

1 June 2011 – 31 May 2014

- A total of 29 legal representatives acted for class representatives. Seventeen of them had no prior experience in running class actions.

1 June 2014 – 31 May 2017

- A total of 43 legal representatives acted for class representatives. Twenty-two of them had no prior experience in running class actions. Six of these 22 legal representatives were able to make their debut in Australia's class actions space thanks to the support of litigation funders.

⁸⁶ The term legal representatives, rather than law firms, has been employed in light of the fact that a variety of entities other than law firms have represented lead plaintiffs in class actions.

CHAPTER 5

OUTCOMES OF CLASS ACTIONS, COMMON FUND ORDERS, CLOSED CLASSES AND COMPETING CLASS ACTIONS

In this final chapter I provide data with respect to the manner in which class actions have been resolved together with data with respect to the effect that - the ground-breaking October 2016 judgment of the Full Federal Court authorising the employment, in funded class actions, of a modified version of the North American common fund doctrine - has had on the phenomenon of competing class actions and the use of the closed class device.

I. HOW CLASS ACTIONS HAVE BEEN RESOLVED

The next three tables provide data with respect to the way in which class actions have been resolved as at 30 June 2017 and also divide these outcomes into two periods of twelve and a half years each and between resolved federal and State class actions.

There has been a significant increase in the percentage of settled class actions in the second half, driven largely by an increase in the settlement rate for federal class actions and, as we have seen in the preceding chapter, this higher settlement rate is substantially attributable to the significant involvement of litigation funders in federal class actions during this latter period. Conversely, we see that there has been a small increase in the settlement rate in State class actions in the second half.

Table 8 – Outcomes of class actions filed from 1 June 1992 to 31 May 2017

How class actions were resolved	Percentage of all resolved class actions
Proceeding settled pursuant to a judicially-approved settlement agreement	52% [Fed = 49%] [State = 63%]
Proceeding discontinued by the class representative	13.8% [Fed = 14.8%] [State = 9.6%]
Proceeding summarily dismissed (for reasons not including want of prosecution or lack of jurisdiction)	7.8% [Fed = 9.1%] [State = 2.4%]
Proceeding discontinued, as a class action, by the Court	7.3% [Fed = 7.4%] [State = 7.2%]
Proceeding discontinued, as a class action, by the class representative	5% [Fed = 5.9%] [State = 1.2%]
Post-trial ruling unfavourable to the class representative and the class	3.5% [Fed = 4.1%] [State = 1.2%]
Post-trial ruling favourable to the class representative and the class	3.3% [Fed = 3.8%] [State = 1.2%]
Proceeding transferred to another	2.6% [Fed = 1.4%] [State = 7.2%]

jurisdiction	
Proceeding permanently stayed	1.1% [Fed = 0.2%] [State = 4.8%]
Proceeding dismissed for lack of jurisdiction	1.1% [Fed = 1.4%] [State = 0%]
Post-trial ruling favourable to only a minority of the class members	0.7% [Fed = 0.8%] [State = 0%]
Post-trial ruling partly favourable to the class representative and the class	0.7% [Fed = 0.8%] [State = 0%]
Proceeding dismissed for want of prosecution	0.4% [Fed = 0.2%] [State = 1.2%]
Total	100% [Fed = 100%] [State = 100%]

Table 9 – Outcomes of class actions filed from 1 June 1992 to 30 November 2004

How class actions were resolved	Percentage of all resolved class actions
Proceeding settled pursuant to a judicially-approved settlement agreement	42% [Fed = 40%] [State = 61%]
Proceeding discontinued by the class representative	18.1% [Fed = 18%] [State = 5.5%]
Proceeding discontinued, as a class action, by the Court	9.7% [Fed = 9.1%] [State = 16.6%]
Proceeding summarily dismissed (for reasons not including want of prosecution or lack of jurisdiction)	7.4% [Fed = 8.1%] [State = 0%]
Post-trial ruling favourable to the class representative and the class	5.5% [Fed = 5.6%] [State = 5.5%]
Post-trial ruling unfavourable to the class representative and the class	4.6% [Fed = 5.1%] [State = 0%]
Proceeding discontinued, as a class action, by the class representative	4.6% [Fed = 5.1%] [State = 0%]
Proceeding transferred to another jurisdiction	1.8% [Fed = 1.5%] [State = 5.5%]
Proceeding dismissed for lack of jurisdiction	1.8% [Fed = 2%] [State = 0%]
Post-trial ruling favourable to only a minority of the class members	1.3% [Fed = 1.5%] [State = 0%]
Post-trial ruling partly favourable to the class representative and the class	1.3% [Fed = 1.5%] [State = 0%]
Proceeding dismissed for want of prosecution	0.9% [Fed = 0.5%] [State = 5.5%]
Total	100% [Fed = 100%] [State = 100%]

Table 10 – Outcomes of class actions filed from 1 December 2004 to 31 May 2017

How class actions were resolved	Percentage of all resolved class actions
Proceeding settled pursuant to a judicially-approved settlement agreement	62% [Fed = 60%] [State = 64%]
Proceeding discontinued by the class representative	9.2% [Fed = 9.2%] [State = 10.7%]
Proceeding summarily dismissed (for reasons not including want of prosecution or lack of jurisdiction)	8.2% [Fed = 10.6%] [State = 3%]
Proceeding discontinued, as a class action, by the class representative	5.3% [Fed = 7%] [State = 1.5%]
Proceeding discontinued, as a class action, by the Court	4.8% [Fed = 4.9%] [State = 4.6%]
Proceeding transferred to another jurisdiction	3.4% [Fed = 1.4%] [State = 7.6%]
Post-trial ruling unfavourable to the class representative and the class	2.4% [Fed = 2.8%] [State = 1.5%]
Proceeding permanently stayed	2.4% [Fed = 0.7%] [State = 6.1%]
Post-trial ruling favourable to the class representative and the class	0.9% [Fed = 1.4%] [State = 0%]
Proceeding dismissed for lack of jurisdiction	0.4% [Fed = 0.7%] [State = 0%]
Total	100% [Fed = 100%] [State = 100%]

II. THE IMPACT OF *MONEY MAX* ON CLOSED CLASSES AND COMPETING CLASS ACTIONS

In its ground-breaking judgment in *Money Max* the Full Federal Court revealed the expectation or hope that the operation of its common fund doctrine would reduce the number of funded Part IVA proceedings that used a closed class device - to describe the represented group at the outset of the litigation - and that this reduced use of closed classes might in turn see a decrease in the instances of competing class actions filed in the Federal Court. It is therefore appropriate to reveal and contrast the data that I have collected on closed classes and competing class actions in the period after *Money Max* with corresponding data with respect to the pre-*Money Max* period.

A. Closed classes in funded class actions

It will be recalled that the *Money Max* judgment was handed down on 26 October 2016. My data on the employment of closed classes in funded Part IVA proceedings goes up to 31 May 2017. In the five years preceding *Money Max* - that is, the period from 26 October 2011 to 25 October 2016 - 48% of the funded federal class actions filed during

that period used a closed class mechanism in defining the class at the outset of the litigation.

In the seven months or so after *Money Max* - the period from 27 October 2016 to 31 May 2017 - a total of 13 funded class actions were brought in the Federal Court. Three (or 23%) of these funded class actions employed closed classes. Over the same period, common fund applications have either been filed or foreshadowed in several federal class actions; some of these class actions were filed *before Money Max*. The most interesting of these common fund applications, in pre-*Money Max* Part IVA proceedings, is *Pearson v State of Queensland* as this class action was filed pursuant to a closed class. As a result, the foreshadowed common fund application will be accompanied, or indeed preceded, by an application to “open the class”. All of this strongly suggests that *Money Max* has led to an increased use of open classes in federal class actions.

Before assessing the impact of *Money Max* on the filing of competing class actions in the Federal Court, reference needs to be made to the proportion of funded Part IVA proceedings in the post-*Money Max* period. As at 31 May 2017, a total of 19 new Part IVA proceedings were before the Federal Court after *Money Max*; 13 (68%) of these proceedings were funded. Whilst this percentage of funded federal class actions exceeds the proportion seen in the last 5 years - which it will be recalled was 55.3% - this increase may not be “blamed” on *Money Max*.

In fact, three of these 13 funded class actions came to the Federal Court as a result of “transfer” orders made by the Supreme Court of Victoria whilst two other class actions were filed in the Federal Court following “permanent stay” orders made, again by the Supreme Court of Victoria, with respect to virtually identical class actions filed against the same companies in the Victorian Supreme Court. If these five class actions are not taken into account, when considering whether *Money Max* has led to a greater proportion of funded federal class actions (as some critics of this ruling predicted after it was handed down), we are left with 8 (57%) funded Part IVA proceedings out of a total of 14 post-*Money Max* class actions.

B. Competing class actions

I have identified a total of 34 instances of competing class actions as at 30 June 2017. Four of these instances have occurred since *Money Max*. The last set of competing class actions involved a class action in the Queensland Supreme Court followed by a class action in the NSW Supreme Court. But the other three instances of competing class actions all occurred in the Federal Court: six Part IVA proceedings supported by litigation funders that employed an open class device, although one of these six class actions was filed two weeks before *Money Max* whilst the second/competing class action was filed in June 2017.

It will be interesting to see whether over the next few months and years this increased frequency of competing class actions in the Federal Court will continue and, if so, whether it can be attributed, in any way, to *Money Max*. The fact that despite coming into

operation only in March 2017, the Queensland class action regime has already “contributed”, as noted above, to one instance of competing class actions shows that close attention will also need to be paid to competing class actions filed in multiple jurisdictions.

I suspect that the judgment that Justice Beach of the Federal Court is currently writing, with respect to the competing class actions filed by Maurice Blackburn and Slater & Gordon against Bellamy’s Australia Ltd, will be as important as *Money Max* in influencing the future conduct of plaintiff solicitors and their funders. A very interesting way of dealing with competing class actions was recently adopted by Justice Middleton of the Federal Court who “declassified” one of the two competing class actions.

Finally, in the last few months, there have also been two extremely innovative steps taken by (potentially) competing solicitors: one involving an unsuccessful attempt to secure leave for a class member (and his lawyers) to take part in mediations taking place in an existing class action. This class member’s solicitors had announced months earlier that it was investigating a class action with respect to the same dispute that led to the existing class action.

The other fascinating step was successfully taken by the solicitors in an existing class action “against” other solicitors who had announced the imminent filing of a competing class action. The Court ordered the sending of a notice to class members in the current class action which advised them, among other things, that in order to remain as class members they did not need to sign a funding agreement with the litigation funder supporting the foreshadowed second/competing class action or any other litigation funder. They were also told that if they had already entered into a funding agreement with the litigation funder behind the announced second class action, they could withdraw from that agreement by giving written notice to the litigation funder in question within 21 days after the date that they entered into that agreement.