Class Actions Landscape Australia

2024 Edition

maurice blackburn lawyers

Introduction

With a line now well and truly drawn under an eventful 2023, it's timely to review how the big shifts in class actions and corporate conduct last year may impact on the courts, legal practitioners, and group member participants over the course of 2024.

In this edition of Maurice Blackburn's Class Actions Landscape Australia (CALA) report, we can see evidence of how the management of class actions over 2023 might continue to shape the challenges we are likely to face in 2024.

Carriage fights continue to be a prominent feature of the landscape, with a more defined procedure beginning to emerge. While the track record on experience and recovery are increasingly being recognised by the courts as relevant factors in determining who should be awarded carriage, such as in the Hino carriage dispute, the most significant factor remains funding arrangements and the likely return to group members.

So too is an ability to demonstrate to the court that the managing firm can proceed in a way likely to save the court time and resources whilst acting in the best interests of group members, which was a feature of the recent decision to award carriage of the EDI Downer shareholder class action to Maurice Blackburn.

Sitting in the wings still is the Federal Government's response to the 2018 ALRC review into class actions, and any direction or answers that might provide to guide the courts and practitioners through the current maze.

A clear trend that is also emerging, is the increasing propensity of defendants to seek larger amounts of security for costs and refusing to accept that the balance sheet of substantial law firms and funders as adequate assurance of an ability to pay adverse costs. It will be interesting to see how the Courts approach the early decisions in these challenges, which have significant implications for access to justice, and if this trend is matched by increased requests from the plaintiff side to unveil true levels of company insurance early in a proceeding.

Late last year, and with a number of class action trials expected through 2024, we have also seen a rush towards soft class closures directed towards facilitating the resolution of matters prior to trial. This serves as a sharp reminder to participants and their representatives of the importance of early registration in matters that are generally on foot for several years.

In addition to this year's busy class actions trial schedule, already a couple of major settlements have been achieved. The NSW Junior Doctors underpayment class action settlement was quickly followed by the settlement in the class action against Uber on behalf of participants in the taxi and hire car, limousine, charter vehicle industries. Both settlements will be in the top 10 class actions settlements in Australian legal history.

Most recently, Monash University's Professor Vince Morabito has released his latest report on the class actions regime, looking at Group Costs Orders and Funding Commissions, and unsurprisingly to those of us that have followed the evidence and advocated strongly for their inclusion as a funding option, Professor Morabito has found that the contingency fee regime in Victoria "provides a vastly superior outcome for class members."

Finally, in some news closer to home for Maurice Blackburn, after helping the firm to secure its 10th listed securities recovery in excess of $100million on the AMP shareholder action, Andrew Watson has departed the firm to take up a role as a Justice of the Supreme Court of Victoria.

We know he'll be an excellent addition to the Court, and I am extremely grateful for the opportunity to lead the brilliant team here at Maurice Blackburn as we continue to deliver on the work that both he, and Justice Murphy of the Federal Court before him, began many years ago.

Rebecca Gilsenan
National Head of Class Actions
Maurice Blackburn Lawyers

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Crowley v Worley Ltd

This judgment arose following a remitter from the Full Court. In summary:

- On 14 August 2013 the respondent (**Worley**) published its results for the year ended 30 June 2013 (**FY13**), reporting a net profit after tax (**NPAT**) of $322 million. On the same day, Worley gave earnings guidance for FY14 – although it did not identify a specific figure or range, it stated that it expected "*increased earnings*" in FY14 (i.e. greater than the $322 million NPAT reported for FY13). That guidance was based on Worley's internal budget for FY14, which forecast NPAT for FY14 of $352 million.
- Worley subsequently reaffirmed that guidance in ASX announcements which it issued on 9, 10 and 15 October 2013.
- However, on 20 November 2013 Worley withdrew the guidance, and gave revised guidance for FY14 NPAT of $260-$300 million, citing various reasons for the downgrade.

At the initial trial of the proceeding, the primary judge (Gleeson J) dismissed the applicant's claims (*Crowley v Worley Ltd* [2020] FCA 1522). Her Honour found that the applicant had failed to establish that Worley lacked a reasonable basis for the earnings guidance at the time it was given, or when it was subsequently reaffirmed. Consequently, her Honour did not need to address any issues relating to causation and loss.

On appeal, the Full Court overturned the primary judge's decision, and remitted the proceeding to a single judge for redetermination (*Crowley v Worley Ltd* (2022) 293 FCR 438; [2022] FCAFC 33). The remitted proceeding came before Jackman J.

In relation to questions of liability, the applicant chose not to lead expert evidence regarding (or otherwise seek to pinpoint) the earnings guidance that Worley, acting reasonably, should have issued on 14 August 2013. Instead, because Worley's sole justification for the earnings guidance which it gave on that date was its internal budget for FY14 and the process by which that budget was prepared, the applicant's attack was, for the most part, confined to a qualitative (rather than quantitative) attack on that process, and the various assumptions which underpinned the budget (which the Full Court held the applicant was entitled to do).

Due to the nature of a remitter, Jackman J considered that he was bound by, and was not at liberty to disturb, any findings of fact or law made by:

- the Full Court; and
- the original primary judge (to the extent those findings had not been disturbed by the Full Court),

notwithstanding that his Honour did have reservations about the veracity of some of those findings.

Based on those findings, and certain additional findings of his own arising from a review of the evidence led at the initial trial, his Honour determined that the applicant had succeeded in establishing that Worley lacked a reasonable basis for the earnings guidance at the time it was first given, and when it was subsequently reaffirmed, for reasons which included:

- Worley had a history of poor budgeting – in five of the past six years Worley had achieved earnings that were more than 10% below its initial budget;
- Worley's budget for FY14 included a large (and excessive) amount of 'blue sky' revenue from as yet unidentified projects, and made insufficient allowance for potential downsides – in other words, it assumed everything would go right, when it knew that some things would go wrong; and
- Worley's budget for FY14 was not a 'P50 Budget' (being one where there is an equal chance of exceeding the budget as there is of falling short of it) – in that regard, his Honour said (at [68]):

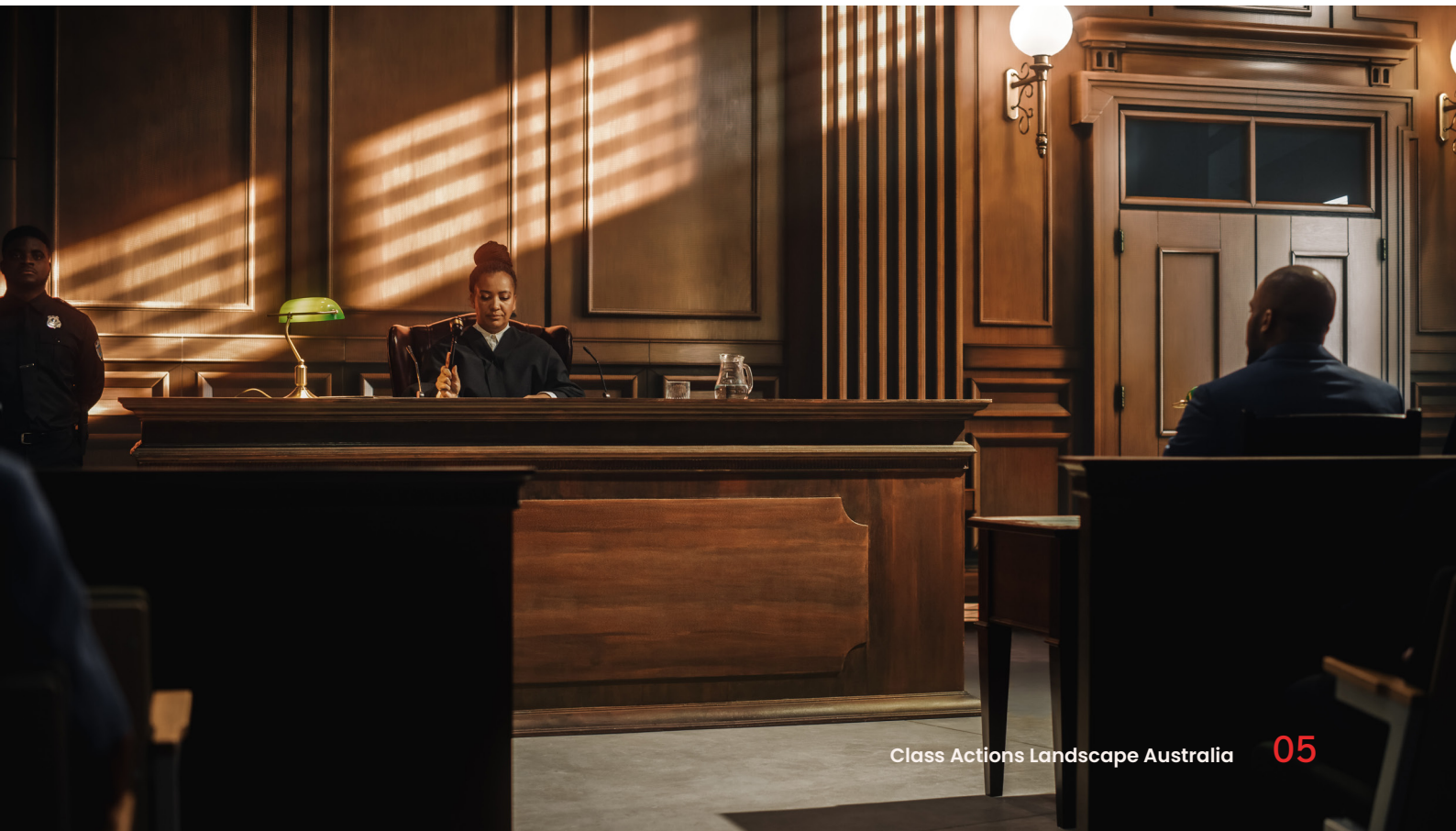
> … it is self-evident that a budget which is not broadly in line with the parameters for a P50 Budget does not provide a reasonable basis for earnings guidance announced to the market. A reasonably based budget requires that the relevant company has reasonable grounds to think that, in broad terms but not necessarily with the precision of a bookmaker, the company is at least as likely to exceed its estimate as it is to perform below it.

Thus, the applicant succeeded in establishing misleading or deceptive conduct by Worley

and a contravention by Worley of its continuous disclosure obligations.

His Honour then turned to consider questions of causation and loss. His Honour had no hesitation in accepting that an event study was a valid method of establishing causation and loss in a shareholder class action, and rejected Worley's submission to the contrary. However, for the purposes of the event study analysis (which was the only basis on which the applicant had sought to prove loss, having chosen not to lead evidence as to the fundamental value of Worley shares), it was necessary for the applicant to establish, on the balance of probabilities, what the appropriate counterfactual was (i.e. the earnings guidance that Worley, acting reasonably, should have issued on 14 August 2013, it not being contended by the applicant that Worley would not have issued any earnings guidance at all on that date). Because of the approach adopted by the applicant to questions of liability as noted above (i.e. not attempting to pinpoint the earnings guidance that Worley, acting reasonably, should have issued on 14 August 2013) the identification and proof of the appropriate counterfactual was far from straightforward. The applicant posited three alternative counterfactuals:

- *Earnings guidance in the same terms as was ultimately given by Worley on 20 November 2013 (i.e. NPAT of $260-$300 million)* (**Counterfactual 1**): The applicant sought to justify this on the basis that the qualitative reasons given by Worley for the earnings downgrade on 20 November 2013 already existed as at and prior to 14 August 2013. However, his Honour rejected that argument, on the basis that the downgrade on 20 November 2013 was, to a large extent, based on Worley's actual results from the first four months of trading, which was obviously not something that was known to Worley (or to anyone) as at 14 August 2013. Further, even if the qualitative reasons cited for the downgrade on 20 November 2013 already existed in some form as at 14 August 2013, it did not follow that they would have had the same quantitative impact as at the earlier date. Thus, the applicant failed to establish, on the balance of probabilities, that Counterfactual 1 was the appropriate counterfactual.
- *Earnings guidance of $289 million* (**Counterfactual 2**): His Honour stated that there was no basis in the evidence for that figure, which appeared to be a figure that was chosen on the basis that it was materially (i.e. 10%) less than the FY13 NPAT of $322 million. Thus, his Honour rejected Counterfactual 2 as the appropriate counterfactual.
- *Earnings guidance of $284 million* (**Counterfactual 3**): That figure was based on the forecast NPAT contained in an earlier draft of Worley's budget, which the applicant accepted was reasonable (prior to a series of 'management adjustments' which increased the forecast to the ultimate figure of $352 million). However, his Honour noted that the applicant had not challenged the reasonableness of at least some of those 'management adjustments'. Once those



unchallenged 'management adjustments' were included, the appropriate counterfactual was $317 million (not $284 million). However, his Honour considered that there was no evidence to establish, and it was not otherwise self-evident, that if Worley had given earnings guidance of $317 million as at 14 August 2013 (as opposed to $284 million), there would have been any impact on Worley's share price, and the applicant's loss expert had not addressed a counterfactual in those terms. Further: (i) even if there would have been some impact on the share price, because the applicant's expert evidence had not addressed such a counterfactual, the applicant had failed to prove what the quantum of that impact was (and therefore what his loss was); and (ii) even if earnings guidance of $284 million had been the appropriate counterfactual, there was a lack of economic equivalence because the reasons given by Worley for the downgrade on 20 November 2013 would not have been the same as at 14 August 2013.

His Honour also considered that this was not a case where the applicant was unable to adduce precise evidence of his loss (such that the Court must do the best it can to estimate loss); instead, it was a case where he was able to do so, but had simply *failed* to do so.

In the end result, therefore, his Honour found that the applicant had failed to prove that he had suffered any loss as a result of Worley's contraventions, or what the amount of that loss was. Consequently, his Honour dismissed the applicant's and class members' claims.

[Postscript:

(1) In a subsequent judgment (Crowley v Worley Ltd (Costs) [2024] FCA 211 Jackman J ordered the applicant to pay Worley's costs of the proceeding (including the costs of the initial trial before Gleeson J). In doing so, his Honour rejected the applicant's argument that those costs should be reduced on account of the applicant having succeeded on the question of liability – his Honour indicated that, in circumstances where the claim was, in substance, one for the recovery of compensation, the applicant's claim had wholly failed, and his success on some questions relating to liability was merely a "*Pyrrhic victory*" which did not warrant a different order as to costs.

(2) On 7 February 2024 the applicant filed an appeal from Jackman J's decision.]

Crowley v Worley Ltd (No 2) [2023] FCA 1613		
Federal Court of Australia | Jackman J | 19 December 2023		
Applicant's Solicitors:	Shine Lawyers	
Respondent's Solicitors:	Herbert Smith Freehills	
Applicant's Funder:	N/A	
Austlii Link:	Available here	

Solicitors' CFO proposed in securities class action

This judgment relates to a securities class action brought against Blue Sky Alternative Investments Ltd (**Blue Sky**), a company in liquidation.

In an earlier judgment in this proceeding, Lee J had made a number of observations concerning the Court's power to make a solicitor's common fund order (i.e., an order which provides for a payment to a solicitor or solicitors of an amount for funding a proceeding, in addition to costs and disbursements, out of any settlement or judgment sum). Though the question of a common fund order did not directly arise there (and his Honour was not required to reach any decision), it was raised during his Honour's consideration of a proposed consolidation agreement and recent commentary in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* (No 13) [2023] FCA 84 (at [190]) that no such power exists).

During a case management hearing on 15 November 2023, his Honour required each respondent to seek specific instructions in respect of the following question (marked as MFI-1):

> Is it any respondent's position in this proceeding that if a common fund order is proposed, which order provides for a payment to a solicitor or solicitors for 'funding' the proceeding (that is, proposes an amount to be paid to solicitors over and above a payment representing costs and disbursements) that, by reason of that fact alone, such an order could not be characterised as being 'just' and hence within power?

Blue Sky and the fifth to eighth respondents (the insurers) adopted no position in respect of the above question. The second, third and fourth respondents, however, contended that the answer to the question is 'yes' such that if a solicitors' common fund order is proposed in the proceeding, the Court is bereft of power to make it.

Having regard to the broader significance of the issue, and the need for appellate guidance as to the bounds of the Court's existing power to make such orders, his Honour determined that it was appropriate in all the circumstances that an order be made pursuant to s 25(6) of the *Federal Court of Australia Act 1976* (Cth) that the following question be referred to a Full Court for determination:

> Is it a licit exercise of power, pursuant to statutory powers conferred within Pt IVA of the *Federal Court of Australia Act 1976* (Cth), or otherwise, for the Court, upon the settlement or judgment of a representative proceeding, to make an order (being a 'common fund order', as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 at [19], [22]-[30]) which would provide for the distribution of funds or other property to a solicitor otherwise than as payment for costs and disbursements incurred in relation to the conduct of the proceeding?

R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Limited (Administrators Appointed) (in liq) (Reserved Question) [2023] FCA 1499	
Federal Court of Australia | Lee J | 28 November 2023	
Applicants' Solicitors:	Banton Group (1A), Shine Lawyers (2A)
Respondents' Solicitors:	Gilbert + Tobin (1R), Arnold Bloch Leibler (2R), GRT Lawyers (3R), Corrs Chambers Westgarth (4R), Clyde & Co (5R), Wotton + Kearney (6R), Colin Biggers & Paisley (7-8R)
Applicants' Funder:	International Litigation Partners No 10 Pte Ltd and LCM Funding Pty Ltd
Austlii Link:	Available here

Vic Supreme GCO again the way to go for group members

This judgment related to an application for a group costs order (**GCO**) under s 33ZDA of the *Supreme Court Act 1986* (Vic) (**SCA**) in a group proceeding brought by 5 Boroughs NY Pty Ltd (**5 Boroughs**). The proceeding is brought on behalf of retail businesses that are alleged to have suffered economic loss as a consequence of (allegedly negligent) COVID-19 transmission events at two hotel quarantine sites and consequent restrictions on the supply of goods and services from premises located in Victoria.

The GCO sought was as follows: (1) the legal costs payable to the solicitors representing the plaintiff and class members, Quinn Emanuel, be calculated as a percentage of the amount of any award or settlement that may be recovered in the proceeding, that percentage being 30% (inclusive of GST); and (2) liability for payment of the legal costs pursuant to the above be shared among the plaintiff and all class members.

His Honour was ultimately persuaded that a GCO of 30% was appropriate to ensure that justice is done in the proceeding, having regard to the principles set out by the Honourable Justice Nichols in *Fox v Westpac; Crawford v ANZ* [2021] VSC 573 and *Allen v G8 Education Ltd* [2022] VSC 32, and the following factors:

1. that the lead plaintiff, having been fully apprised of all relevant information (and having obtained independent legal advice on three separate occasions), fully supported the GCO sought and had provided cogent reasons for his view that the GCO is in the best interests of class members;
2. the material risk that if a GCO was not made the proceeding would not continue because of an inability to obtain alternative funding or the unlikely prospect that Quinn Emanuel would agree to represent the plaintiff on a conditional basis with recovery of legal costs calculated on an hourly rate (and consequently, the risk that the plaintiff and class members would lose the opportunity to vindicate their rights);
3. the real likelihood that if alternate funding could be arranged the outcome for class members would be less favourable. His Honour accepted this having regard to two reasons: first, that third-party funding would not provide the simplicity, transparency, and certainty of a GCO (which the lead applicant had deposed were desirable outcomes) and, secondly, the very real prospect that class members would achieve a poorer financial outcome if an alternate funding arrangement to a GCO was put in place;
4. that the proceeding is novel, complex, difficult, and attended with significant risk,

and had been vigorously defended to date. His Honour further noted that the uncertainty faced by Quinn Emanuel and Regency may be contrasted with the considerable benefit of the certainty that would be achieved for class members by the proposed GCO. In particular, his Honour indicated that the risk/reward consideration was very relevant to the determination of this application;

5. the claim raises for consideration important issues concerning the public health response by government to the COVID-19 pandemic, the duties and obligations that might arise in that context, and the corresponding rights of and protections provided to different sections of the community;
6. while each application under s 33ZDA of the SCA must be determined on its own facts, his Honour's review of other applications had fortified the conclusion that the GCO application should be allowed. His Honour expressly noted that the GCO rate of 30% was the second highest GCO rate ordered to date, however, concluded that outcome was justified having regard to the abovementioned complexity and risk attaching to the claim; and
7. the benefit of certainty provided by the GCO was supported by the plaintiff's undertaking that it will not apply to increase the GCO percentage at any stage of the proceeding.

5 Boroughs NY Pty Ltd v State of Victoria (No 5) [2023] VSC 682

Supreme Court of Victoria	Keogh J	23 November 2023
Plaintiff's Solicitors:	Quinn Emanuel Urquhart and Sullivan LLP	
Defendants' Solicitors:	Minter Ellison; Herbert Smith Freehills	
Litigation Funder:	Regency V Funding Pty Ltd	
Austlii Link:	Available here	

Maurice Blackburn secures $110m settlement success in AMP shareholder action

This was a shareholder class action on behalf of persons who purchased shares in AMP Ltd (**AMP**) between May 2012 and April 2018. The proceeding arose from revelations of AMP's misconduct during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, to the effect that for several years AMP had knowingly been charging clients ongoing fees for no service in various contexts, and had misled ASIC on repeated occasions when reporting to ASIC regarding its charging of fees for no service. The plaintiffs alleged that by failing to disclose this information, and making certain statements to the market, AMP engaged in misleading or deceptive conduct and breached its continuous disclosure obligations.

On the eve of trial, the parties reached an in-principle agreement to settle the proceeding for $110 million, inclusive of costs. In this judgment, Elkaim AJ approved the proposed settlement, including proposed deductions for legal and settlement administration costs. His Honour was satisfied that the settlement was fair and reasonable and in the interest of class members, including in light of the contested issues capable of impeding the range of quantum and success on liability. His Honour approved the following deductions from the settlement sum:

- $26.2 million for the plaintiffs' legal costs and disbursements;
- $32,000 for each of the plaintiffs' reimbursement payments; and
- $1.13 million for pre-approved settlement administration costs (with Maurice Blackburn to act as scheme administrator).

After the above deductions, $82.6 million will be distributed to class members, being 75% of the settlement sum.

Komlotex Pty Ltd v AMP Limited (No 4) [2023] NSWSC 1378	
Supreme Court of New South Wales | Elkaim AJ | 14 November 2023	
Plaintiff's Solicitors:	Maurice Blackburn
Defendants' Solicitors:	Herbert Smith Freehills
Plaintiff's Funder:	N/A
Austlii Link:	Available here

Optus Data Breach: Optus' fight over internal Deloitte report found to be "meritless"

This judgment concerned an application for orders for the discovery and inspection of a report prepared by Deloitte for the Optus respondents in relation to the September 2022 data breach (**Deloitte Report**), including the documents prepared for the purpose of providing instructions to Deloitte and all documents provided for the purposes of preparing such a report. The respondents asserted legal professional privilege over the relevant materials, which privilege the applicants challenged on the basis that the relevant 'dominant purpose' test had not been satisfied, or alternatively, there had been a waiver of privilege.

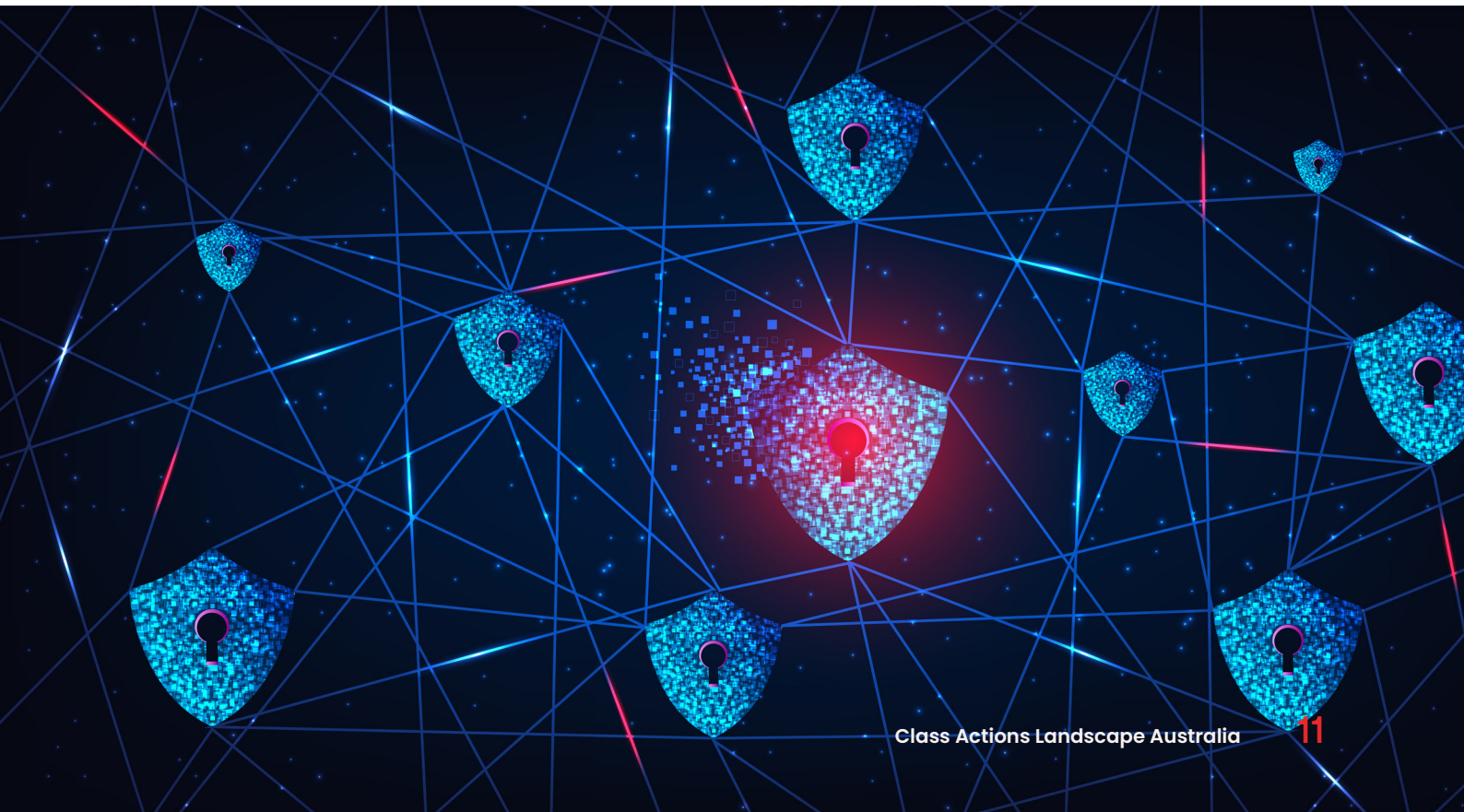
Ultimately, his Honour was not persuaded that the 'dominant purpose' test had been satisfied. The report was said to have been procured for multiple purposes, including a privileged purpose, however this latter purpose did not satisfy the requisite 'dominant purpose' test. In respect of any waiver of privilege (had the 'dominant purpose' test been met), his Honour found the applicants' position to be 'meritless' and accepted that there ***has been*** no waiver of privilege.

Legal Professional Privilege

As the dispute related to pre-trial disclosure and not the adducing of evidence, his Honour determined the issues by reference to common law principles as distinct from s 118 of the *Evidence Act 1995* (Cth). Under the common law, legal professional privilege applies to confidential communications made for the dominant purpose of the client obtaining legal advice or for use in litigation or regulatory investigations or proceedings. The protection is confined to confidential communications made for the dominant purpose of giving or obtaining (including preparation for obtaining) legal advice or the provision of legal services, including legal representation in litigation or other proceedings.

The relevant principles in respect of claims for privilege are extracted in full at [88], which are summarised (non-exhaustively) by his Honour as follows:

1. the purpose for which a document was created is a matter of fact to be determined objectively, having regard to the evidence (which must be focused and specific as distinct from generalised, opaque or repetitive verbal



formulae or assertions), the nature of the document and the parties' submissions;

2. evidence of the intention of the person who made the document, or the person who authorised or procured it, is not conclusive of purpose. In many instances, it is the character of the document(s) over which privilege is asserted that will illuminate purpose; and
3. it is not sufficient to show a substantial purpose or that the privileged purpose is one of two or more purposes of equal weighting; rather it must predominate, and be the paramount or most influential purpose.

Having regard to the above, and following a detailed consideration of the circumstances surrounding the creation of the Deloitte Report, his Honour found that the respondents had failed to discharge the onus of establishing their claim of privilege. Instead, on the evidence there were a 'multiplicity of purposes' evinced across key documents (including board resolutions, media releases and terms of engagement), which included generally to identify the circumstances and root cause(s) of the cyber-attack for management purposes, and rectification and reviewing the respondents' management of cyber-risk in relation to its policies and processes.

His Honour was particularly critical of the evidence led by the respondents, his analysis being fortified by the vagueness of the evidence of its general counsel, the 'uncomfortable sense' that important aspects of the evidence 'involved an element of reconstruction', and the absence of evidence from chief executive officer, Kelly Bayer Rosmarin, or any member of the board (leading to a *Jones v Dunkel* point that "*[wa]s not without merit*").

Waiver of Privilege

In the alternative, and as was rejected by his Honour, the applicants argued that should his Honour find the Deloitte Report to be privileged, that privilege had been waived. Broadly, it was submitted there was an inherent inconsistency in the respondents relying upon the Deloitte Report in these ways whilst it was in the midst of a public relations crisis, and subsequently seeking to rely upon privilege in trying to resist any inspection of the report itself and its underlying material.

An implied waiver occurs where there is some inconsistency between the conduct of the privilege holder and the maintenance of the confidentiality which the privilege is intended to protect. The relevant inquiry to be undertaken is a fact-based inquiry as to whether by conduct the privilege holder has directly or indirectly put the contents of an otherwise privileged document in issue, and entails an evaluative decision based on a consideration of the whole of the circumstances of the particular case.

Having regard to the circumstances of the case, his Honour was not persuaded that the public statements referred to by the applicants put the contents of the otherwise privileged report in issue and, therefore, there had been no meaningful disclosure of the substance of Deloitte's views or advice or any public deployment of the gist thereof.

Robertson v Singtel Optus Pty Ltd [2023] FCA 1392

Federal Court of Australia	Beach J	10 November 2023	
Applicants' Solicitors:	Slater & Gordon		
Respondents' Solicitors:	Ashurst		
Applicants' Funder:	N/A		
Austlii Link:	Available here		

Group member definition dispute in BHP securities action

This judgement concerned an issue of interpretation between the parties of the group member definition in paragraph 3(a) of the applicants' statement of claim. The issue of interpretation regarded whether the group member definition covered persons who entered into contracts to acquire BHP Ltd or BHP Plc shares on trading platforms other than the ASX, LSE or JSE, in particular Chi-X (now Cboe Australia). Broadly, the respondents sought to exclude persons who acquired shares through Chi-X, or any other non-ASX platform, arguing they did not fall within the group member definition, whilst the applicants contended that such persons did fall within the definition.

The applicants contended further that, in any event, if there was any doubt about the construction, it was unnecessary to resolve the issue for the purpose of approving an opt out notice and the issue could be deferred until trial. Further, given the capacity to affect the substantive rights of persons by excluding them from the proceeding, the applicants contented that should only be done on full evidence and submissions rather than at a case management hearing to approve an opt-out notice. However, Moshinsky J did not consider this a practical approach and sought to ensure the opt-out notice stated with clarity who is covered by the group member definition, and thus heard the argument.

By way of background, during the Relevant Period, BHP operated under a dual listed company structure, with two parent companies, BHP Ltd and BHP Plc. BHP Ltd was incorporated in Australia and had a primary listing on the ASX equities market. BHP Plc was incorporated in the UK and had a primary listing on the LSE equities and a secondary listing on the JSE equities market. In Australia, ordinary shares in BHP Ltd listed on the ASX could be traded through ASX operated platforms such as ASX Trade and ASX PureMatch, but also could be traded through other trading platforms not operated by ASX, such as Chi-X, that interface directly with the ASX equity market.

BHP Ltd shares purchased through Chi-X could be sold on ASX owned platforms, and vice versa. Evidence was led by the applicants that group members would likely not have known which platform was used to execute trades, as trades placed on brokerage software were automatically allocated to the best available deal, regardless of which platform was used to acquire the share. Furthermore, the joint applicants contended that trades executed on Chi-X were cleared and settled in an identical manner to those directly traded on ASX operated platforms, via the ASX's Trade Acceptance Service and Settlement Facilitation Service. Therefore, the group member's interest remained the same, regardless of whether they bought BHP Ltd shares through ASX or Chi-X.

The group member definition as expressed in paragraph 3(a) of the applicants' statement of claim relevantly defines group members as all persons who or which:

a. during the period … entered into a contract … to acquire an interest in fully paid-up ordinary shares in:

   i. … BHP Ltd, on the *Australian Securities Exchange (ASX)*, a financial market operated by the Australian Exchange ASX Limited (the BHP ASX Shares);

   ii. BHP Group Plc… on the *London Stock Exchange (LSE)*, a financial market operated by the London Stock Exchange Group Plc (the BHP LSE Shares); and/or

   iii. BHP Plc on the *Johannesburg Stock Exchange (JSE)*, a financial market operated by the Johannesburg Stock Exchange Limited (the BHP JSE Shares)

BHP submitted that the word "on" qualifies the *acquisition* referred to in the opening lines of paragraph 3(a); thus, the acquisition must have taken place *on* the relevant exchange, confining the definition to on-market transactions through the three platforms specified by the applicants.

The applicants submitted that BHP ASX Shares are defined as meaning "*fully paid-up ordinary shares in … the Respondent … on the Australian Securities Exchange*" and that the word "*on*" in the definition attaches to the entity (BHP Ltd). They emphasised that excluding individuals who acquired shares on other trading platforms would be illogical, noting their intention throughout the proceedings was to represent *all* persons who obtained shares in BHP Ltd or BHP Plc during the relevant period. The applicants argued that

to the extent that there exists any ambiguity in the group member definition, it ought to be resolved in their favour to avoid a multiplicity of proceedings, aligning with the objectives of Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**). They also submitted that the description of group members in the applicants' originating application was concerned with identifying the relevant shares which must have been acquired for the purposes of group membership rather than by the platforms used to acquire those shares. Accordingly, the statement of claim ought to be read in a consistent fashion.

BHP Ltd responded that the applicants failed to execute their intention in paragraph 3(a), emphasising that the words in the statement of claim were carefully chosen; if the word "on" meant listed on the relevant exchange, the words "on the Australian Securities Exchange" would not have been necessary.

Moshinsky J sided with BHP's interpretation of the group member definition, quoting s 33H(1)(a) of the FCAA "*a document filed in support of such an application, must … describe or otherwise identify the group members to whom the proceeding relates*". His Honour found that:

> It was necessary to focus on the definition provided in the statement of claim, contending that the natural reading of the text is that the shares were acquired on the ASX. In other words, the "on" qualifies the acquisition.

> The pleadings included a definition of the ASX Share Market, the LSE Share Market and JSE Share Market, forming the basis of the applicants' causation pleading. The pleadings appear to be centred on group members having purchased their shares on one of those exchanges. No other platforms are pleaded or referred to.

> An objective approach was necessary to interpret the group member definition, focusing on the words used in context. Whilst the applicants believed it made no sense to carve out persons who acquired shares on other trading platforms, his Honour decided there was logic to defining the class by reference to the acquisition of shares on the ASX, LSE or JSE exclusively. His Honour rejected that the respondents had conducted the proceedings on the basis the definition extended to other trading platforms.

> It would be inapt to describe a trade executed on ChiX which is cleared and settled by the ASX, as an acquisition of the ASX. Rather, it is aptly described as an acquisition on Chi-X.

As such, his Honour decided that the group member definition excludes persons who acquired an interest in a BHP Ltd or BHP Plc share through any trading platform or exchange other than the ASX, LSE or JSE. His Honour made orders requiring the parties to confer and provide the Court with a revised draft of the opt-out notice reflecting the judgment.

[Postscript: The applicants have since filed an application seeking leave to appeal from the judgment and a separate application for leave to amend their pleadings to clarify the group member definition. The application to amend also seeks that any amendment to the group member definition ought to take effect from the date of commencement rather than the date of amendment.]

Impiombato v BHP Group Limited (No 4) [2023] FCA 1354

Federal Court of Australia	Moshinsky J	3 November 2023	
Applicants' Solicitors:	Maurice Blackburn and Phi Finney McDonald		
Respondents' Solicitors:	Herbert Smith Freehills		
Applicants' Funder:	G&E KTMC Funding LLC		
Austlii Link:	Available here		

GCO availability in Victoria a decisive factor in transfer application battle

The Arrium class action was commenced in the Supreme Court of Victoria in August 2020 on behalf of class members who acquired an interest in shares in Arrium Ltd in the relevant period. In February 2021, an application was filed by the plaintiffs seeking a group costs order (**GCO**) and, shortly after, KMPG filed and served a summons seeking the transfer of the proceeding from the Supreme Court of Victoria to the Supreme Court of New South Wales. After receiving submissions from the parties, Nichols J determined that the appropriate sequencing was for the transfer application to be heard after the GCO application and, subsequently, orders providing for a GCO in the amount of 40% were made. No appeal was brought from that order.

Consequently, in determining the transfer application questions arose as to what weight, if any, ought to be given to the existence of the GCO in the exercise of the transfer power and, if the proceedings were transferred, whether the GCO would apply in apply and be enforceable in New South Wales thereafter (in circumstances where there remains a prohibition on contingency fees). Having regard to the general importance of these questions, her Honour referred the following questions to the Court of Appeal for determination:

1. In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), is the fact that the Supreme Court of Victoria has made a group costs order under s 33ZDA of the *Supreme Court Act 1986* (Vic) relevant? (Answer: Yes)
2. If the proceedings are transferred to the Supreme Court of New South Wales:
   a. will the GCO made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the Supreme Court of New South Wales, subject to any order of that Court; (Answer: No) and
   b. if the GCO will remain in force, does the Supreme Court of New South Wales have power to vary or revoke the GCO? (Answer: Does Not Arise)
3. Should the proceeding be transferred to the Supreme Court of New South Wales pursuant to s 1337H of the Corporations Act, as sought in prayer 3 of the summons filed by the fifth defendant on 26 February 2021? (Answer: No)

Before addressing the above questions, their Honours considered the relevant legislative frameworks and the GCO in this case. Importantly, it was concluded that it is clear, from both the form of the order and the legislative context in which it was made, that the GCO is only expressed to operate in respect of the proceeding in the Supreme Court of Victoria. It follows that, absent some order or legislative provision, the GCO will not continue to bind those to whom it relates if the proceeding is transferred to another court.

In respect of question 1, this was answered in the affirmative. Their Honours concluded that there is neither a textual nor contextual reason that would require the court to ignore a GCO that it had made when it later came to the decision as to the appropriate forum. Further, it would be a striking construction of s 1337H, which is expressed in very broad terms, to require the court to ignore an order that it had made pursuant to a power conditioned on the interests of justice and in respect of which the plaintiff and the law practice may have ordered their affairs. Further, neither *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; [2004] HCA 61 (which determined that where a party enjoys a procedural advantage by reason of having instituted a proceeding in one forum, and the other party suffers a corresponding disadvantage by reason of that choice, that procedural advantage is irrelevant to the assessment of the interests of justice) nor *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45 preclude the court from taking the GCO into account in the transfer application under s 1337H. Accordingly, both the existence of a GCO and the consequences for the GCO in the event of a transfer are relevant to the choice of forum.

Ancillary to the above, their Honours rejected the submission that the GCO is irrelevant on the basis that it should not have been made before the application to transfer had been determined. First, no appeal from the decision to grant the GCO had been made, and secondly the circumstances in which the GCO was made may be relevant to an application to transfer.

Question 2 was answered in the negative in respect of subpart (a), and therefore subpart (b) did not arise. Central to this question was the operation of s 1337P(2) of the Corporations Act which provides that:

> "[i]f a proceeding is transferred or removed to a court (the transferee court) from another court (the transferor court), the transferee court must deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court".

The defendant submitted that the GCO was an order that constituted a "*step that had been taken for the purposes of the proceeding*" and is therefore taken to have been made in the transferee court. Conversely, the plaintiffs submitted that s 1337P does not apply to a GCO and only operates in respect of orders, or kinds of orders, that are within the power of the transferee court to make. Their Honours concluded that the evident purpose of s 1337P is to preserve steps taken in one court so they do not have to be duplicated in the transferee court (i.e. as a deeming provision, it gives legal force to the steps taken in the first court, but critically is not expressed to be a conferral of power to take that step (and does not endow the transferee court with that power where there are no cognate or similar provisions in the transferee court)).

Question 3 was answered in the negative. Interestingly, their Honours indicated that "*the existence of a GCO does not mean that a transfer should not be made*", however, considered it was a factor relevant for the Court to take into account (and in some circumstances, it may be a powerful factor).

Ultimately their Honours concluded, taking into account the importance of the GCO to the proceedings, that it was made because it was determined to be necessary or appropriate in the interests of justice in the proceeding and the relatively neutral state of the agreed facts as to the natural forum, their Honours were not persuaded that the Supreme Court of New South Wales was the more appropriate forum and the proceeding should not be transferred to that court.

Bogan v The Estate of Peter John Smedley (Deceased) [2023] VSCA 256 (Ferguson CJ, Niall and Macaulay JJA)		
Victorian Court of Appeal |	Ferguson CJ, Niall and Macaulay JJA |	26 October 2023
Applicants' Solicitors:	Banton Group	
Respondents' Solicitors:	Baker McKenzie, Ashurst Australia (Fifth Respondent)	
Applicants' Funder:	Equite Capital No 1 Pte Ltd	
Austlii Link:	Available here	

Court orders short class closure period in Boral shareholder action

This was a short judgment in which Lee J resolved differences between the parties as to the terms of an opt out and registration notice to be distributed to class members. Both parties were agreed that the notice should include a form of 'soft' class closure in accordance with the Full Court's decision in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47. The difference between the parties related to the time at which the 'soft' class closure should expire, and the class 'reopen'. The applicants contended that it should expire at the end of July 2024 (with a mediation scheduled to occur no later than 31 May 2024). The respondent contended that it should continue up until final judgment, or alternatively four weeks after the conclusion of the initial trial.

His Honour favoured the applicant's position and said:

> [12] The mediation date in this case has been selected by the parties as being an appropriate juncture in the life of the class action for structured and supervised settlement discussions to take place. Everything that can be done should be done to assist in facilitating the mediation at this time and to focus the minds of the parties on the desirability of settling sooner rather than later (if it is possible to reach a settlement capable of approval by the Court).

> [13] Experience demonstrates it is far easier for a class action to resolve at a mediation if there is some certainty as to the likely loss alleged to have been suffered by group members. Of course, there may be cases where it is appropriate to progress the proceeding without registration, particularly in the light of opposition by one or other party. It is ultimately a matter of discretion. But where, as here, both parties are represented by experienced practitioners and registration orders are sought jointly to facilitate productive settlement discussions, the practice has been for such orders to be made. The method and mode of communication is clear, and the notice ought to be approved.

> [14] As to the narrow difference, as noted above, to the extent possible, the parties should focus on settlement now and not later. If settlement cannot be achieved in a reasonable period following the mediation, there is no reason why the class ought not be "reopened". I prefer a short period of so-called "soft closure".

> [15] Accordingly, I will make the orders proposed by the Applicant.

Parkin v Boral Ltd (Opt Out and Registration Notices) [2023] FCA 1300	
Federal Court of Australia | Lee J | 24 October 2023	
Applicants' Solicitors:	Maurice Blackburn
Respondent's Solicitors:	Herbert Smith Freehills
Applicants' Funder:	N/A
Austlii Link:	Available here

Defendants fail in bid to exclude carcinogen expert in RoundUp Class Action

This was an evidentiary ruling in the trial of the Roundup class action. The applicant sought to lead expert evidence from Dr William Sawyer as to the carcinogenic effects of Roundup. The respondents applied to exclude Dr Sawyers' evidence under s 135 of the *Evidence Act 1995* (Cth), on the basis that, *inter alia*:

- he had previously given similar evidence in numerous other cases against the respondents; and
- he has a fixed view that the respondents have engaged in unethical and, indeed, criminal conduct in seeking to interfere with the publication of scientific research concerning the alleged carcinogenic effects of Roundup, and therefore, lacked the degree of independence ordinarily required of an expert who is giving opinion evidence.

That application was made after the respondents had made a forensic decision not to lead evidence from their opposing expert in response to Dr Sawyers' evidence. His Honour refused the respondents' application, in effect holding that the appropriate course was to allow Dr Sawyers' evidence to be admitted, in circumstances where each party no doubt will, in closing submissions, closely scrutinise the evidence, and address the weight that should be attached to it.

McNickle v Huntsman Chemical Company Australia Pty Ltd (Evidentiary Ruling) [2023] FCA 1268	
Federal Court of Australia | Lee J | 23 October 2023	
Applicant's Solicitors:	Maurice Blackburn
Respondents' Solicitors:	Herbert Smith Freehills
Applicant's Funder:	N/A
Austlii Link:	Available here

"Modest" returns for group members in Hastie Group Ltd Shareholder settlement

This was a closed class action on behalf of those shareholders in Hastie Group Ltd (now in liquidation) (**HGL**) who entered into a funding agreement with the funder, brought against the auditors of HGL. In this judgment, Moshinsky J approved a proposed settlement of the proceeding, stating that the proposed settlement was fair and reasonable, having regard to the considerable risks that the applicant faced. His Honour said (at [37]):

> The settlement here reflects a modest and probably disappointing outcome for class members. The applicant submits, and I accept, that this is a reflection of the risks that ultimately proved to attach to their claims, and of the costs that had to be incurred in getting the information that finally enabled a full assessment of their prospects. It does not at all negate the fairness or reasonableness of the settlement that has been achieved, when it is measured, as it should be, against a realistic commercial valuation of the claims rather than their best-case potential.

The settlement encompassed the following:

- the total settlement sum was $18.5 million;
- the applicant's legal costs were approved in the amount of approximately $7.5 million;
- settlement administration costs were approved in the amount of $125,000;
- a reimbursement payment to the applicant was approved in the amount of $30,000; and
- a payment to the funder as commission was approved in the amount of $5.13 million.

After payment of those (and other minor) deductions, the amount available for distribution to class members would be approximately $5.75 million (approximately 31% of the total settlement sum).

Sadie Ville Pty Ltd v Deloitte Touche Tohmatsu (A Firm) (No 7) [2023] FCA 1273		
Federal Court of Australia | Moshinsky J | 19 October 2023		
Applicants' Solicitors:	Phi Finney McDonald	
Respondent's Solicitors:	Clifford Chance	
Applicants' Funder:	Omni Bridgeway Ltd	
Austlii Link:	Available here	

Federal Court drives through decision on making settlement CFOs in Maccas matter

This judgment arose out of competing actions commenced against the respondent alleging contraventions of the *Fair Work Act 2009* (Cth) (**FWA**) concerning the provision of rest breaks to employees. One of those actions was commenced as a conventional class action under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), funded by a litigation funder (**Part IVA Action**). The other actions comprised non-Part IVA actions commenced by an industrial association on the employees' behalf. In the context of resolving the multiplicity of actions, a question arose as to whether or not the Court had power to make a 'Settlement CFO' (given that such an order was proposed to be sought in the Part IVA Action).

Consequently, the following question was referred to a Full Court (**CFO Question**):

If it was just to do so, does the Court have the statutory power, pursuant to s 33V of the [FCAA], to make an order distributing money paid under a settlement in the form of a "*Settlement CFO*", as that term is defined in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd* [2020] FCAFC 183; (2020) 281 FCR 501 (at 506– 507 [19], [22]-[25])?

Following the referral of that question, a separate issue arose, namely, as to whether a class action could even be commenced under Part IVA in relation to alleged contraventions of the FWA, or whether such an action was contrary to the scheme of the FWA. That issue arose from the fact that the FWA contains its own detailed regime for conferring standing, in certain circumstances, on employees, unions, industrial associations, etc to enable them to commence 'representative' style proceedings on behalf of employees, and was, in substance, argued to be an exclusive code which operated to oust the ability of persons to commence 'representative' style proceedings under other (inconsistent) regimes (i.e. by operating as a partial 'implied' repeal of Part IVA) (**Standing Question**).

All three members of the Full Court gave separate reasons; however, the leading judgment was given by Beach J. In relation to the Standing Question, Beach J rejected the argument that a class action was not able to be commenced under Part IVA in respect of alleged contraventions of the FWA, finding that there was no inconsistency between the two regimes (at [9], [15]-[89]) (see also Lee J at [341]-[363] and Colvin J at [447]-[449]).

In relation to the CFO Question, Beach J held that:

> the Court does have power to make a 'Settlement CFO', and nothing that was said by the High Court in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45 was to the contrary, given that it concerned only the scope of the Court's power under s 33ZF, not s 33V (indeed, his Honour (at [129]) ventured to suggest that nothing in *Brewster* prevented the Court from still making an 'early CFO' in reliance on s 23 of the FCAA, without any need to rely on s 33ZF) (at [10], [90]-[174]) (see also Lee J at [384]- [412] and Colvin J at [451]-[505]); and

> the making of a 'Settlement CFO' involves an exercise of judicial power by the Court, and in answering the 'CFO Question', there was a 'matter' before the Court, and the question was not hypothetical, principally because the answer to the question was relevant not Confidential and for internal use only 6 only to resolution of the 'multiplicity' question in this case but also to the content of notices that will in due course need to be distributed to class members (at [11]-[13], [175]-[317]) (see also Lee J at [364]-[383] and Colvin J at [450], [507]).

In relation to the CFO Question, Beach J said (at [103]):

> But it is not in doubt that the purpose of Part IVA is to enhance access to justice by making some small claims economically viable to litigate, and to enhance efficiency in the administration of justice by enabling the Court to deal with common questions once and for all related claims. And it is not in doubt that commercial litigation funding has been firmly established as being conducive to the achievement of the legislative objectives of Part IVA. And in that regard CFOs and funding equalisation orders (FEOs) are also conducive to such objectives.

Elliott-Carde v McDonald's Australia Ltd [2023] FCAFC 162

Federal Court of Australia | Beach, Lee and Colvin JJ | 12 October 2023	
Applicants' Solicitors:	Shine Lawyers, Lieschke & Weatherill
Respondent's Solicitors:	Ashurst Australia
Applicants' Funder:	N/A
Austlii Link:	Available here

Self-represented applicant permanently stayed in Meta Platforms class action

This was a class action against Meta Platforms, Inc (formerly Facebook, Inc) and Google LLC, on behalf of persons who were adversely affected by the respondents' actions during the period between 29 January 2018 and about July 2018 when they each introduced measures which prohibited, or substantially restricted, advertising related to cryptocurrency and, more broadly, the cryptocurrency industry.

The applicant, Mr Hamilton:

- is self-represented (and although legally qualified, was not the solicitor on the record in the proceeding, and expressly denied that he was acting as a solicitor in conducting the proceeding); and
- is the sole shareholder, the chief executive officer and one of two directors of the funder (**JPB**) (the other director being his mother) – JPB funded the proceeding by issuing 'SUFB Tokens' (itself a form of cryptocurrency) to persons who made financial and non-financial contributions to the litigation (at Mr Hamilton's discretion, including to Mr Hamilton himself).

The respondents applied for the proceeding to be permanently stayed, or alternatively an order that it not continue as a representative proceeding.

They contended that to permit the proceeding to continue in its current form would bring the administration of justice into disrepute for two principal reasons:

i. *first*, Mr Hamilton is in an intractable position of conflict vis-à-vis class members such that continuation of the proceeding with him as representative applicant, sole shareholder and CEO and director of the funder, and without the benefit of legal representation, will bring the administration of justice into disrepute; and

ii. *secondly*, the manner in which Mr Hamilton's interest in the proceeding has been structured involves him in, in substance, obtaining prohibited contingency fees through the issuance of 'SUFB Tokens' to him by JPB as a reward for his non-financial contributions to the litigation.

In her reasons, Cheeseman J analysed in detail the complicated funding arrangements involving JPB, and the obvious conflicts that arose from Mr Hamilton's multifaceted role in the proceeding, particularly as both representative applicant and funder. Although JPB had a 'Conflict Management Policy' in place, which was amended during the hearing to address some obvious deficiencies, nevertheless numerous deficiencies remained

(not least of all the roles which it contemplated would be performed by the 'Lawyers' in the proceeding, notwithstanding that no lawyers had ever been (nor was it proposed that they would be) appointed to act in the proceeding).

Her Honour also analysed (at [77]-[104]) the nature of the duties which a lead applicant owes to class members, concluding (at [83] and [104]) that "*Mr Hamilton owes a duty to Group Members not to act in a way that is contrary to their interests in conducting the proceeding*" (a duty which was only heightened in this case in the absence of a legal practitioner acting in the case, and which Mr Hamilton could not discharge in circumstances where he was, in substance, also the funder).

Given the pervasive (and intractable) conflicts of interest arising from Mr Hamilton's multiple roles and interests, her Honour ultimately concluded that the proceeding should be permanently stayed (but without prejudice to the right of class members to pursue their claims in a separate (and properly structured) proceeding. Her Honour summarised her conclusions as follows:

> [12] To permit the proceeding to continue in the current form would bring the administration of justice into disrepute. Although Mr Hamilton sought to advance a number of ways in which the proceeding may be managed so as to mitigate the issues identified by the respondents, I am not satisfied that the conflicts inherent in Mr Hamilton's multi-faceted interests in the proceeding are capable of being appropriately managed.

> [183] I am satisfied that this proceeding should be stayed because it would otherwise bring the administration of justice into disrepute and undermine the integrity of the Court's processes in relation to representative proceedings. In a representative proceeding, the administration of justice may be brought into disrepute where the manner in which it is conducted principally serves the interests of the representative applicant and the litigation funder and leaves the interests of group members inadequately protected. Such an arrangement is contrary to the scheme of Part IVA of the Act.

> [185] As I have set out above, there is the very real potential for conflicts of interests to arise and influence Mr Hamilton' [sic] conduct of the proceedings in ways that are to the detriment of Group Members. The conflicts set out above arise from the many and varied roles Mr Hamilton undertakes in and in relation to this proceeding and are not adequately addressed by the LFA, CMP or the undertakings Mr Hamilton has proffered to the Court. Were the conflicts to arise, there are real concerns about how Mr Hamilton would address them in circumstances where he frames his claim as being primary and those of Group Members as being secondary. Even with the best of intentions, the way in which the myriad of conflicts can manifest may be subtle and insidious. The protection of Group Members is not appropriately addressed by Court oversight, particularly in this proceeding where the Court is bereft of an independent solicitor, that is an officer of the Court, acting on record for the representative applicant. I accept that a permanent stay is regarded as a tool of last resort, however, I am satisfied that it is required in this proceeding.

[Postscript: On 11 October 2023 Mr Hamilton filed an application for leave to appeal from Cheeseman J's decision.]

Hamilton v Meta Platforms, Inc [2023] FCA 1148

Federal Court of Australia	Cheeseman J	29 September 2023
Applicant's Solicitors:	N/A	
Respondents' Solicitors:	Corrs Chambers Westgarth; Herbert Smith Freehills	
Applicant's Funder:	JPB Liberty Pty Ltd	
Austlii Link:	Available here	

Maurice Blackburn trumps as sole solicitors in Downer EDI shareholder class action

This judgment concerned a joint carriage dispute and group costs order applications in relation to a shareholder class action. The plaintiffs in three proceedings jointly sought consolidation; the carriage dispute was between the consolidated proceedings (Lidgett, Teoh and Jowene) run by Maurice Blackburn and William Roberts Lawyers, and the Kajula proceeding represented by Quinn Emanuel. In both, a group costs order (**GCO**) of 21% was sought. The defendant did not oppose the GCOs, nor the consolidation if a costs referee was appointed.

Justice Delany made the consolidation orders in light of the following being consistent with the overarching purpose:

a. the proceedings are of broadly similar nature;

b. significant efficiencies will be achieved;

c. each proceeding has progressed to the same stage (due to joint management by the Supreme Court of Victoria and the Federal Court);

d. the proceedings concern the same subject matter and the causes of action are very similar; and

e. the consolidation will enhance the prospects of resolution by way of negotiation or mediation.

The plaintiffs in the Jowene and Teoh proceedings sought to have their costs be costs in the consolidated proceedings, on the basis that the Teoh funding arrangements carried over, and the Jowene proceeding was commenced first. His Honour held it was reasonable to make such orders as it facilitated the efficient and cost-effective resolution of issues in dispute.

His Honour was satisfied that the GCO was in the best interests of class members whichever matter was to proceed because:

a. it would result in a more favourable financial outcome than traditional funding plus legal costs;

b. 21% is a reasonable rate and sits below the rate in most other recent shareholder class actions;

c. it would provide transparency and certainty to class members and the plaintiffs; and

d. it would result in a fair distribution of the burden of legal costs across all class members.

In relation to which proceeding should go forward, his Honour noted that the decision depended on what was in the best interests of class members and compliance with the overarching purpose. His Honour noted that most factors were neutral including that the class membership and claim period was the same, all firms and counsel were suitably experienced, the financial position of firms to meet an order for adverse costs were sufficient, and provisions for security were acceptable.

The defendant submitted that an independent costs referee should be appointed at the expense of the plaintiffs' solicitors to reduce duplication of costs and therefore the defendant's possible liability for any such costs. His Honour agreed and held that with the provision of a costs referee, the risk of duplication of costs factor was also neutral. The need for the Lidgett proceeding to amend pleadings was considered to be neutral as it required only four weeks – a relatively short time.

Ultimately, his Honour ordered that the consolidated proceeding continue and the Kajula proceeding be stayed on the basis that the lawyers in the consolidated proceeding had worked cooperatively to narrow the issues in dispute at the carriage hearing, agree on the identity of the plaintiffs and arrangements for representation and cooperative funding, and thereby fulfilled their obligations under the *Civil Procedure Act 2010* (Vic), "*giv[ing] confiden[ce] in the ability of those involved to act efficiently and cooperatively in the best interests of group members*" (at [131]).

Lidgett v Downer EDI Ltd [2023] VSC 574

Supreme Court of Victoria | Delany J | 27 September 2023	
Plaintiff's Solicitors:	Maurice Blackburn; Quinn Emanuel Urquhart & Sullivan; Piper Alderman; William Roberts Lawyers
Defendant's Solicitors:	Gilbert + Tobin
Lidgett's funder:	CASL
Kajula's funder:	Regency VII Funding Pty Ltd
Austlii Link:	Available here

Courts continue to grapple with carriage disputes

This case involved four competing securities class actions against The Star Entertainment Group Ltd (**Star**), commenced respectively by Slater & Gordon (**S&G**), Maurice Blackburn (**MB**), Phi Finney McDonald (**PFM**) and Shine (in that order). Each of the plaintiff firms, other than Shine, proposed to conduct the proceeding pursuant to a group costs order (**GCO**) as follows:

- S&G: 14%;
- MB: 10% of the first $50 million, 20% of the next $50 million, and 25% of any amount over $100 million; and
- PFM: 17%.

Shine, on the other hand, proposed to conduct the proceeding on a conventional 'no-win no-fee' basis.

As there were no proposals for consolidation of proceedings, the hearing was conducted on the basis that only one of the proceedings would continue, with the remaining three proceedings being permanently stayed.

Pursuant to a highly prescriptive process, each parties' evidence and submissions was required to address ten identified topics, namely:

- proposal for carriage;
- practitioners (i.e., experience and resources);
- nature and scope of the causes of action advanced (and relevant case theories);
- group membership;
- funding and legal costs (including any proposed GCO);
- proposals for security;
- extent of any bookbuild;
- the state of preparation of the proceedings;
- any other material factor(s); and
- relief sought.

Each party filed voluminous evidence and submissions in relation to each of those topics, and sought to distinguish it (and its proceeding) from the others in various ways. However, Nichols J ultimately concluded that the vast majority of those factors were neutral in the overall determination of multiplicity.

Her Honour decided to award sole carriage to the S&G proceeding, primarily based on its unprecedented GCO rate of 14%. In doing so, her Honour agreed with the position adopted by the contradictors, and dismissed arguments raised by the other parties that:

- the rate was too low, in the sense that it was a 'loss leader' for S&G which would not ultimately be in class members' interests;
- the financial position of S&G was such as to raise legitimate concerns as to its ability to adequately resource the proceeding through to a conclusion; and
- the rate proposed by MB would produce a better outcome for class members for lower settlement amounts, below approximately $80 million (which, despite the large estimated overall losses, was a realistic possibility in this case given the precarious financial position of Star and the lack of any information as to its insurance position).

D A Lynch Pty Ltd v The Star Entertainment Group Ltd [2023] VSC 561	
Supreme Court of Victoria | Nichols J | 19 September 2023	
Plaintiff's Solicitors:	Slater & Gordon; Maurice Blackburn; Phi Finney McDonald; Shine
Defendant's Solicitors:	King & Wood Mallesons
Plaintiff's Funder:	N/A
Austlii Link:	Available here

Common Fund Order in best interest of PFAS class action group members

This *ex tempore* judgment concerned a successful application for settlement approval in relation to a class action against the Commonwealth for the alleged contamination of private land with chemicals known as PFAS through their use on RAF bases.

The proposed settlement was for $132.7 million inclusive of legal and funding costs. The Court made a common fund order (**CFO**) of 25% of the sum, amounting to $33.2 million and approved the deductions sought for legal costs, being $16.6 million. Additionally, various reimbursement payments were sought and granted for lead applicants, sample class members, and another class member who played a particularly active role.

His Honour noted that the earlier PFAS actions, in which a CFO of 25% was granted, were significantly less complex than the present matter. His Honour was minded to make the order particularly given that a CFO would provide certainty as to the sum of the deduction which would not be the case with a funding equalisation order, and it would be consistent with the previous PFAS actions.

The proposed settlement would not affect any claim or potential claim for personal injury damages associated with PFAS contamination.

In determining whether the proposed settlement was fair, reasonable, and in the interests of class members, Lee J considered an extensive confidential opinion prepared by counsel for the applicants. Interestingly, orders were made permitting class members to inspect the opinion subject to signing a confidentiality undertaking.

His Honour was satisfied that "*the amount of compensation a claimant will receive roughly reflects the merits of the claims*", particularly having regard to the liability and quantum risks set out in the confidential opinion.

His Honour was satisfied that the distribution scheme was reasonable, though the reasons for this were not detailed, and the capped administration costs were appropriate. As to legal costs and additional deductions for particular class members and the lead applicants, his Honour was satisfied that they were fair and reasonable, noting that the costs referee was satisfied with the legal costs as sought.

A number of class member objections were received and considered by his Honour including nine class members who made oral submissions at the hearing. His Honour addressed the concerns of individual class members including by explaining that subjective feelings of hurt caused by the contamination do not necessarily have a bearing on whether the settlement is fair and reasonable.

In relation to funding costs, his Honour noted that the funder entered into funding agreements with two thirds of the class members, and thus funded class members were contractually obliged to pay a funding fee.

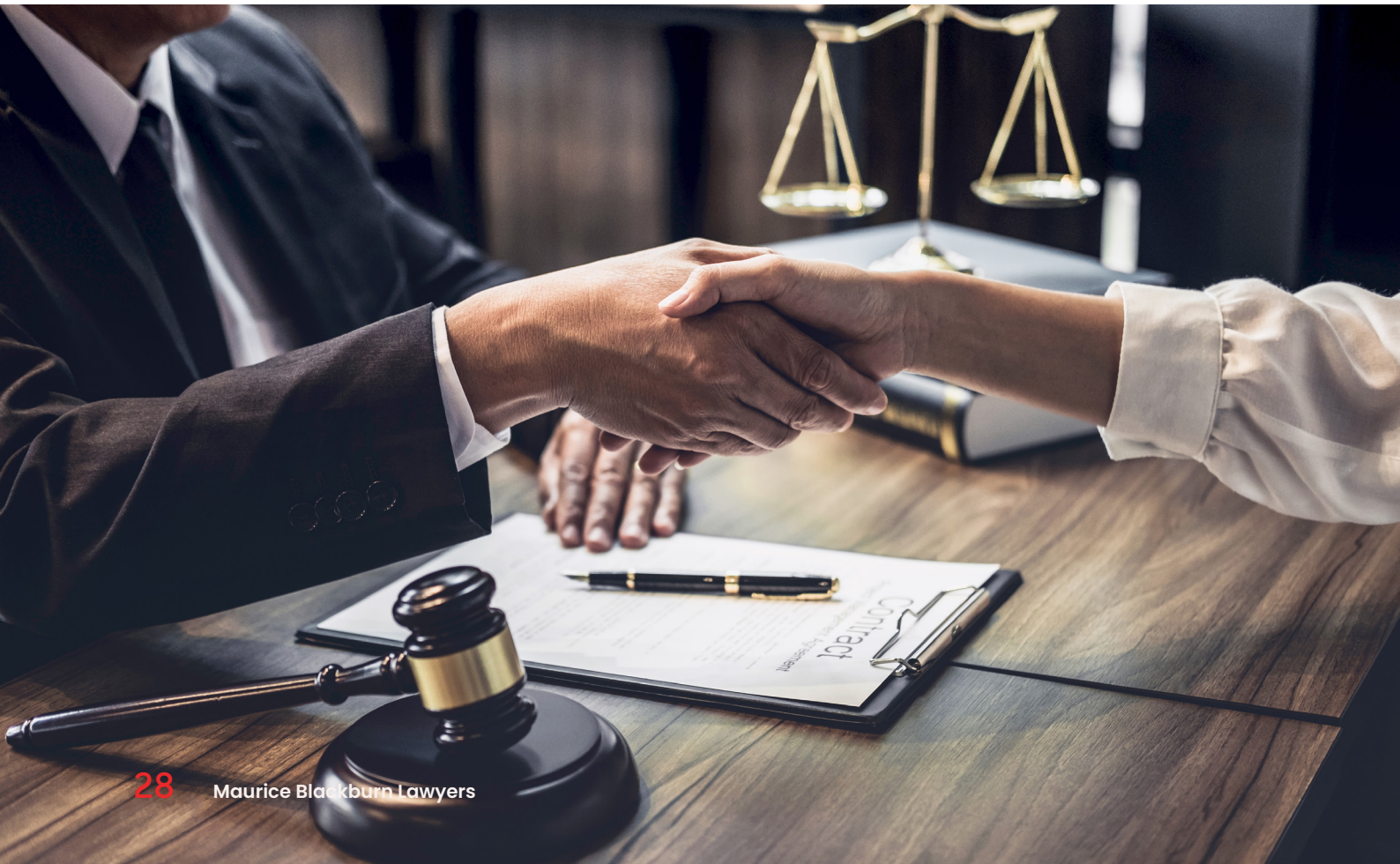
Haswell v Commonwealth of Australia (No 3) [2023] FCA 1093	
Federal Court of Australia | Lee J | 13 September 2023	
Applicants' Solicitors:	Shine Lawyers
Respondent's Solicitors:	Corrs Chambers Westgarth
Applicants' Funder:	LCM Funding Pty Ltd
Austlii Link:	Available here

Settlement and costs approved in $29m Consumer Credit Insurance Policies Action

This was a class action against Westpac Banking Corporation and two related companies (together **Westpac**) on behalf of persons who acquired consumer credit insurance policies for Westpac credit cards, flexi loans or personal loans between 1 January 2010 and 30 June 2019. The applicant alleged, among other things, that Westpac engaged in misleading or deceptive conduct and/or unconscionable conduct, including by representing that the policies were not optional or provided value and by using unfair tactics in arranging the issue of the policies.

In this judgment, O'Bryan J gave reasons for approving a settlement of the proceeding in the amount of $29 million, pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth). His Honour found that the settlement was fair and reasonable as between the applicant and Westpac (see [51]-[55]) and as between class members (see [59]). In approving the settlement, his Honour made orders approving the following deductions from the settlement sum:

- approximately $6.7 million for the applicant's legal costs and disbursements (including uplift) of the applicant to the date of the settlement approval – in doing so, his Honour adopted the report of the Court-appointed costs referee Cate Dealehr, save for one minor and insignificant exception;
- approximately $1.6 million for the potential future costs of the administration of the settlement, comprising approximately $575,000 for the applicant's solicitors' (**Slater & Gordon**) estimated legal fees and approximately $1 million for disbursements associated with the work of Deloitte, including the development of a secure registration portal and assessment of the data provided through that portal;
- approximately $275,000 for the reimbursement of the costs of Slater & Gordon holding after the event (**ATE**) insurance for adverse costs in the proceeding. His Honour opined that, when considering whether the costs of ATE insurance may be properly deducted from a settlement of a representative proceeding, analogous considerations arise whether the insurance was obtained by a third-party litigation funder



that is entitled to a funding commission, or by a law firm running a matter on a no win, no fee basis that is entitled to an uplift fee. His Honour said that "*[t]he costs would be assessed as reasonable if the terms of the policy are appropriate in the context of the proceeding and the premium charged for the policy has been determined in a competitive market setting. The costs of ATE insurance may not be reasonable if a proceeding is brought in a "no costs" jurisdiction*" (at [91]). In the present case, his Honour was satisfied that it was reasonable for the costs of Slater & Gordon obtaining ATE insurance to be deducted from the settlement sum, on the basis that there was a real prospect that the claims might fail, the amount insured under the policy was reasonable, the policy was acquired in a competitive market, and, having regard to Slater & Gordon's costs agreement, there could be no expectation that the risks of an adverse cost order had been factored into, and were effectively absorbed by, Slater & Gordon's uplift fee. In relation to that final consideration, his Honour noted that "*[t]he potential need for insurance against an adverse costs order, and the additional costs involved in taking out such insurance, were disclosed in the legal costs agreement*" (at [92]).

- $20,000 as the applicant's reimbursement payment and $30,000 as the sample class members' combined reimbursement payments.

After the above deductions, approximately $20.3 million will be transferred to registered class members, being approximately 70% of the total settlement sum.

Kemp v Westpac Banking Corporation (No 4) [2023] FCA 830

Federal Court of Australia	O'Bryan J	21 July 2023
Applicant's Solicitors:	Slater & Gordon	
Second Respondent's Solicitors:	Allens	
Applicant's Funder:	N/A	
Austlii Link:	Available here	

Uber pre-trial class closure approved

This is a decision in the class action against Uber brought on behalf of members of the taxi and hire car industries in Victoria, Queensland, New South Wales and Western Australia. A 10-week trial of the proceeding has been set down to commence in March 2024. This decision concerned an application by the parties for the Court to make 'soft' class closure orders and to fix a date by which class members were to register or opt out of the proceeding. The 'soft' class closure orders sought by the parties operate by fixing the number of class members eligible to participate in any settlement reached prior to trial but spring back open if a settlement is not reached by that stage. The orders were sought pursuant to ss 33ZF and 33ZG of the *Supreme Court Act 1986* (Vic) (**SCA**).

Justice Nichols considered that the soft class closure orders, along with the scheme for notification to class members, were appropriate. Her Honour held that ss 33ZF and 33ZG of the SCA expressly empowered the Court to make soft class closure orders (at [6]). Her Honour agreed with the parties' submissions that class closure orders were appropriate for the following reasons (at [7] – [21]):

- Without class closure orders, the parties' legal representatives considered there to be a significant risk that settlement discussions would be unable to proceed.
- The proceeding was substantially advanced.
- The nature of the proceeding – a mass tort claim – was such that registration was inevitable.
- There was agreement between the parties that soft class closure orders should be made.
- Class members would have adequate notice of the need to register to participate and sufficient time in which to do so.
- Were a class member to fail to register by the class deadline, they would still be free to seek orders from the Court at a later stage allowing them to participate in any settlement that may be reached.

Given the unique nature of class membership in the case – where there is no maintained central record of class members (such as a share register) – novel orders for distribution of the notice were made. In addition to the conventional orders for notice via an advertisement in newspapers, on the Court and Maurice Blackburn's website, orders were made for Maurice Blackburn to distribute the notice to several industry bodies with those bodies to then further distribute the notice to their members and industry contacts.

Andrianakis v Uber Technologies Inc [2023] VSC 415	
Supreme Court of Victoria | Nichols J | 21 July 2023	
Plaintiff's Solicitors:	Maurice Blackburn
Defendants' Solicitors:	Herbert Smith Freehills
Plaintiff's Funder:	Harbour Fund III, L.P
Austlii Link:	Available here

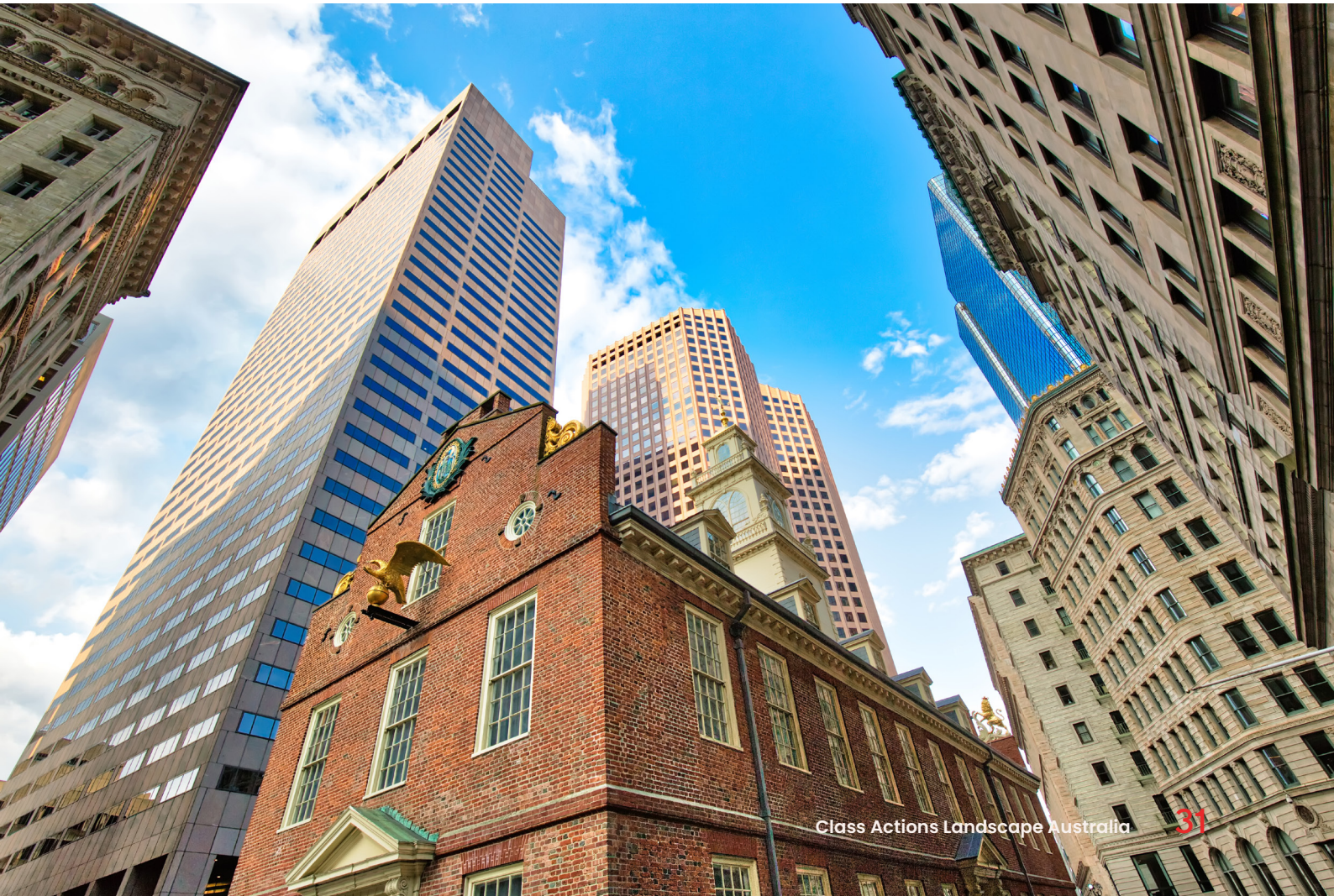
Opt Out orders taking shape in Victoria

This was a judgment in the 'flex commission' class actions in respect of orders under ss 33J, 33X and 33Y of the *Supreme Court Act 1986* (Vic) for opt out and claim registration. The parties had substantially agreed on the form of those orders, save for the consequences for failing to register (if any) and the manner in which notification should occur. It was not disputed that the Court has the power to make orders of the kind sought, but whether there is a proper basis for the exercise of the power, in the circumstances.

In respect of voluntary registration, the defendants (referred to collectively for the purposes of this summary though each defendant made submissions relevant to its own proceeding) sought 'soft class closure' orders to the effect that, while voluntary, class members who failed to register by a certain deadline would be precluded from seeking any benefit under an in-principle settlement achieved at (or as a consequence of) mediation. They contended that this would achieve greater certainty in respect of potential quantum, and that absent any such orders mediation would occur without any real parameters for estimating the claims. In particular, it was argued that without knowing how many class members are participating, the sheer number of class members in the proceedings would magnify the differences between the parties.

The plaintiffs opposed the making of the above orders and contended that the Court should provide for voluntary registration by class members without any consequence attending the failure to register. It was submitted that voluntary registration would be sufficient for assessing quantum for the purposes of mediation, and that class members should not be required to register until a settlement is on the table. Further, the plaintiffs submitted that:

a. in this case, the utility of knowing how many people wished to participate in the proceedings and thereby assisting the forthcoming



mediations did not outweigh the prejudice that could be caused to class members who might be unintentionally excluded; and

b. in respect of potential quantum, the defendants have in any event all the data necessary to make an informed decision about the quantum of the claims.

Justice Nichols determined that it was appropriate to make the 'soft class closure' orders essentially in the form sought by the defendants. Her Honour was persuaded that ascertaining participation rates had a real prospect of making a material difference to the parties' ability to reach agreement on the quantum at stake in the proceedings. Her Honour was also persuaded that individually addressed notices (drawn from the defendants' records) which informed recipients they had been identified as a class member in the proceedings would likely ameliorate confusion as to eligibility. Further, the parties agreed (subject to Court order) that the defendants would provide the solicitors for the plaintiff with access to a unique database with data relevant to the claims which would further assist in responding to class member enquiries.

Finally, the means by which the notice should be distributed to class members for whom an email address was not available was in dispute (which for each defendant was a majority and very significant number of class members). Her Honour found that as personal notice was to be given to class members, distribution must involve a number of channels: email in the first instance, followed by SMS for class members for whom there is no email address, then post where neither email nor SMS were available. In respect of costs, her Honour found that notification would benefit both parties in each case and it was therefore appropriate for both sides to share the costs of notification.

Fox v Westpac Banking Corporation [2023] VSC 414

Supreme Court of Victoria | Nichols J | 20 July 2023	
Plaintiffs' Solicitors:	Maurice Blackburn
Defendants' Solicitors:	King & Wood Mallesons / Herbert Smith Freehills / Gilbert + Tobin
Plaintiffs' Funder:	N/A (Group Costs Order)
Austlii Link:	Available here

Representatives entitled to damages due to AMP's 'buyer of last resort' policy amendments

This was a class action on behalf of financial planners who were authorised representatives of the respondent (**AMP**), arising out of purported amendments by AMP to its 'buyer of last resort' (**BOLR**) policy. Although described as a 'policy', the BOLR policy had contractual force between AMP and the financial planners. In short, the BOLR policy enabled financial planners to sell their practice to AMP at a price calculated as 4x ongoing revenue. However, on 8 August 2019 AMP purported to amend the BOLR policy by reducing the multiple from 4x to 2.5x (**8 August Amendment**).

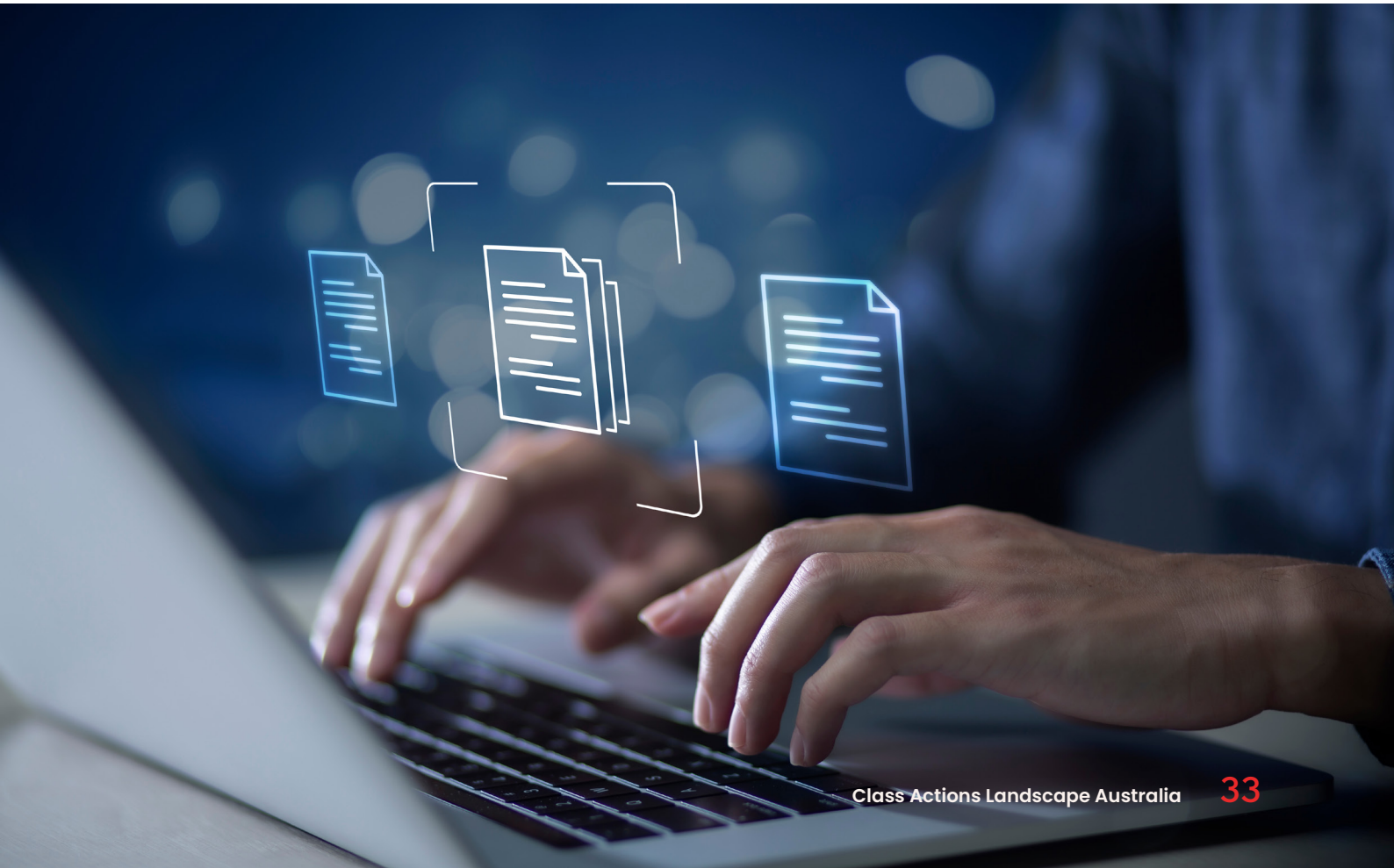
The BOLR policy could be amended by AMP by giving 13 months' written notice of any changes (which was not given in this instance), or otherwise if "*legislation, economic or product changes render any part of [the BOLR] policy inappropriate following consultation with the ampfpa [being the organisation which represents the financial planners]*" (**Amendment Term**). The applicant contended, in summary, that the 8 August Amendment was ineffective because:

- AMP did not 'consult' with the ampfpa in relation to the purported amendment, as required by the Amendment Term;
- in any event, there were no relevant 'legislation, economic or product changes' within the meaning of the Amendment Term (or even if there were, they were not such as to render any part of the BOLR policy 'inappropriate' within the meaning of the Amendment Term); and
- alternatively, the 8 August Amendment was not reasonably necessary to address any such changes.

The applicant further contended that AMP, in making the 8 August Amendment:

- acted in breach of a contractual obligation of good faith;
- engaged in unconscionable conduct; and/or
- engaged in misleading or deceptive conduct.

AMP denied the applicant's claims. The claims of a sample class member were also determined



at the trial of the proceeding, being a class member who AMP contended had granted to AMP a release in respect of the claims made in the proceeding.

Following a lengthy trial, Moshinsky J upheld the applicant's (and sample class member's) claims. His Honour's reasons comprise 722 paragraphs, and it is difficult to fairly summarise them here, but in substance his Honour held:

- the requirement on AMP to 'consult' was a precondition to the effectiveness of the 8 August Amendment (and not just an obligation the breach of which sounded only in damages);
- AMP had failed to 'consult' within the meaning of the Amendment Term (having given the ampfpa notice of the proposed 8 August Amendment only 12 days before it became effective, being a manifestly insufficient period in the circumstances);
- AMP had also failed to establish that there was any 'legislation, economic or product change' which was such as would justify the 8 August Amendment;
- thus, the 8 August Amendment was ineffective (and it was therefore unnecessary to determine whether AMP breached a contractual obligation of good faith, or engaged in unconscionable or misleading or deceptive conduct); and
- in relation to the sample class member's claim, although the release granted in favour of AMP was not an 'unfair term' under the Australian Consumer Law (**ACL**) (because it was not contained in a 'standard form contract' as defined in the ACL), it was nevertheless procured by conduct of AMP that was, in all of the circumstances, unconscionable, and was therefore void.

Consequently, both the applicant and the sample class member were entitled to damages (representing, in effect, the difference between the amount they would have received for the sale of their practice to AMP under the original 4x multiple of ongoing revenue, and the amount they had in fact received (or now stood to receive) under the amended 2.5x multiple).

Equity Financial Planners Pty Ltd v AMP Financial Planning Pty Ltd [2023] FCA 741	
Federal Court of Australia | Moshinsky J | 5 July 2023	
Applicant's Solicitors:	Corrs Chambers Westgarth
Respondents' Solicitors:	King & Wood Mallesons
Applicant's Funder:	Augusta
Austlii Link:	Available here

Defendants' motion dismissed in NSW junior doctors' class action

This is a class action against the Secretary for the NSW Ministry of Health and the State of New South Wales on behalf of junior medical officers to recover unpaid employment entitlements, including unpaid overtime, break and superannuation entitlements.

In this judgment, Garling J dismissed the defendants' motion to declass the proceeding pursuant to s 166(1) of the *Civil Procedure Act 2005* (NSW) (CPA) and ordered the defendants to pay the plaintiff's costs of the motion.

His Honour observed that the proceeding raises a number of substantial questions of fact or law which are likely common to the claims of class members, including the proper interpretation of the overarching legislative provisions, Industrial Awards and Department of Health Policy Directives covering the disputed areas in respect of which claims for payment have been made.

Further, and notwithstanding there may have been many individual circumstances as to how class members were treated, his Honour was satisfied that a single determination of those common questions will be the most efficient way of resolving them. Indeed, his Honour observed that if thousands of individual claims were brought in the Local Court, there would be a real risk of conflicting decisions, the plaintiffs would incur millions of dollars in filing fees, and there would be a significant intrusion on the resources of the State. By contrast, the provisions of Pt 10 of the CPA provide the Court with "*a flexible and highly efficient method of determining a large number of claims which have a relatively low value*" (at [29]).

Further, in a representative proceeding, there is a single set of lawyers for the plaintiff and class members, and a single set of lawyers for the defendants. Were the proceeding to be declassed, there would likely be many different lawyers acting for individual plaintiffs, which would likely result in legal fees being significantly higher if claims were made individually.

His Honour noted that there may come a time (assuming the plaintiff's claims are established at trial) when it becomes necessary for there to be individual assessments of the claims of class members. However, this could be addressed by the Court referring out assessments to expert panels or referees; making an aggregate damages award; addressing the claims of individual class members in sub-groups; or declassing the proceeding. However, his Honour concluded that the defendants' application was premature and that, for the reasons outlined above, it was in the interests of justice for the matter to proceed as a representative proceeding. As such, his Honour dismissed the defendants' motion and made a costs order in favour of the plaintiff.

Fakhouri v NSW Ministry of Health [2023] NSWSC 808	
Supreme Court of New South Wales | Garling J | 27 June 2023	
Plaintiff's Solicitors:	Maurice Blackburn
Defendants' Solicitors:	Minter Ellison
Plaintiff's Funder:	N/A
Austlii Link:	Available here

Security for costs an increasing trend in defendants' tactics

This is a class action on behalf of passengers of a 'Southern Australia Cruise' operated by the respondent in December 2016. The applicant alleges that there was an outbreak of norovirus onboard the cruise, which caused significant disruption to the cruise. The applicant alleges that the respondent breached the consumer guarantees in the Australian Consumer Law and seeks compensation on her own behalf and on behalf of class members.

This decision concerned an application by the respondent for production of any retainers and costs agreements between the applicant and her solicitors, Shine Lawyers (**Shine**). The application arose against the background of a foreshadowed application by the respondent for security for costs. In response to a letter from the respondent's solicitors, Shine stated that they were acting on a "no-win, no-fee" basis, and that there was no third-party standing behind the applicant who will benefit from the litigation if it is successful, that is, providing any funding, backing, or indemnity such as to enliven ordinary security for costs principles against those parties. The respondent sought production of Shine's costs agreement on the basis that it was ambiguous as to whether Shine was covered by that statement and/or whether some other party may have agreed to protect the applicant in the event of an adverse costs order.

Justice Jackman made the orders sought by the respondent. In doing so, his Honour first rejected the applicant's submission that the Court did not have power to order the production of Shine's costs agreement, finding that s 23 of the *Federal Court of Australia Act 1976* (Cth) provided such power. Second, his Honour rejected the applicant's submission that the documents sought had no relevance to any security for costs application. His Honour acknowledged that, in *Madgwick v Kelly* (2013) 212 FCR 1; [2013] FCAFC 61 (**Madgwick**), the Full Court held that a law firm acting in circumstances where it would only recover its professional fees and disbursements if the litigation were successful has no relevant commercial interest in the litigation such as to expose it to the need to provide security for costs, in contrast to the position of a litigation funder. His Honour observed (at [10]) that "*[t]he reasoning of the Full Court in Madgwick appears to me to make an application for security for costs in the present proceedings difficult, but not necessarily hopeless*". Indeed, his Honour said that the documents sought may expose differences between the terms of Shine's costs agreement in this case with the agreement in issue in *Madgwick*. On the other hand, his Honour said that production of the agreement "*may confirm the applicability of the reasoning in Madgwick …, and thus obviate the need for the Court to deal further with any application for security for costs*" (at [10]). Finally, his Honour agreed with the respondent's submission that the correspondence between the parties did not unequivocally rule out the possibility of the existence of some agreement with another party to protect the applicant against any adverse costs order.

McLean-Phillips v Carnival plc t/as P&O Cruises Australia (No 2) [2023] FCA 627		
Federal Court of Australia | Jackman J | 14 June 2023		
Applicant's Solicitors:	Shine Lawyers	
Respondent's Solicitors:	Clyde & Co	
Applicant's Funder:	N/A	
Austlii Link:	Available here	

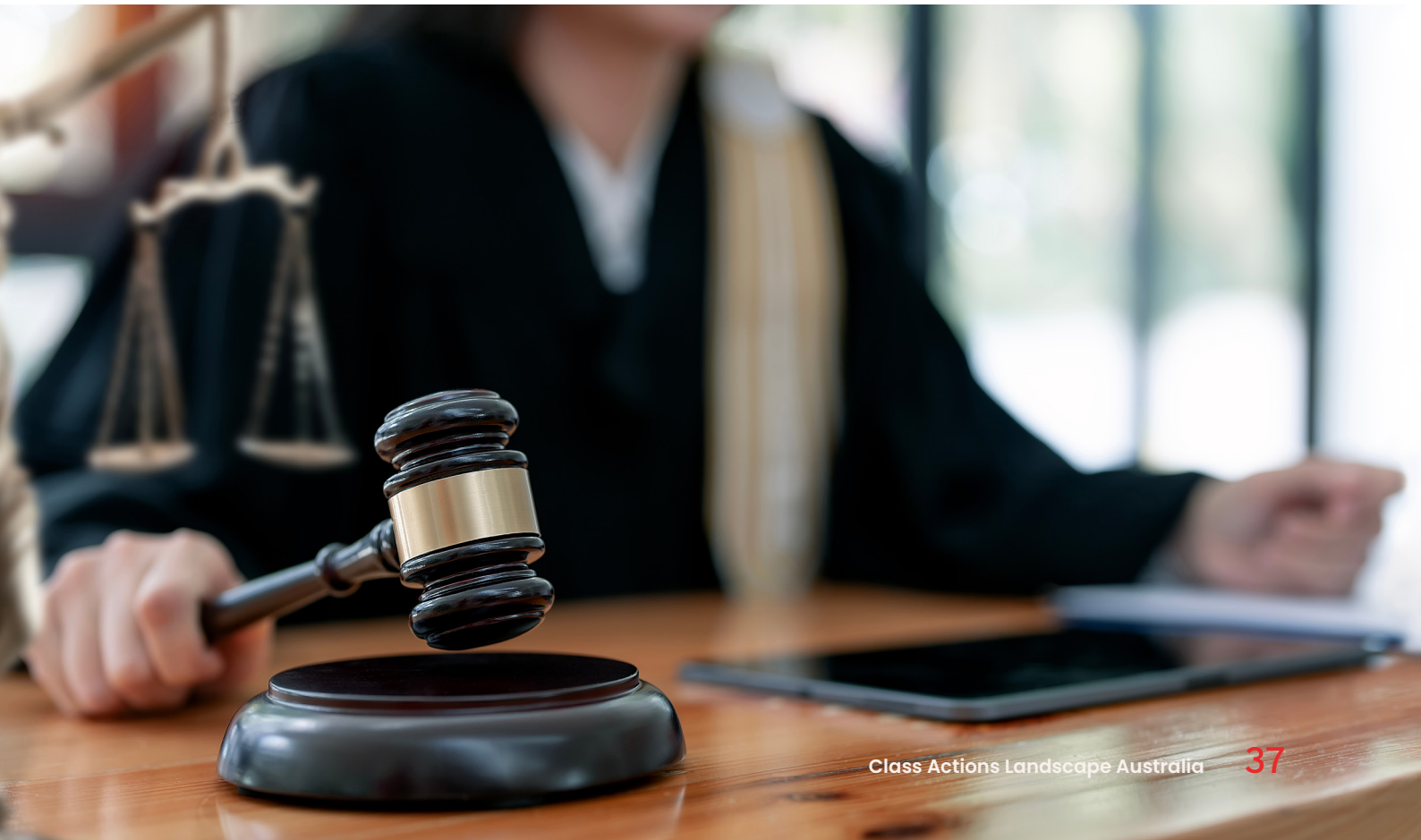
Judge rejects Colonial's professional privilege claim

This is a class action on behalf of beneficiaries of the Colonial First State FirstChoice Superannuation Trust (Fund), of which the first respondent (Colonial) is and was the trustee. The applicants allege, in substance, that the interest rate that was paid by Colonial's parent company, Commonwealth Bank of Australia (CBA), on certain term deposits held by the Fund with CBA was lower than that which would have been negotiated had Colonial been dealing with CBA at arms-length.

Colonial claimed legal professional privilege in respect of certain discovered documents. The applicants asserted that any privilege in respect of those documents was a joint privilege held jointly by the trustee and beneficiaries (i.e. the class members), and could not therefore be asserted by the trustee against the beneficiaries. In this judgment Colvin J determined that question (by reference to five sample documents).

An earlier application by the first applicant (Mr Kayler-Thomson) raising the same issue was dismissed (*Kayler-Thomson v Colonial First State Investments Ltd (No 2)* (2021) 153 ACSR 663; [2021] FCA 854), on the basis that Mr Kayler-Thomson did not personally share a joint privilege in the relevant documents (because he was not a member of the Fund at the time when the documents came into existence), and his role as the representative applicant in the proceeding did not entitle him to claim production of discoverable documents on the basis of a joint privilege that was held by members of the represented class (but not held by him personally). Thus, the present application was brought by the (subsequently added) third applicant instead (Ms Gibson), who was a member of the Fund at the relevant time.

The primary issue between the parties was whether joint privilege existed only in respect of documents which came into existence during the period in which Ms Gibson's funds were actually invested in the particular investment option concerned (as contended by Colonial), or whether, as Ms Gibson contended, joint privilege existed because the documents concerned the



administration of an aspect of the overall Fund in which she had an interest at the time that the documents were brought into existence, and concerned an investment option that would be made available to her as a member of the Fund who could choose the relevant investment option (even if she did not in fact choose that option at any given time).

That contention of Ms Gibson had been rejected in the earlier judgment, but without the issue having been expressly raised for decision. Accordingly, his Honour held (at [46]-[53]) that nothing which had been said in the earlier judgment (which in any event was interlocutory only) operated to preclude Ms Gibson's application, whether by some form of estoppel or otherwise.

On the substantive question, his Honour upheld (at [54]ff) Ms Gibson's contention that the joint privilege arose in respect of documents that came into existence when she was a member of the Fund, irrespective of whether she had chosen the particular investment option the subject of the proceeding (and thus the subject of the documents). That was principally on the basis of the terms of the Fund's trust deed, and the duties of Colonial as trustee, which meant that "*each beneficiary has an interest in the due administration of the Fund as a whole*" (at [60], underlining added) – that interest was not limited to the particular investment option that each beneficiary had chosen. Accordingly, Colonial's assertion of privilege against Ms Gibson was rejected.

Kayler-Thomson v Colonial First State Investments Ltd (No 3) [2023] FCA 606	
Federal Court of Australia | Colvin J | 9 June 2023	
Applicant's Solicitors:	Slater & Gordon
Respondent's Solicitors:	Herbert Smith Freehills
Applicant's Funder:	N/A
Austlii Link:	Available here

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