Class Actions Landscape Australia

November 2024 Edition

maurice blackburn lawyers

Introduction

As we close out another extraordinary year of developments, revelations and results in Australian class actions, this latest edition of Class Actions Landscape Australia addresses some of the pressing issues that trended in 2024.

We saw research published by Monash University's Professor Vince Morabito and the McKell Research Institute, each examining the life of Victoria's Group Costs Order (contingency fees) regime.

Both reports independently concluded that the GCO regime in Victoria clearly delivers better outcomes for class action litigants. The Morabito report found GCOs deliver "a vastly superior outcome for class members", while the McKell report suggested that "Victoria's GCO model should, in the interests of access to justice, be replicated across all of the Commonwealth's class action regimes".

In a further and first-hand vote of confidence in the GCO regime, Victorian Supreme Court Judge Jim Delany declared to this year's Corporate Conduct and Class Action Symposium that he was a convert to the benefits of contingency fees, having presided over several cases where his preexisting fears were allayed and where he saw the benefits of GCOs for class members and the justice system.

The power and propensity of courts in different jurisdictions to make pre-trial orders closing the class for mediation was contentious this year, as several of the articles in this edition demonstrate. The issue now sits with the High Court of Australia for final determination – one of several significant matters on appeal during November.

Two recent decisions, one in the Worley shareholder class action and the other in the CBA shareholder class action, have created some significant challenges for plaintiffs in planning and presenting cases brought on behalf of shareholders. Two main consequences follow from those cases.

First, they have established a narrow test for listed companies' disclosure obligations, and placed a requirement on plaintiffs to anticipate the contextual information that companies might disclose along with any announcement of wrongdoing, making it hard for plaintiffs to establish liability.

Secondly, as a prerequisite for proving loss, they impose a strict requirement on plaintiffs to prove how a market would hypothetically have reacted if the company had complied with its disclosure obligations. That is often difficult to do, given the uncertainties created by the company's own failure to disclose and the time periods involved. It is important to note, however, that both are decisions of single judges, and both are presently being appealed. The CBA class action appeal was heard in the week commencing November 18 and the Worley appeal is due to be heard in March 2025.

Although there is already some Full Federal Court authority suggesting disagreement with the initial approaches in those cases, both of those appeals will be carefully watched by plaintiffs and defendants alike.

The corporate interests that lobbied the former Liberal Government to give big businesses a Covid-reprieve on their continuous disclosure obligations will have welcomed the outcome of this year's Lewis Report. That report – a review commissioned by the government into continuous disclosure changes after two years of operation – concluded that insufficient time has passed to allow a proper assessment of the effects of the changes so the Covid settings ought to remain for private litigation, but be relaxed for matters pursued by the Australian Securities and Investment Commission.

Despite these developments, and the fact that the number of new class actions being filed is lower than it has been for several years, an odd smattering of ill-informed, right wing "think tanks" and other apparently politically motivated organisations are starting to complain again about the harms of class actions. There must be an election on the horizon.

In good news for class members and as an ongoing demonstration of the utility of the regime, 2024 has been bookended with noteworthy settlements.

The early 2024 settlements in Uber and NSW Young Doctors class actions mentioned in the last edition of CALA were significant in terms of the remedial impact for those classes as well as in effecting broader change. Both of those settlements sit in the top echelon of historical recoveries in Australia.

In recent weeks we have seen settlements secured in the second shareholder action against Treasury Wine Estates, the case against Allianz for junk add-on insurance products, and the case against ANZ in relation to commissions paid to car dealers on consumer car loans. These settlements (still subject to court approval) represent a strong end to 2024 for clients of Maurice Blackburn.

Data privacy has led class action and legislative developments during 2024, and we expect to see it continue to feature prominently into 2025 and beyond.

One thing is certain, 2025 will continue to present challenges across the board for those grappling with consumer, shareholder, and data privacy issues, among a raft of serious corporate conduct concerns that deserve the proper scrutiny of private enforcement.

Rebecca Gilsenan
National Head of Class Actions
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Full Court sets tone on shareholder actions, ahead of CBA appeal

Under the *Corporations Act 2001* (Cth) and the ASX Listing Rules, listed entities have an obligation to disclose immediately, information concerning the listed entity that is not generally available and that a reasonable person would expect to have a material effect on the price or value of the entity's securities.

This appeal arose from the decision of Justice Moshinsky in October 2023, that ANZ breached continuous disclosure rules by failing to disclose a $750 million bailout by underwriters, during a $2.5 billion equity capital raising in August 2015.

His Honour found that the bank should have alerted the market to the agreement by the underwriters to pick up the shortfall of between $745 million and $790 million from the capital raising. Had that information been disclosed, people who 'commonly invest in securities' within the meaning of the *Corporations Act* would have held an expectation that the underwriters would promptly dispose of shares and therefore place downward pressure on ANZ's share price (**the prompt seller inference**).

ANZ appealed from Justice Moshinsky's decision on the following bases:

- people who '*commonly invest in securities*' are influenced in deciding whether to acquire or dispose of securities, based on company fundamentals and the information here was not relevant to the value of ANZ's shares;
- the information was not '*material*' within the meaning of the *Corporations Act*, if proper consideration was given to additional contextual information which would render it immaterial;
- proper regard should be given to what ANZ knew and understood when assessing the materiality of the information; and
- the information was not information '*concerning*' ANZ.

Value of shares not the test

Justice Lee (with whom the other judges agreed), held that the test for materiality under the continuous disclosure regime does *not* require the relevant information to have a concrete effect on the economic value of the shares.

His Honour said:

> The contention the materiality test *requires* the information to have an established economic value effect is a gloss. Relatedly there is no necessity to *prove* that a change in the price of securities occurred to establish liability

His Honour held that any inquiry into compliance of disclosure obligations involves a question of fact and a focus on the time at which it is alleged the disclosure should have been made, including a consideration of all relevant material. It is sufficient if the information would be likely to influence the decisions of potential investors.

His Honour noted that ANZ's focus on fundamental value:

> Makes little practical sense when one considers the way the market operates in the real world and the forensic realities in sometimes proving changes in the fundamental value of a share.

Additional context / ANZ's understanding

ANZ also argued that the primary judge wrongly found the information to be material, because his Honour failed to properly consider additional context, which rendered the information immaterial. ANZ argued that when viewed in light of the additional information, the prompt seller inference would not arise as the additional information revealed that the underwriters did not intend to dispose of the shares promptly.

That additional information in essence was that:

- the book was fully covered;
- at least one reason for the underwriters taking up the shares, was to avoid allocation to certain hedge funds that might sell quickly and create a disorderly market; and
- ANZ understood from communications with the underwriters that they would not promptly sell their shares and create a disorderly market.

There was some difference of opinion amongst the appeal judges in relation to those arguments. But ultimately, the majority held:

- the fact that the book was covered and the reasons for avoiding issuing stock to hedge funds, had no bearing on the materiality of the

information because neither undermined the prompt seller inference;

- the balance of the contextual material submitted by ANZ did not affect the materiality of the information; and
- the test is an objective one; general assurances as to the underwriters' intentions to hold on to the shares may have been subjectively credible to ANZ but that did not mean the information was not material.

Not information 'concerning' ANZ

ANZ argued that the information was not information concerning ANZ within the meaning of ASX Lising Rule 3.1, because the information concerned the identity and intentions of ANZ shareholders and not the business or assets of ANZ.

All three appeal judges rejected this argument. Justice Button and Justice Markovic upheld the primary judge's finding that the information was information concerning the bank because it '*represented the outcome of a large placement of ANZ shares*'. Justice Lee noted:

> ANZ's attempt to introduce a gloss to achieve a 'balance' by creating an artificial demarcation between information that may concern the subjective intentions of shareholders with information concerning the entity, is misconceived.

ANZ's appeal was dismissed with costs.

Australia and New Zealand Banking Group Limited v Australian Securities and Investments Commission [2024] FCAFC 128		
Federal Court of Australia | Markovic, Lee, Button JJ | 2 October 2024		
Appellant's Solicitors:	Allens	
Respondent's Solicitors:	Johnson Winter & Slattery	
Austlii Link:	Available here	

$229.8M Settlement approved in NSW Junior Doctors underpayment class action

This class action was brought on behalf of a large number of junior medical doctors (**JMD**), working in the NSW public system. The proceedings claimed that the JMD's had been underpaid in relation to issues such as overtime and meal breaks.

The defendants argued, in essence that under the correct interpretation of each of the relevant Industrial Awards, the JMD's had been properly remunerated. They also relied on a policy directive issued by the Ministry of Health, which required prior approval of un-rostered overtime.

The proceeding settled at mediation in March 2024 for $229.8 million (inclusive of legal and other costs). In this judgment, Garling J approved that settlement as fair and reasonable, taking into account the interests of all group members. His Honour noted that the sum to be paid was significant and the resolution of all the claims would likely have been '*extremely time consuming, expensive and procedurally difficult*'. He also found that the deduction for legal costs and expenses was fair and reasonable, as was the cost of settlement administration.

Fakhouri v The Secretary for the NSW Ministry of Health (No.2) [2024] NSWSC 1171	
Supreme Court of New South Wales | Garling J | 20 September 2024	
Applicant's Solicitors:	Maurice Blackburn
Respondent's Solicitors:	Minter Ellison
Austlii Link:	Available here

Trial adjourned part-heard due to evidence objection in Boral shareholder suit

This judgment arose during the course of the trial of a shareholder class action against the respondent (**Boral**), and in particular, during the cross-examination of Boral's CEO at the relevant time, Mr Kane. The proceeding arises out of financial irregularities that were discovered in one of Boral's US subsidiaries, described as its 'Windows' business. Those irregularities were the subject of an investigation and report by Ernst & Young (**EY**), over which Boral had claimed privilege.

However, earlier in the proceeding Boral had given discovery of an email, which had been sent by Mr Kane, and which referred to the EY investigation and stated, *inter alia*, that "*if controls were as bad as EY suggests how did KPMG, inside audit and Allan and Oren miss it*" (**Kane Email**). Nevertheless, during the course of Mr Kane's cross-examination, Boral objected to the applicants' counsel asking questions of Mr Kane as to what he meant by the controls being 'as bad as' EY suggested, and in particular, what he had been told by EY about the internal controls in the Windows business. The objection was that those questions would require Mr Kane to disclose privileged communications. The applicant contended that because privilege in the Kane email had been waived by Boral, privilege could not be maintained in relation to the EY communications, because disclosure of those communications was, within the meaning of s 126 of the *Evidence **Act** 1995* (Cth), "*reasonably necessary to enable a proper understanding*" of the statement in the Kane Email. That section provides, in substance, that where privilege in a communication or the contents of a document is lost, it is also lost in any other communication or document which is reasonably necessary to enable a proper understanding of the first communication or document.

Boral's arguments were six-fold.

First, that privilege never existed in the Kane Email in the first place, such that s 126 did not apply ('No Privilege Contention') (see [50]-[59]). Justice Lee rejected that argument, on the basis that privilege had existed in the Kane Email (and, indeed, had repeatedly been claimed by Boral) insofar as it disclosed the substance of communications with EY, but that privilege was subsequently lost by waiver (at the very latest, when an unredacted copy of the Kane Email was tendered, without objection by Boral, at an interlocutory hearing in the proceedings).

Secondly, that the evidence in question is not 'relevant', within the meaning of ss 55 and 56 of the Act ('No Relevance Contention') (see [60]-[77]). His Honour held that this contention was "*without merit*", and that the evidence in question was plainly relevant to the facts in issue based on the pleadings and on the agreed statement of issues to be determined at the trial (which was also supported by the fact that Boral itself had discovered the Kane Email, and so must have considered that it was 'directly relevant' to the issues in dispute in the proceeding).

Thirdly, that even if the evidence is relevant, the Court ought to exclude it on discretionary grounds under s 135 of the Act because its probative value is substantially outweighed by the danger that the evidence might cause or result in undue waste of time ('Discretionary Exclusion Contention') (see [78]-[102]).That section requires the Court to undertake a balancing exercise – his Honour did so, and despite some likely additional costs and delay arising from the evidence, he considered that the balancing exercise was "*not a close-run thing*" and dismissed Boral's contention.

Fourthly, the proposed questions to be asked of Mr Kane are not "*reasonably necessary*" to understand the statement in the Kane Email, within the meaning of s 126 of the Act ('Not Reasonably Necessary Contention') (see [103]-[115]). His Honour dismissed this contention, including on the basis that it was demonstrably inconsistent with Boral's other submissions that the statement in the Kane Email was opaque and ambiguous. As his Honour put it (at [109]):

> On the one hand Boral maintains that the Proposed Kane Evidence is not reasonably necessary to enable a proper understanding of [the Kane Email] and yet, on the other, Boral contends the relevant communication is opaque and that there is apparently a *bona fide* dispute as to what the relevant communication conveyed.

Fifthly, the adduction of the evidence in question would amount to an abuse of process on the part of the applicants and their legal representatives, essentially because it involved a challenge to a privilege claim which could, and should, have

been mounted earlier, and now had the effect of disrupting the trial and distracting resources away from the conduct of the trial ('Abuse of Process Contention') (see [116]-[142]). Although his Honour described the position as 'suboptimal', he rejected this contention on the basis that it was Boral's solicitors who in large part had created the current situation by maintaining up until trial a claim for privilege in relation to the relevant part of the Kane Email which was plainly unsustainable after the email had been tendered at the earlier interlocutory hearing.

Sixthly, the applicants were estopped from contending that the Kane Email was initially privileged, but that privilege had been waived (as opposed to contending that the email was never privileged) ('Estoppel Contention') (see [47]). His Honour rejected this contention on the basis that it was based on a false premise (namely, that privilege in the Kane Email was lost by Boral during the course of the trial, when it was in fact lost much earlier).

Accordingly, his Honour ruled that the applicants were permitted to ask questions of Mr Kane about the relevant statement in the Kane Email (subject, of course, to any specific objection that may be made to any particular question asked).

[Postscript: On 13 September 2024 Boral filed an application for leave to appeal from Lee J's ruling, which has been listed for hearing on 22 November 2024. In light of that application, Lee J acceded to Boral's application to adjourn the further conduct of the trial until after that application has been heard and determined (see Parkin v Boral Limited (Loss of Privilege Issue) (No 2) [2024] FCA 1082).

Parkin v Boral Limited (Loss of Privilege Issue) [2024] FCA 1039	
Federal Court of Australia | Lee J | 9 September 2024	
Applicant's Solicitors:	Maurice Blackburn
Respondent's Solicitors:	Herbert Smith Freehills
Applicant's Funder:	N/A
Austlii Link:	Available here

Court approves landmark GCO settlement in favour of group members

This judgment was the first occasion on which the Supreme Court of Victoria considered the power to vary a group costs order (**GCO**) pursuant to s 33ZDA(3) of the ***S**upreme **C**ourt **A**ct 1986* (Vic) in the context of a settlement approval application. The proceeding was a 'guidance case' brought by Slater and Gordon (**S&G**) in November 2020, and the first class action where a GCO was made under s 33ZDA of the SC Act (in February 2022 at a rate of 27.5%). The class action settled in March 2024 for the sum of $46.5 million. In terms of the settlement, Watson J: approved the proposed settlement as fair and reasonable; appointed S&G as the administrator of the Settlement Distribution Scheme; and approved administration costs of $350,000 (and, in doing so, held that "*[p]roperly construed an order under s 33ZDA does not extend to administration costs")*.

As this was the first occasion where the Court considered possible variation of a GCO in a settlement approval context, Nichols J appointed a contradictor and S&G were granted leave to intervene on the question of whether the GCO should be varied. In summary, no party submitted that the GCO rate should be varied: the plaintiffs did not seek to vary the GCO rate; S&G contended it should remain the same; no class member objected to the rate; and, during the hearing, the contradictor accepted there were no grounds to reduce the GCO rate.

S&G initially provided limited evidence (on a confidential basis), but ultimately tendered further evidence that his Honour found was of assistance in determining whether to vary the GCO. The evidence tendered by S&G, which his Honour noted would "*generally be of assistance*" in future such applications, included:

- Information regarding the hours worked by the legal practice on the proceeding. In this case, the hours worked by S&G staff totalled approximately 13,000 hours.
- The actual costs incurred by the firm for labour, overheads, disbursements, financing costs and insurance (if any). Although S&G did not do so, his Honour suggested that actual costs could be determined by calculating "*the professional costs on an hourly rate basis and removing the practice's average profit margin*".
- The costs which would have been charged by the firm on an hourly rate basis. S&G's professional fees on an hourly rate basis (inclusive of GST but excluding any allowance for uplift) would have been approximately $5.8 million (also noting that S&G expended on disbursements (inclusive of GST) approximately $3.3 million).
- Appropriate financial metrics, including the return on investment and internal rate of return.

His Honour set out several principles relevant to the exercise of the power under s 33ZDA(3) of the SC Act – including most relevantly:

- The power to amend a GCO should only be exercised if the Court is satisfied that circumstances now mean that an amendment is appropriate or necessary to ensure that justice is done in the proceeding. Whilst the language of s 33ZDA(3) of the SC Act contains no express limitation, such a limitation arises by necessary implication from the structure of s 33ZDA and the conditions on the original exercise of power under s 33ZDA(1).
- Close attention should be paid to the reasons for the original GCO.
- The Court should ensure that costs payable to the lawyer under the GCO remain proportionate in that they continue to represent an appropriate reward in the context of the effort and investment of the legal practice, the duration of the proceeding and the risks which were undertaken under the GCO.
- Where the outcome of a proceeding falls within the range of estimates relied upon by the legal practice in support of its application for the original GCO or where the outcome falls outside those estimates but not substantially so, this will weigh against amending the GCO percentage on account of a lack of proportionality.

Ultimately, his Honour concluded that he was "*comfortably satisfied*" that there was no basis to vary the GCO in this matter (and noted there were "*substantially higher settlement outcomes which would similarly not have warranted*" variation of the GCO rate). His Honour reached this conclusion for various reasons, including:

1. the GCO rate was reasonable having regard to the effort S&G devoted to the proceeding, and the associated risks;
2. the benefits of certainty and transparency in making the GCO, upon which the Court had placed considerable weight, did not support any exercise of the power to vary the GCO;
3. a comparison with litigation funding was a "*very strong factor militating against*" varying the GCO (and the evidence on this point was "*even stronger*" at settlement than when the GCO was initially made);
4. the various financial metrics indicated that S&G's 'return' was reasonable and appropriate; and
5. the absence of any party or the contradictor submitting that the GCO be varied was a factor which weighed "*significantly in the balance in favour of leaving the percentage*".

Allen & Anor v G8 Education Ltd (No 4) [2024] VSC 487	
Supreme Court of Victoria | Watson J | 28 August 2024	
Plaintiff's Solicitors:	Slater & Gordon
Defendants' Solicitors:	MinterEllison
Plaintiff's Funder:	N/A
Austlii Link:	Available here

Careful judicial discretion exercised in Ansell GCO application

This is a shareholder class action, in which the plaintiff alleges that the defendant engaged in misleading or deceptive conduct, made misleading statements and breached its obligations of continuous disclosure to the market about its future earnings guidance (which it first published on 24 August 2021 and approximately five months later downgraded by around 28%).

The plaintiff applied for a group costs order (**GCO**) under s 33ZDA of the *Supreme Court Act 1986* (Vic) at the rate of 40%. The evidence disclosed that earlier attempts to obtain litigation funding for the proceeding had been unsuccessful, at least on terms that could be considered economic or would result in a better outcome than the proposed GCO rate. Otherwise, as is commonly the case in such applications, much of the evidence (concerning estimated claim value, prospects of success, etc) was confidential and therefore not disclosed in the reasons for judgment.

His Honour accepted the plaintiff's submissions regarding the well-recognised benefits of a GCO, which have been acknowledged now in numerous cases. The defendant acknowledged its limited interest and role in the application, but nevertheless drew the Court's attention to the relatively high rate (40%) that was sought, in comparison to rates that have been approved in other cases.

Ultimately, his Honour was satisfied that:

- a "*group costs order is appropriate and necessary in this proceeding subject to the determination of a proportionate and reasonable rate at least on a prima facie basis so that justice may be done in the proceeding*" (at [50]);

- a rate of 40% was appropriate if the plaintiff and class members are successful in the proceeding and the resolution amount is $50 million or less (at [65]);
- however, for resolution amounts above $50 million, a rate of 40% "*exceeds a proportionate or reasonable return on a prima facie basis in the circumstances of this proceeding*" and "*may have untoward or unexpected consequences depending on the magnitude of the resolution amount*" (at [68]-[69]); and
- it was therefore appropriate to make a GCO providing for a rate of 40% on any recoveries up to $50 million, and a rate of 25% for any amounts recovered over and above $50 million (at [70]-[72]).

Warner v Ansell Limited [2024] VSC 491	
Supreme Court of Victoria | Garde J | 22 August 2024	
Plaintiff's Solicitors:	Slater & Gordon
Defendants' Solicitors:	Herbert Smith Freehills
Plaintiff's Funder:	N/A
Austlii Link:	Available here

Courts grapple with carriage contest across jurisdictions

These were two concurrent judgments of the Federal Court of Australia and the Supreme Court of Victoria, resolving a cross-court carriage dispute. The dispute involved three separate competing class actions: one in the Supreme Court of Victoria (**SCV Proceeding**) and two in the Federal Court of Australia (which applied to be consolidated) (**FCA Proceedings**).

All three class actions were brought against International Capital Markets and its founder Mr Budzinski, on behalf of investors who suffered loss as a result of trading contracts for difference (**CFDs**). A CFD is a highly leveraged financial product that allows the holder to make a trade based on their prediction of the likely movement in the value or price of an underlying asset. Each of the class actions involve similar allegations, namely misleading and deceptive conduct and unconscionable conduct.

There was a dispute between the applicants in each of the proceedings, as to whether one or more of the proceedings should be stayed, to enable the efficient resolution of the overlapping claims of group members, in essence, a carriage contest.

That dispute was heard by the Federal Court and the Supreme Court, at a concurrent sitting, pursuant to an agreed protocol between the two courts, for communication and cooperation in class action proceedings.

The Federal Court and Supreme Court were in agreement, and each held that:

- the SCV Proceeding be stayed;
- the FCA Proceedings be consolidated, and
- carriage of the class action be awarded to the consolidated FCA Proceedings.

The reasons of each court were substantially the same.

Pleadings and experience

Central to both judges' decision was the amount of work done by the applicant's lawyers in the FCA Proceedings. Counsel retained in the FCA Proceedings were heavily involved in preparing the pleadings and it was obvious that an enormous amount of 'thought and intellectual endeavour' had gone into them.

It was equally clear that the solicitors for the applicants in the SCV Proceeding had applied very little independent skill or original intellectual input. The pleadings in the SCV Proceeding were virtually an identical copy of the detailed pleadings prepared in the FCA proceeding. Justice O'Bryan in the Federal Court noted that the solicitors' used the expression '*harmonise*' as a euphemism for '*copy*'. Justice Delaney in the Supreme Court said:

> To describe what has occurred as plagiarism may sound harsh, but it is accurate. The pleadings were copied and pasted and put forward...without any attributions. It would not be a just result and it would not be in the best interests of group members to award carriage to a firm that has engaged in such conduct unless there were other compelling reasons to do so.

Apart from concerns about the conduct itself, Delaney J raised the substantive concern that the pleadings were copied without any first-hand knowledge of the investigations or research underlying the preparation of those pleadings. This would '*invariably leave the practitioner copying, in an inferior position to run the case than those who prepared the original pleading*'.

Counsel in the FCA Proceedings also had more direct experience in dealing with consumer claims against issuers of CFDs litigation generally, than counsel retained in the SCV Proceeding.

Group member composition

The FCA Proceedings captured more group members, as those proceedings covered a wider claim period. This was a material advantage of the FCA Proceeding over the SCV Proceeding.

Funding and legal costs

The SCV Proceeding was to be funded on a 'no win no fee' basis, together with a Group Costs Order (**GCO**) under s 33ZDA of the *Supreme Court Act 1986* (Vic), in the event of a successful outcome.

The FCA Proceedings was to be funded by a litigation funder, together with an 'all inclusive' common fund order in the event of a successful outcome (being an order for payment of all legal costs, disbursements and funding commission, as a percentage of the amount recovered).

Solicitors for the applicants in the SCV Proceedings argued that the ability to seek a GCO in the Supreme Court was advantageous for group members because that order could be sought at the beginning of the proceeding, whereas a common fund order in the Federal Court could not be made until settlement or judgment. This was not ultimately found by either court to be material.

While both courts found that the litigation funding model proposed in the SCV Proceeding was more beneficial to group members because the percentage of any win sought by the solicitors was lower, this was not determinative and was outweighed by other factors. Justice O'Bryan said:

> The ultimate financial return to group members will be most affected by the amount of any award or settlement achieved, and that will be affected by the overall conduct of the proceeding, including the skills, expertise and resources able to be devoted to the conduct of the proceeding.

Both courts also had concerns about the financial position of the applicant's solicitors in the SCV Proceeding and the lack of detailed evidence as to their ability to fund the class action.

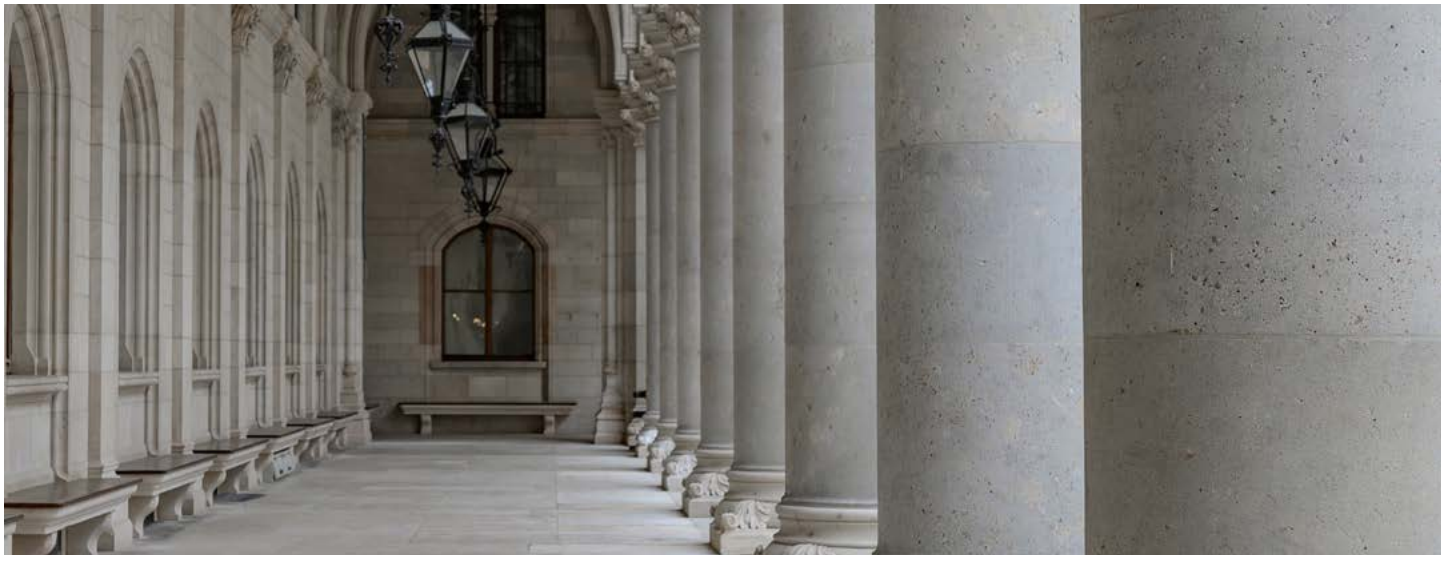
The retainer in the SCV Proceeding did not provide indemnity for costs and it also contained provisions which allowed the solicitors to potentially withdraw from (and cease funding) the proceeding if a GCO was not made at a rate acceptable to them. There were no equivalent provisions in the Conditional Costs Agreement in the FCA Proceedings. Ultimately both courts found that the funding proposal in the FCA Proceedings was more favourable for group members.

Security for costs and interest on damages

Justice O'Bryan observed that while the primary consideration in resolving a carriage contest is in the interests of group members, the respondent must also be treated fairly. The applicants in the FCA Proceedings accepted the need to provide security for costs and offered to do so by way of a Deed of Indemnity from the insurer. By contrast, the applicants in the SCV Proceeding did not accept that security for costs was necessary and did not submit a firm proposal with respect to providing such security.

Both courts also found that the Federal Court offered potential benefits to group members in relation to the statutory interest available on any damages awarded. The standard position in the Federal Court is that interest on damages is awarded from the time the cause of action accrues. In contrast, the position in the Supreme Court is that interest generally only runs from the date the proceeding commenced.

As a result of all of those considerations, both courts held that the case for awarding carriage to the FCA Proceedings was '*overwhelming*'.



Bain v International Capital Markets Pty Ltd (No 2) [2024] FCA 847 (O'Bryan J) and Vingrys v International Capital Markets Pty Ltd & Ors [2024] VSC 455 (Delany J)

Federal Court of Australia | O'Bryan J	Supreme Court of Victoria | Delany J	2 August 2024
Applicants' Solicitors:	Echo Law / Piper Alderman	
Respondents' Solicitors:	Banton Group	
Austlii Link:	Available here & Available here	

Solicitors' CFO proposed as contingency fee workaround

This judgment arises from the consolidation of two securities class actions against Blue Sky Alternative Investments Ltd. The proposed consolidation agreement foreshadowed that the solicitors for the applicants, on settlement or successful judgment, would seek a 'Solicitors' Common Fund Order' (i.e. an order providing for payment to a solicitor, for funding a proceeding, over and above a payment for costs and disbursements) (**Solicitors' CFO**).

Three of the respondents contended that the Court has no power to make any form of common fund order, including a Solicitor's CFO. Accordingly, Lee J made an order pursuant to s 25 (6) of the *Federal Court of Australia Act 1976* (Cth) that the question be reserved to the Full Court to determine whether it was a "licit exercise of power" for the Court (on settlement or judgment of a class action), to make a Solicitor's CFO.

The applicants indicated that if the Court lacked power to make a Solicitors' CFO, they would apply to have the proceeding cross-vested to the Supreme Court of Victoria in order to seek a 'Group Costs Order' under s 33ZDA of the *Supreme Court Act 1986* (Vic) or try to obtain commercial litigation funding.

The respondents argued that the Court should decline to answer the question, because while not entirely hypothetical, without specific facts (such as the amount of the payment to be later sought), any answer could only provide general guidance.

The Court disagreed and pointed out the practical advantages of exercising its discretion to resolve what was in fact a live issue.

However, given the class action context, and the desire to avoid any consideration of abstract hypothetical issues, the Court confined itself to dealing only with the power to make a Solicitors' CFO under Pt IVA of the *Federal Court of Australia Act 1976* (Cth). It did not deal with the power of a court of equity, to make an order analogous to a Solicitors' CFO under r 9.21 of the *Federal Court Rules 2011* (Cth) or, following a declassing of a class action, the settlement of an individual claim.

The Decision

The Full Court ruled that a Solicitors' CFO can be made under s 33V or 33Z of the *Federal Court of Australia Act 1976* (Cth) (provisions which provide the Court with discretion in relation to the 'just' distribution of settlement money and reimbursement of representative party's costs).

At the outset, the Court rejected the argument that it had no power to make any type of settlement common fund order. It endorsed the decision in *Elliot-Carde v McDonalds Australia Ltd* (2023) 301 FCR 1 which established the existence of such power.

The Court then looked specifically at the power to make a Solicitors' CFO, and the contention that such an order could never be 'just' (within the meaning of s 33V and 33Z) on the basis it would:

- create a conflict of interest between a solicitor's fiduciary/ professional obligations and personal financial interest in a class action:
- be inconsistent with or breach the *Legal Profession Uniform Law* (NSW) prohibiting contingency fees; and
- be contrary to public policy against contingency fees.

The Court noted that these arguments went to the issue of discretion rather than of power (whether a Court *should* make such an order, rather than whether it *could*).

While not sufficient to persuade the Court that it lacked power, the issues raised may still be relevant in a particular case where a Solicitors' CFO is sought. The Court provided some useful guidance on the exercise of that discretion:

The considerations relevant to the exercise of the discretion and as to whether the proposed order is, or is not, "just" will include the existence of the fully-informed consent of the applicants, and the adequacy of notification to group members and the reaction of those group members — not to mention the Court's ability to scrutinise whether the solicitors had in fact acted in a way consistent with the existence of the obligations explained above (perhaps aided, at that time, by a court-appointed contradictor if necessary).

The Victorian experience

The Court reviewed the effectiveness of Group Costs Orders available in the Supreme Court of Victoria (allowing solicitors to receive a contingency fee upon judgment or settlement) and concluded that:

> Despite any temporal differences, given the extent of similarity between the orders, there is no reason to think the availability of a Solicitors' CFO would not, consistently with the experience of GCOs, make the resolution of group member claims in large class actions significantly less expensive.

[Postscript: in August 2024, two of the respondents lodged a special leave application with the High Court, seeking a definitive answer to the question of whether the Federal Court has power to make common fund orders, and if that power extends to making a Solicitors' CFO. In November 2024, the High Court granted special leave to appeal, however no hearing date has been set.]

R&B Investments Pty Ltd (Trustee) v Blue Sky Alternative Investments Ltd (Reserved Question) [2024] FCAFC 89	
Federal Court of Australia | Murphy, Beach and Lee JJ | 5 July 2024	
Applicants' Solicitors:	Banton Group
Respondents' Solicitors:	GRT Lawyers; Arnold Bloch Leibler; Corrs Chambers Westgarth
Austlii Link:	Available here

Group members have important win in BHP action

This judgment concerned an application brought by the applicants seeking leave to amend:

- the class member definition contained in the **C**onsolidated **O**riginating **A**pplication and **A**mended **C**onsolidated **S**tatement of **C**laim; and
- the **loss** and causation pleading in the COA and the ACSOC (the **Applications**).

The applicants also sought to have the amendments relate back to the commencement of the proceeding (**Relation Back**).

Background

Class members are defined in the COA and ACSOC as those who, inter alia, entered into a contract during the claim period to acquire an interest in BHP **ASX**, BHP **LSE** or BHP **JSE** shares (emphasis added).

In ***Impiombato*** *v BHP Group Ltd* ***(No 4)*** [2023] FCA 1354 Moshinsky J held (at [30]) that the class definition in the COA and ACSOC excluded those persons who acquired an interest in BHP through trading *only* on secondary share trading platforms (ie Chi-X Australia, BATS Chi-X Europe) (**Excluded Shareholders**).

The application to amend dealt with in this judgment follows Moshinsky J's findings in *Impiombato* (No 4).

Basis for Amending

The applicants argued that leave should be granted to correct a lawyers' drafting error and to give effect to the applicants' original intention.

The respondent did not oppose the amendment, but did oppose the Relation Back, on the basis that the evidence adduced was insufficient to demonstrate a mistake (see [9]-[10]).

Applicants' Intention

The lawyers for the applicants deposed that they always intended that the class definition cover all persons who acquired an interest in BHP shares, irrespective of the trading platform (see [33]).

Justice Murphy held that the applicants' evidence on intention was "*insufficient to support a conclusion either way*" (at [54]). However, his Honour later clarified that the conflicting documentation did not reduce the probative relevance of the applicants' evidence, since the respondent made a 'calculated' decision not to cross-examine (at [139] and [142]).

Prejudice

For Excluded Shareholders, the applicants submitted that prejudice would be suffered because they would be unable to seek a benefit from any settlement or judgment in the proceeding. Further, Excluded Shareholders would not have taken any steps to preserve their rights against the respondent outside the proceeding, because putative class members had reasonable grounds to believe they were class members in the proceeding, up until 2 June 2023, when BHP had sought "*clarification of the parameters of the class*" (see [25]).

For *existing class members*, his Honour summarised the evidence of prejudice as follows:

> [78] … He [Mr Myers] said they will be prejudiced because it is likely that they will face:
>
> (a) significant burden of undertaking fact intensive enquiries to identify the trading platform on which trades were executed to demonstrate their group membership and eligibility for compensation;
>
> (b) significant costs and delay associated with such enquiries;
>
> (c) added complexity for opt out, registration and any class closure;
>
> (d) a chilling effect on group member registration; and
>
> (e) significant additional complexity for the applicants' lawyers in estimating the potential value of the claims in the proceeding, which will delay and will make it more difficult for the parties to reach a settlement at any mediation.

The respondent's evidence in reply was summarised by his Honour (at [89]) (italicised emphasis in original; bolded emphasis added):

> I found her [Ms Tran's] evidence that:
>
> (a) group members *may* know the trading platform upon which their BHP Shares were acquired, because of instructions they gave to their dealer/broker;

> (b) group members' brokers *might* not have access to multiple trading platforms, and therefore the enquiries required would not be lengthy or burdensome; and
>
> (c) group members' brokers *may* continue to hold electronic records of trades made given the applicable record-keeping requirements…
>
> **both uncertain and self-servingly optimistic.**

Findings on Prejudice

His Honour held (at [154]) that the Excluded Shareholders were outside the scope of the class definition due to a lawyers' drafting error. The respondent was incorrect to contend that Excluded Shareholders were barred as a result of the "*operation of the Part IVA scheme and the public policy underpinning limitation periods*".

His Honour¬, despite these findings, held that consideration of the prejudice to Excluded Shareholders did not "*carry substantial weight in the exercise of the discretion*" to allow the amendment with Relation Back (at [155]). This is because the Excluded Shareholders "*are not, and never have been, group members in the proceeding*". Instead, his Honour was 'moved' to allow the amendment with Relation Back on the basis that "*… prejudice [is] likely to be suffered by existing group members*".

The respondent argued two species of prejudice. Firstly, that the amendment, with Relation Back, would expand their potential aggregate liability in the proceeding. In that regard his Honour held:

> [182] … I accept that inclusion of Excluded Shareholders' claims is likely to increase BHP's potential aggregate liability in the proceeding. I am not, however, persuaded that the increase in BHP's potential liability will be as substantial as it suggests, nor that the prejudice to BHP will be as great as it submits.

The respondent deposed that a further 3.3 billion shares would be introduced into the proceeding if the amendment was allowed (see [183]). His Honour regarded such an approach as 'simplistic', because Mr Myers' evidence showed that all but one major Australian retail broker had access to multiple trading platforms (at [183] and [185]). It was therefore likely that (emphasis added):

> [186] … many of the 3.3 billion BHP Shares that were acquired on secondary platforms during the Relevant Period **were acquired on behalf of persons who are existing group members**. If that is the case, the expansion in the class and the resultant prejudice to BHP **is likely to be significantly less substantial than its submissions suggest**. As I later explain, I consider it to be plain that existing group members should have leave under r 16.53 **to claim any further losses they have suffered through the acquisition of further BHP Shares on secondary trading platforms**.

On the second species of asserted prejudice, his Honour held that allowing the amendment with Relation Back did not prevent the respondent from raising a limitations defence (at [191]). His Honour's view was that the respondent could raise a limitations defence at the appropriate interlocutory stage, irrespective of his finding on the amendment with Relation Back.

Decision

Ultimately, his Honour:

> [14] … consider[ed] it to be appropriate in the interests of justice in the proceeding to grant leave for the proposed amendments and for the amendments to take effect from the commencement of the proceeding.

Impiombato v BHP Group Limited (No 5) [2024] FCA 591	
Federal Court of Australia | Murphy J | 6 June 2024	
Applicants' Solicitors:	Phi Finney McDonald & Maurice Blackburn
Respondents' Solicitors:	Herbert Smith Freehills
Applicants' Funder:	N/A
Austlii Link:	Available here

Procedural fairness in carriage dispute questioned

This judgment concerned an application for leave to appeal, and if leave were granted an appeal, from the orders of the primary judge (Lee J) on 12 October 2023 in respect of the determination of carriage: *Greentree v Jaguar Land Rover Australia Pty Ltd (Carriage Application)* [2023] FCA 1209. The primary judgment concerned a multiplicity dispute between two competing proceedings (the **Jennings proceeding** or **Jennings applicant** and the **Greentree proceeding** or **Greentree applicants**) brought against Jaguar Land Rover Australia Pty Ltd in respect of allegedly defective diesel particulate filters.

Among the grounds of appeal advanced were that the primary judge erred:

- in ordering the Jennings proceeding be automatically stayed if the applicants, solicitors and funder in the Greentree proceeding provided an undertaking to match the funding model in the Jennings proceeding including because, the provision of an opportunity *after the hearing and after judgment* to the Greentree applicants to improve the terms of their funding model (but not the Jennings applicant) involved a lack of procedural fairness (**procedural fairness ground**); and
- in finding that that the 'accumulated experience' of the solicitors in the Greentree proceeding would enable the claims of class members to be advanced more efficiently and effectively than those claims would otherwise be advanced in the Jennings proceeding in circumstances where that finding was based on evidence not before the primary judge (or that the evidence before the primary judge provided no basis for a number of comparative conclusions).

During the hearing, their Honours sought submissions first in respect of only the procedural fairness ground and, upon hearing the parties, delivered judgment – forthwith – that leave to appeal should be granted and the appeal allowed. It was therefore unnecessary to hear submissions on the other grounds (and following an invitation by the Court the parties reached an in-principle agreement to consolidate, thereby obviating the need for the re-exercise of the discretion).

Notwithstanding the truncated hearing, the principles relevant to applications for leave to appeal are briefly summarised in the judgment (being well established and not being in dispute) including, briefly:

- an applicant for leave to appeal must usually show that in all the circumstances the decision proposed to be appealed is attended with sufficient doubt to warrant its reconsideration on appeal; and, supposing the decision to be wrong, substantial injustice to a party would result if leave were refused (these considerations being cumulative such that leave ought not to be granted unless each limb is made out): *Décor Corp v Dart Industries Inc* (1991) 33 FCR 397, 398-399; *Rawson Finances Pty Ltd v Deputy Commissioner of Taxation* [2010] FCAFC 139, [5]; and
- in respect of discretionary decisions, an applicant for leave to appeal will generally need to demonstrate that the doubts as to the correctness of the decision involve errors or matters of principle of the kind described in *House v The King* (1936) 55 CLR 499, 504-5. It will not be sufficient (including if the decision below is not discretionary in the *House v The King* sense, but instead evaluative) to merely demonstrate that the discretion could or even should have been exercised differently.

Turning then to the procedural fairness ground, their Honours concluded that:

> [26] It was procedurally unfair for the primary judge to grant carriage to the Greentree applicants, and to stay the Jennings proceeding, by permitting the Greentree applicants to make a revised funding offer after the hearing, and without notice to the Jennings applicant such that the Jennings applicant had no opportunity to make submissions in relation to that, and no corresponding opportunity to revise their funding offer. The unfairness is clear given that the primary judge considered that the fact that the Jennings proceeding offered superior returns for group members was determinative. His Honour said that unless the Greentree applicants also capped their fees and funding costs at 25% of any aggregate settlement or judgment the Greentree proceeding would be stayed and the Jennings proceeding would go forward.

> [31] Importantly, at no point in the hearing did the primary judge raise the possibility of an order such as Order 2, nor provide an opportunity to the Jennings applicant to be heard as to that. The Jennings applicant would have been perfectly justified in understanding that the Greentree applicants had no opportunity, nor any intention, to cap its legal and funding costs at 25% of any aggregate settlement or judgment. There was no opportunity for the Jennings applicant to make submissions in relation to a proposition that was not on the table.

Of note, their Honours were unpersuaded by (and critical of) the submission advanced on behalf of the Greentree applicants that his Honour "*expressly contemplated and raised with the parties the possibility of the Greentree applicants altering their funding model after the hearing of the applications; indeed, his Honour specifically invited submissions as to whether that would be against principle for him to proceed in that way*".

In their Honours' view, this may have been a real answer to the Jennings applicant's complaint as to the absence of procedural fairness, however, having regard to the transcript, that assertion of fact was unfounded and the submission (which was ultimately withdrawn) should not have been made.

Finally, their Honours indicated (for completeness) that no procedural unfairness had arisen in the way in which the primary judge took into account Gilbert + Tobin's successful conduct of the Toyota class action. Their Honours were not persuaded that the primary judge went beyond the evidence and the uncontested matters of public record in reaching the conclusion that he did in relation to Gilbert + Tobin's superior experience.

[Postscript: By way of orders dated 17 July 2024, Murphy J approved the terms of the proposed consolidation, the consolidated proceeding being Leah Maree Greentree & Ors v Jaguar Land Rover Australia Pty Ltd (NSD1010/2022).]

Jennings v Jaguar Land Rover Australia Pty Ltd [2024] FCAFC 62	
Federal Court of Australia | Murphy, Thawley and Stewart JJ | 17 May 2024	
Greentree Applicants' Solicitors:	Gilbert + Tobin
Greentree Applicants' Funder:	Balance Legal Capital II UK Ltd
Jennings Applicant's Solicitors:	Maurice Blackburn
Jennings Applicant's Funder:	Fortress Investment Group LLC
Respondent's Solicitors:	Clayton Utz
Austlii Link:	Available here

Optus fails to prove Deloitte Report's dominant purpose as 'legal advice'

This was an application for leave to appeal from the decision of the primary judge (Beach J) in *Robertson v Singtel Optus Pty Ltd* [2023] FCA 1392. The proceeding relates to the Optus data breach which occurred between 17 and 20 September 2022. In the decision appealed from, the primary judge held that the respondents (being the applicants for leave to appeal) (**Optus**) had failed to establish that an investigation report prepared by Deloitte (**Deloitte Report**) in relation to the data breach was covered by privilege.

In summary, the relevant background was:

- On 3 October 2022 Optus published a media release stating that it was appointing Deloitte "*to conduct an independent external review of the recent cyberattack, and its security systems, controls and processes*".
- On 11 October 2022 the board of Optus formally resolved to retain Deloitte.
- On 21 October 2022 Optus' external solicitors, Ashurst, formally retained Deloitte.
- The Deloitte Report was ultimately provided by Deloitte to Optus' General Counsel and Company Secretary (Mr Kusalic), and to Ashurst (Optus' external solicitors), on 13 July 2023.

At first instance the primary judge accepted that one of Optus' purposes in procuring the Deloitte Report was to obtain legal advice in relation to the data breach (including as to the (rightly) anticipated class action(s) and civil penalty proceedings that were expected to come its way). However, his Honour concluded that Optus had multiple purposes in procuring the Deloitte Report, and that Optus had failed to discharge its onus to show that the legal purpose for procuring the report was the 'dominant' purpose.

The Full Court unanimously concluded that none of Optus' proposed grounds of appeal had sufficient merit to warrant a grant of leave to appeal and therefore dismissed the application. In summary, the Full Court determined:

- The primary judge was correct to find on the evidence that there were multiple purposes for which the Deloitte Report was commissioned (only one of which was for legal advice / litigation purposes), and that the evidence did not establish that the Deloitte Report was procured for the *dominant* purpose of Optus obtaining legal advice or for use in litigation or regulatory proceedings.
- Although the evidence of Optus' General Counsel and Company Secretary (Mr Kusalic) as to the purpose for procuring the Deloitte Report was not challenged by way of cross-examination, the primary judge was not bound to accept his evidence uncritically and as being determinative, and instead was entitled to have regard to other contemporaneous, objective evidence, including the terms of the media release on 3 October 2022 and the terms of the board resolution on 11 October 2022 (neither of which referred to a legal purpose, and both of which demonstrated numerous non-legal purposes, for procuring the Deloitte Report). In circumstances where Mr Kusalic's evidence did not even acknowledge or refer to those other (non-legal) purposes, it failed to establish that the legal purpose was the predominant or ruling purpose. In that respect, it was open to the primary judge to find that the evidence of Mr Kusalic was "*vague, generalised, and ambiguous in key respects*".
- Further, whilst the evidence Mr Kusalic may have been sufficient to establish *his* purpose in procuring the Deloitte Report, it failed to adequately address the other purposes and states of mind of other relevant Optus personnel, including the CEO and members of the board, that were apparent from the media release and the board resolution referred to above.
- The proper date upon which to assess the dominant purpose will depend upon the particular circumstances of the case, but it will usually be the case that, where a party has commissioned a report from a third-party provider, the relevant time to assess the party's purpose for doing so will be at the time of the report's commissioning (in this case, 21 October 2022). However, that is not to say that evidence as to later events cannot be relevant (as the purpose of the report may evolve between the time of its commissioning and the time of its delivery). In any event, there was no evidence that Optus' purpose relevantly changed between the date of the media release on 3 October 2022 and the date of delivery of the Deloitte Report on 13 July 2023, and in that

respect no error was demonstrated in the approach which the primary judge took.

- In light of the above, the Court concluded (at [93], emphasis in original):

> … Mr Kusalic's evidence shows that *his* purpose for requesting an investigation and report by Deloitte was the legal purpose, and there is nothing to show any change in *his* purpose. He always had the same purpose. However, the evidence shows, and Optus accepted before us, that in fact it had multiple purposes for procuring the Deloitte Report. In those circumstances, the fact that Mr Kusalic took steps to carry into effect *his* purpose through Ashurst did not establish Optus' dominant purpose. His evidence as to *his* purpose was just part of the evidence required to be taken into account in determining Optus' dominant purpose. It was not good enough for Mr Kusalic's evidence to establish that one of Optus' purpose for procuring the report was the legal purpose. Optus needed to establish that the legal purpose was the dominant purpose, and as the primary judge explained it did not adduce adequate evidence to do so.

Singtel Optus Pty Ltd v Robertson [2024] FCAFC 58		
Federal Court of Australia |	Murphy, Anderson and Neskovcin JJ |	27 May 2024
Applicants' Solicitors:	Ashurst	
Respondents' Solicitors:	Slater and Gordon	
Applicants' Funder:	N/A	
Austlii Link:	Available here	

Major decision in CBA trial to be challenged

The CBA class action was a shareholder class action that arose out of tens of thousands of breaches of Anti-Money Laundering legislation that occurred between 2012 and 2017. On 3 August 2017, the contraventions were first revealed to the market through an announcement by the regulator, AUSTRAC, that it had commenced a civil penalty proceeding against CBA. In the days following the announcement, CBA's share price fell sharply.

The applicants alleged that CBA was aware of the AML contraventions (either constructively or subjectively) throughout the period from 16 June 2014 to 3 August 2017, that the contraventions were material, and that accordingly CBA had breached its continuous disclosure obligations. The applicants also alleged that CBA had misled the market by making representations that it had effective systems and processes in place to ensure compliance with its continuous disclosure and regulatory (including AML) obligations.

The applicants' case on constructive awareness hinged on evidence that: the contraventions *had, in fact, occurred* by the start of the relevant period; the contraventions *could and should have been discovered* by the start of the relevant period; and, having been discovered, the contraventions *should have been escalated* to officer level. The applicants relied on the Full Federal Court's decision in Crowley v Worley Ltd (2022) 293 FCR 438; [2022] FCAFC 33 to the effect that a company would be aware of information if "*reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer*".

Justice Yates rejected those arguments, in effect holding that it was irrelevant whether a proposition constituting the information was, as a matter of fact, true. Instead, his Honour held that in order for awareness to be established, and for the principles in Worley to be engaged, information must exist in "*in a form whose content was fixed and comprehensible as a matter of ordinary perception*". It is not immediately apparent where the boundaries of this new test lie in the context of modern information systems and databases: in CBA, the information was readily ascertainable from a database query, but no one carried out that query. Accordingly, if this approach is followed it seems likely that the information will either need to exist in collated, written form (for example in a report which existed, and was generated, but which was not read) or be subjectively known by some person.

For that reason, his Honour found that awareness was not established prior to April 2017, when all the integers of the information were subjectively known by officers of CBA.

Despite finding that CBA was aware of the information, his Honour found that there had been no disclosure breach even from April 2017. His Honour accepted the importance of several contextual points raised by CBA (for example, the number of transactions which were correctly reported, the bank's history of constructive interactions with the regulator, and the size of the bank's business in general) which he found provided necessary context for the undisclosed information. This approach told against the applicants in two ways. First, it meant that no obligation to disclose the information as pleaded arose, because any such disclosure would have been misleading without that contextual information. Secondly, it meant that a disclosure breach did not arise because, when accompanied by the contextual information, the undisclosed information was not material.

Having found that the information need not be disclosed without context, and that it was, in any event, immaterial with context, his Honour did not need to determine the questions of causation and loss. However, his Honour proceeded to consider them both.

The applicants had led evidence from an event study expert calculating the statistically significant price reaction which followed the regulator's announcement it was commencing proceedings. The event study was premised on an assumption that information economically equivalent to the alleged corrective disclosure could have been disclosed at any point within the relevant period. That assumption was in turn supported by the evidence of two materiality experts, both of whom opined that the key factor to which the market reacted was the substantial regulatory non-compliance. Viewed from that perspective, the applicants' materiality experts opined that the commencement of proceedings by the regulator, and variations in the exact number of contraventions, were of minimal significance. Fundamentally, the market would have drawn the same conclusions as to the riskiness of investing in CBA shares from a disclosure at the start of the relevant period (by which time tens of thousands of contraventions had already occurred) as it did from the alleged corrective disclosure (when proceedings had commenced).

As an alternative means of establishing causation and loss, the applicants argued that, by establishing the materiality of undisclosed information, they would then have established that it was a cause, even if not the sole cause, of loss. And in those circumstances, in light of evidence to the effect that it was not possible to parse out the relative contribution of different elements of the information or the economic effects of its variation over time (including as a result of the commencement of proceedings), the applicants should *prima facie* be entitled to recover loss quantified with reference to the price decline.

Finally, if the Court felt it necessary to disentangle the price impact of the commencement of proceedings (which could not have been disclosed earlier), the applicants relied on academic research showing the relative share price impact of the commencement of proceedings when compared to disclosure of the underlying conduct, and the example of a statistically significant share price reaction experienced by another major bank when it disclosed AML contraventions but no proceedings had been commenced.

His Honour rejected each of these approaches. As to economic equivalence, he found that investors were not concerned with risks or 'mere possibilities', and would only be moved in their assessment of CBA's shares by a 'real likelihood' of adverse financial consequences for them. His Honour also held that no such likelihood could arise until AUSTRAC had commenced proceedings, or at least resolved to commence proceedings. In light of that finding, the applicants' evidence as to economic equivalence was rejected, since the fact of the commencement of proceedings was found to be not only relevant but indispensable to any assessment of the market's reaction.

His Honour also rejected the argument that, by showing the information was a cause of the price reaction, the applicants had done enough to establish causation. The Court held that "*the valuation question … is inextricably bound up with the problem of establishing loss in the first place*", and thus by not valuing (presumably, precisely quantifying) the loss, the applicants had failed to prove that loss had occurred. His Honour also rejected the empirical evidence relied on by the applicants as a way of estimating the effect of the commencement of proceedings, holding that the examples relied on were not sufficiently analogous to the present case.

[Postscript: On 25 June 2024 a notice of appeal was filed by the applicants.]

Zonia Holdings Pty Ltd v Commonwealth Bank of Australia (No 5) [2024] FCA 477	
Federal Court of Australia | Yates J | 10 May 2024	
Applicants' Solicitors:	Maurice Blackburn & Phi Finney McDonald
Respondents' Solicitors:	Herbert Smith Freehills Applicants'
Funder:	Omni Bridgeway & Therium
Austlii Link:	Available here

Victoria's Legal Innovation: GCOs - a blueprint for national reform

The McKell Institute released its report, "*A Model for the Nation? Four Years of Victoria's Section 33ZDA*" in May this year, in which it analysed the effectiveness of Victoria's Group Costs Orders (**GCOs**) regime after several years of operation.

In its assessment, the McKell Institute highlighted the potential for GCOs to pave the way as a model for national reform to improve access to justice and reduce litigation costs.

The McKell Report highlights that Victoria has become a preferred jurisdiction for class actions, attributing the increased number of cases moving away from the Federal Court and the NSW Supreme Court to the improved transparency and financial returns for claimants under the GCO regime in Victoria.

> "Contingency fees, however, provide substantial certainty and transparency for claimants"

The report found that unlike traditional litigation funding, which often sees portions of settlements consumed by legal fees *and* funding commissions, GCOs consolidate these costs, ensuring a larger share of the settlement goes directly to claimants. The median GCO rate of 24.5% is significantly lower than the combined median funding rate and legal fees of 39.7% in traditional funding, promoting transparency and aligning the interests of lawyers and clients.

Additionally, the report finds that GCOs have helped foster competition among law firms and litigation funders, leading to more competitive rates and better financial outcomes for claimants. The report goes on to find that such a competitive environment ensures claimants receive the best possible terms, as firms strive to secure carriage.

> "It is submitted that Victoria's GCO model should, in the interests of access to justice, be replicated across all of the Commonwealth's class action regime"

This report suggests the Victorian model has proven to be a viable alternative to traditional litigation funding, offering increased access to justice and more equitable solutions for class action plaintiffs. McKell's analysis suggests that adopting the GCO model nationwide, could further enhance access to justice, reduce legal costs, and improve financial returns for claimants. All of which outweigh the challenges that past critics claimed would emerge.

The McKell report found that not only has the introduction of GCOs in Victoria delivered the downward pricing and transparency benefits advocates of the system suggested would occur, but it posed no serious challenge to the Court's ability to case manage perceived conflicts or other potential concerns.

It also highlighted that the Victorian experience has proven that legislative innovation can significantly impact the fairness and efficiency of class action litigation, making it a compelling model for nationwide reform.

> "Claimants would have almost nothing to lose, and plenty to gain by having access to another option for pursuing mass wrongs"

In conclusion, the overriding view of the report is that the evidence is clearly showing GCOs to be of benefit to clients pursuing remedy for mass wrongs via the class action regime, and that there is no sound reasoning GCOs should not be a standardised part of the case funding mix in all class action jurisdictions that operate across Australia.

Link to full Report: Available here

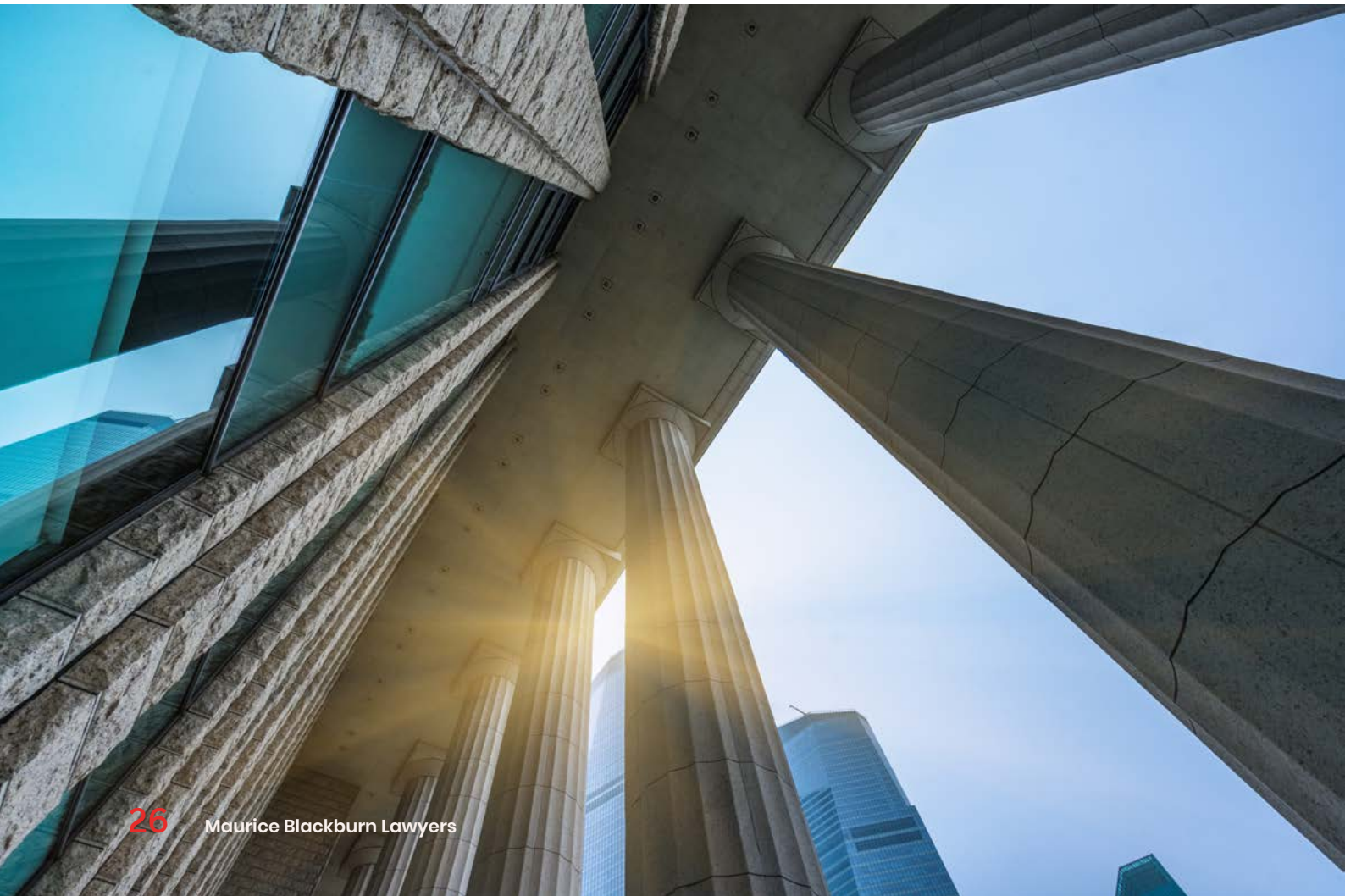
Full Court finds for CFO approval

This decision related to an appeal filed by the litigation funder, **Galactic** Seven Eleven Litigation Holdings LLC, from the decision in *Davaria Pty Ltd v 7-Eleven Stores Pty Ltd (No 13)* [2023] FCA 84. In that decision the primary judge, O'Callaghan J, relevantly approved a $98 million settlement of the proceeding, but refused to make a common fund order (**CFO**) at a funding rate of 25% (in the amount of $24.5 million) as sought by Galactic. The primary judge ruled that the Court does not have the power to make a CFO, and that even if it did, it was appropriate instead to make a funding equalisation order (**FEO**) in the amount of $12.005 million. Galactic had, to date, paid or incurred approximately $20 million in legal costs in the proceeding.

Galactic relied on three grounds of appeal: first, that the primary judge erred in finding that the Court does not have power to make a CFO; secondly, that the primary judge erred as a matter of discretion in declining to make such an order; and finally, that the Court in re-exercising its discretion, free of appealable errors, should make the CFO applied for.

Regarding the first ground, the primary judge considered the majority view of the High Court in *BMW Australia Ltd v* ***Brewster*** (2019) 269 CLR 574; [2019] HCA 45, that the Court did not have power to make a CFO at any stage of a class action proceeding. Justices Murphy, Lee and Colvin unanimously considered that no dicta of the majority in Brewster supported that proposition, and that in interpreting the judgment to stand for that proposition, the primary judge fell into appealable error (at [29]-[31]). Relevantly, following the primary judgment, the Full Court handed down its decision in *Elliott-Carde v McDonald's Australia Ltd* (2023) 301 FCR 1; [2023] FCAFC 162, confirming that the Federal Court does have power under s 33V(2) of the *Federal Court of Australia Act 1976* (Cth) to make a CFO during settlement approval. Justices Lee and Colvin were on the bench for that decision and affirmed their prior reasons; Murphy J also agreed (at [32]).

In respect of the second ground, the contradictors submitted that even if Brewster did not foreclose the power to make a CFO, the "*majority of the High Court have indicated strong reasons for*



favouring the making of a FEO over a CFO" (at [35]). Their Honours similarly considered this a misinterpretation of the reasoning in Brewster. In their Honours' view, Brewster was decided in the context of a CFO made on an early interim basis: "*[i]Importantly, and contrary to the Contradictor's submissions, they were not making statements of principle or doctrine in relation to the exercise of the power under s 33V(2)*" (at [60]). Their Honours considered Brewster as expressing a preference as to the appropriate timing for orders to meet and share the costs of litigation funding (at [59]). In that respect, it was accepted that Brewster expressed a preference against CFOs being made early in the proceeding. Accordingly, their Honours found that Brewster should not be given any decisive weight, the CFO in the present proceedings being sought at the point of settlement approval (and thereby distinguishable from *Brewster*).

Their Honours emphasised that the primary judge was required to engage with the factual matrix of the present application and assess those circumstances against the well-established factors for what constitutes a fair and reasonable funding commission (at [77]) (*see* ***Money Max*** *Int Pty Ltd (Trustee) v QBE Insurance Group Ltd* (2016) 245 FCR 191; [2016] FCAFC 148). Those key factors set out in *Money Max* include*, inter alia*: the funding commission rate agreed by astute class members; a comparison of the funding commission against comparable representative proceedings; the litigation risks of the particular proceeding; the quantum of adverse costs exposure; the legal costs, disbursements, and security for costs funded; and the quantum of the settlement achieved. Ultimately, their Honours found that the primary judge had erred in the exercise of his discretion.

Finally, in re-exercising the discretion to make a FEO or CFO, their Honours unanimously found that a CFO at a funding rate of 25% (in the amount of $24.5 million) was appropriate. Key factors underpinning that conclusion included:

- sophisticated class members who ran small businesses had agreed to a funding rate of 35%, being materially above the rate of the CFO sought;
- a 25% funding rate is in the middle of the range of rates offered by class action funders in Australia;
- there was significant litigation risk associated with the proceedings (in this respect their Honours relied on a confidential opinion of the applicants' counsel);
- to date Galactic had incurred $20 million in legal costs and $6.95 million in security for costs – the CFO represented a modest gain given that expenditure; and
- Galactic was exposed to an estimated $17 million adverse costs risk.

Having reached the above conclusion, Murphy and Lee JJ made a number of comments with respect to the conduct of the settlement approval application. Their Honours considered that the settlement approval process is one in which well-established principles aptly guide applicants and contradictors, and so applications of this kind should be made with a conscious eye to limit costs.

Galactic Seven Eleven Litigation Holdings LLC v Davaria [2024] FCAFC 54	
Federal Court of Australia | Murphy, Lee and Colvin JJ | 2 May 2024	
Solicitors for the Appellant:	Morris Mennilli Pty Ltd
Solicitors for the Respondents:	N/A
Contradictors:	Mr J Redwood SC and Mr R Jameson
Austlii Link:	Available here

Class closure unlikely to improve settlement prospects in AMP Super Fees class action

This was a judgment concerning opt out, registration and 'soft' class closure orders. In short, the first and second respondents (**Trustee Respondents**) brought an application seeking a 'soft' class closure order prior to a pending mediation, which was dismissed by Murphy J on the day of the hearing. In the subsequently published reasons, his Honour held that the Trustee Respondents' application for registration and 'soft' class closure had little or no merit, and dismissed it for the following reasons:

- The application was strenuously opposed, on cogent grounds, by the applicants. Although the position taken by the parties in relation to such an application cannot be determinative, his Honour held that it was "*appropriate to exercise real caution*" when class closure was opposed by the applicants (given the applicants have fiduciary obligations to act in the interest of class members, and the respondents' interests are "*inimical to the group members' interests*").
- The Trustee Respondents' central argument was that registration and class closure were appropriate because they did not have sufficient information in relation to class members' claims (which was due to, *inter alia*, the archiving of administration systems incomplete and outdated records, and other historical deficiencies). Sufficient information would therefore be provided through a registration process, the Trustee Respondents contended, and that would ensure the pending mediation was efficient and effective, and capable of leading to a settlement. His Honour accepted there were deficiencies in the Trustee Respondents' records but found the evidence did not establish that their records were insufficient to enable them to compile a representative sample of class members' claims.
- His Honour found that registration rates from other 'superannuation' class actions had some

probative value (contrary to Delany J's view in *Anderson-Vaughan v AAI Ltd (No 2)* [2024] VSC 65) and that, accordingly, the proposed registration orders in this class action were likely to result in a very low registration rate. Consequently, the Trustee Respondents' records were likely, in any event, to be a much better source from which a representative sample of claims could be compiled.

- His Honour did not accept the Trustee Respondents' evidence that 'soft' class closure orders would further the prospects of settlement. Instead, his view was that one of the purposes of the application was to limit the number of class members who would be permitted to benefit from any settlement; the proposed registration process was, at "*least in part, a cloak to disguise the fact the respondents wish to so confine the class*".
- The fiduciary nature of the relationship between the Trustee Respondents and class members pointed away from making a 'soft' class closure order.
- The evidence did not establish that a registration process *must* occur at some stage because the majority of class members would not need to register to be identified and paid a share of any settlement or judgment amount (given the majority remained AMP members or could be paid via the Australian Tax Office's trustee voluntary payment mechanism (which had occurred in other 'superannuation' class actions)). For any persons that did need to register to participate, the appropriate time for that to occur was after any settlement or judgment.
- The registration process was likely to cost approximately $2 million, which the Trustee Respondents "*balked at the idea of themselves paying for*", and divert resources from preparing for the upcoming mediation and trial. Thus, the significant cost coupled with the likely low registration rate provided a "*strong reason to refuse the application*".
- The facts of three recent cases, where 'soft' class closure orders were made despite the opposition of the applicants, were different to the present case. First, two of those cases were in the Supreme Court of Victoria, where s 33ZG of the *Supreme Court Act 1986* (Vic) provides an express power enabling the Court to make class closure orders. Secondly, in *J Wisbey & Associates Pty Ltd v UBS AG* [2024] FCA 147, Beach J expressed the view that, in assessing whether to make registration and class closure orders, the extent to which such orders would improve the prospects of settlement was a 'paramount factor'. Justice Murphy found this factor to be 'important' rather than 'paramount', but, in any event, reiterated that registration and class closure was unlikely to improve settlement prospects in this case.

His Honour also made an order that the Trustee Respondents pay the applicants' costs of and incidental to the application.

Alford v AMP Superannuation Ltd (No 2) [2024] FCA 423	
Federal Court of Australia | Murphy J | 24 April 2024	
Applicants' Solicitors:	Maurice Blackburn; Slater and Gordon Lawyers 1st and 2nd
Respondents' Solicitors:	King & Wood Mallesons; 3rd, 4th, 5th and 6th
Respondents' Solicitors:	Clayton Utz Applicants'
Funder	Harbour Fund IV, L.P.; Therium Litigation Finance Atlas AFP IC
Austlii Link:	Available here

Soft class closure orders queried in NSW

This judgment concerned the permissibility of 'soft' class closure orders, and the current divergence between the decision of the New South Wales Court of Appeal in ***Wigmans*** *v AMP Ltd* (2020) 102 NSWLR 199; [2020] NSWCA 104, and the decision of the Full Court of the Federal Court in ***Parkin*** *v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47, in which Wigmans was held by Murphy, Beach and Lee JJ to be 'plainly wrong'.

Pursuant to rule 28.2 of the ***U**niform **C**ivil **P**rocedure **R**ules 2005* (NSW), the primary judge stated a **separate question**, at the request of both parties, for the Court of Appeal to determine:

> … does the Supreme Court of NSW have power pursuant to sections 175(1), 175(5) and 176(1) of the *Civil Procedure Act 2005* (NSW) (CPA) or otherwise to approve a notice to Group Members of the right to register to participate in any settlement of the proceedings or opt out of the proceedings for the purposes of CPA section 162 containing the following notation:
>
> 'Upon any settlement of this proceeding the parties, alternatively, the defendant, will seek an order, which, if made, has the effect of providing that any Group Member who by a registration date: (i) has not registered; or (ii) has not opted out in accordance with the orders made by the Court, will remain a Group Member for all purposes of this proceeding but shall not, without leave of the Court, be permitted to seek any benefit pursuant to any settlement (subject to Court approval) of this proceeding that occurs before final judgment.'

The defendants in the underlying proceeding contended that the answer to the separate question should be 'yes' (and that *Wigmans* should be overruled). The plaintiffs did not take a different position on the question of power, however, expressly reserved their position on the question of discretion, that is to say whether the Court should exercise its discretion to issue a notice of the kind contemplated in the separate question if there was power to do so. Both parties accepted that the decision in *Wigmans*, if upheld, would compel a negative answer to the separate question. The Court appointed Kate Morgan SC to act as contradictor.

Of note, a difficulty that emerged during the course of the hearing, and over which serious concern was raised by the Court, was the artificiality and undesirability of answering a question in the abstract, divorced from the context of an agreed form of proposed notice to class members, therefore rendering any answer to the question vulnerable to the criticism of hypotheticality: c.f. *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9. Following the hearing and with a view to curing the objection that any answer to the separate question may be hypothetical, the parties agreed a form of notice which it was proposed would be sent to class members prior to any mediation, and supplemented the notation to the separate question "*in important respects*" (see [10]).

Departing from Previous Authority

As a preliminary matter, the Chief Justice considered the approach to be followed when intermediate appellate courts are asked to depart from the authority of courts of co-ordinate jurisdiction as well as their own previous decision: see ***Totaan*** *v R* (2022) 108 NSWLR 17; [2022] NSWCCA 75 at [72]-[76].

That principle is to the effect that, whilst intermediate appellate courts are not legally bound by their own earlier decisions, they should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision in question is 'plainly wrong' and, such an error having been identified, there are 'compelling reasons' to depart from the earlier decision or decisions. The fact that reasonable minds might differ on the interpretation of a statutory provision will generally be insufficient to warrant a conclusion that an earlier or existing interpretation of the provision or provisions in question was 'plainly wrong'.

An important clarification was that, consistent with the judgment of the High Court in *Hill v Zuda Pty Ltd* (2022) 275 CLR 24; [2022] HCA 21 at [25], the test does not comprise two limbs, being whether an earlier decision is 'plainly wrong' AND where there are 'compelling reasons' to depart from it. Their Honours proceeded on this basis, Confidential and for internal use only 9 and indicated that *Totann* should be qualified insofar as it suggests that two independent limbs would need to be satisfied before any such departure could occur.

Finally, one matter left unresolved on the authorities concerns what a court is to do in circumstances where neither of two competing interpretations can be said to meet the onerous threshold of being 'plainly wrong'. Where one of those decisions is that of the same court which has previously expressed a view on the matter, that court should adhere to its previously expressed view.

Consideration

The analysis is lengthy and detailed and is summarised here at a necessarily high level.

Ultimately, the Chief Justice (with whom Gleeson and Stern JJA agreed in full) was not satisfied that the Court's recent decision in *Wigmans* was 'plainly wrong', or that there are compelling reasons to depart from it. His Honour therefore refused leave, to the extent that leave is necessary, to overrule *Wigmans*, thereby answering the separate question in the negative.

Critical to his Honour's conclusion was a passage from *Mobil Oil Australia Pty Ltd v State of Victoria* (2002) 211 CLR 1; [2002] HCA 27, cited with approval in *BMW Australia Ltd v Brewster* (2019) 269 CLR 574; [2019] HCA 45, that "*[g]roup members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring*" (at [40]). This, in his Honour's view, rendered the conclusion that *Wigmans* was plainly wrong a "*surprisingly ambitious one*".

Further, and consistent with the submissions of the contradictor, his Honour considered that the proposed notification places non-registered class members in a position that would be contrary to the opt out legislative scheme enshrined in Pt 10 of the ***C**ivil **P**rocedure **A**ct 2005* (NSW) and its analogue in the *Federal Court of Australia Act 1976* (Cth) (the 'fundamental precept') – in effect, authorising the issuing of a notice which turned the statutory scheme on its head by, in practical terms at least, requiring class members to opt in to the group prior to any settlement or judgment based on any such settlement.

President Ward agreed with the orders proposed by the Chief Justice, and was not persuaded that either *Wigmans* nor *Parkin* was 'plainly wrong'. The balance of her Honour's judgment (where her Honour respectfully differs from *Wigmans*) concerned the proposition that notification to class members of an intention (or possible intention) at a later point in time to seek an order from the Court excluding unregistered class members from participation in a settlement reached at mediation gives rise to an insoluble conflict of interest at the time that the notice is issued. Her Honour did not accept that the existence of a possibility for a conflict of interest will necessarily result in the existence of an insoluble conflict of interest in reality.

Justice Leeming also agreed with the orders proposed by the Chief Justice and his reasons. Three additional points were included in his Honour's separate reasons:

- First, that it is preferable to express the test applicable when one intermediate appellate court departs from a decision of another intermediate appellate court on federal or uniform legislation or common law which is materially unaffected by statute by asking whether there is a 'compelling reason' to do so. In many or most such cases, it will be better to speak to the quality and cogency of the case made out for departure from the earlier decision, rather than the egregiousness of the Court's error.
- Secondly, in respect of soft class closure being *prima facie* contrary to a 'fundamental precept' of Pt 10 and inherent in the legislative choice of an opt out regime, his Honour did not think that the reasoning in *Parkin* accurately reflected what was said in *Wigmans* – it was not (in his Honour's view) deployed to connote an 'an absolute rule' and rather was deployed to address a basic principle underlying the regime established by the statute.
- Third, his Honour agreed with the Chief Justice concerning differences between s 175(5) and s 183 of the CPA in *Wigmans* at [100], and that *"it is tolerably plain from reading the passage in context that the only point being made was a textual one about those two provisions, rather than a statement that the power was unqualified by any other consideration extraneous to the provision*" (at [159]).

[Postscript: On 14 May 2024 the defendants in the underlying proceeding filed an application for special leave to appeal to the High Court.]

Pallas v Lendlease Corporation Ltd [2024] NSWCA 83

New South Wales Court of Appeal | Bell CJ, Ward P, Gleeson, Leeming and Stern JJA | 17 April 2024

Applicants' Solicitors:	Herbert Smith Freehills
Respondents' Solicitors:	Maurice Blackburn Lawyers
Applicants' Funder:	Harbour
Austlii Link:	Available here

Judge approves GCO application with glowing praise

This judgment related to an application for a group costs order (**GCO**) under s 33ZDA of the *Supreme Court Act 1986* (Vic) in a group proceeding. The proceeding is a shareholder class action against the defendant (James Hardie), an ASX listed company, in respect of alleged misleading or deceptive conduct, misleading statements, and breaches of its obligations of continuous disclosure to the market in relation to representations made about its expected growth, and information withheld about its likely FY23 performance.

The application was neither consented to nor opposed by the defendant, however, brief submissions were made as to the proposed rate of 27.5% in light of the rates set in other cases and on the question as to the extent to which the Court should consider the capacity of the plaintiff's solicitors, Echo Law, to meet the obligations to which it will be subject if a GCO is made.

Ultimately, Osborne J was satisfied that it was appropriate to make a GCO at the rate of 27.5% to ensure justice is done in the proceeding. In reaching this conclusion, his Honour had regard to the following:

Relevant Principles

- The statutory criterion for the exercise of the power to make a GCO under s 33ZDA is that the Court be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding to make such an order; further, a court should be satisfied, in order to make a GCO, that doing so would be a suitable, fitting or proper way to ensure that justice is done in the proceeding.
- The term "justice is done" occurs within a specific statutory context which is focussed on enhancing class members' access to justice. Thus, s 33ZDA confers on the Court the power to

enhance or facilitate access to justice for class members by making a GCO, subject of course to the pre-conditions for the exercise of that power being satisfied. The statutory criterion is capable of being satisfied in "myriad ways".

GCO and Certainty, Transparency and Equity

- Described by his Honour as a very significant benefit, and one highly relevant in the Court's assessment in the exercise of its discretion under s 33ZDA, is the certainty conferred by a GCO on the plaintiff and class members by fixing the proportion of any award or settlement that is offered, subject only to variation by Court order.
- Further, making the GCO will fix the funding mechanism for the proceeding, providing further certainty as to how the proceeding will be funded (and avoiding commensurate delays), the evidence before his Honour establishing that the plaintiff and Echo Law would seek third-party funding in the event that a GCO is not made (nor was Echo Law prepared to fund on a conditional basis).
- There is simplicity and transparency in the GCO funding model, both of which are in the interests of class members.

Continued Protection for the Plaintiff

- Pursuant to the Conditional Legal Costs Agreement and Costs Disclosure Statement (**CCA**), Echo Law's agreement to indemnify the plaintiff against any adverse costs order in the proceeding would lapse 90 days from the making of a decision by the Court to decline a GCO. In these circumstance, the lead plaintiff's evidence was that if the indemnity from Echo Law and the ATE insurance were to lapse (with no appropriate substitutes put in place), he would instruct Echo Law to replace the plaintiff as lead representative or discontinue the proceeding. Accordingly, a GCO in this proceeding would shift the risk of adverse costs and burden of providing any security ordered from the plaintiff to Echo Law for the duration of the proceeding.

Reasonableness of the Proposed Rate

- His Honour was satisfied that a rate of 27.5% is appropriate and that it would not be in the interests of justice to award a lower rate. In particular, his Honour had regard to the internal rate of return analysis carried out by Echo Law, an assumption-based comparison of the 27.5% rate with other funding arrangements and conventional litigation funding, and a comparison of rates ordered in other GCO applications (ranging from 14% to 40%, with a median rate of 24.5% across all cases and 24% in shareholder class actions). Ultimately, his Honour was satisfied that the rate sought of 27.5% is consistent with rates granted in comparable cases.

Raeken Pty Ltd v James Hardie Industries plc [2024] VSC 173

Supreme Court of Victoria | Osborne J | 11 April 2024	
Plaintiff's Solicitors:	Echo Law
Defendant's Solicitors:	Herbert Smith Freehills
Plaintiff's Funder:	N/A (portfolio financing arrangement with CASL)
Austlii Link:	Available here

GCO provides high returns to group members in consolidated Medibank shareholder action

This is a consolidated shareholder class action which arises out of the much publicised data breach by the defendant (**Medibank**) in 2022. The proceeding is being jointly conducted by two firms of solicitors, being **P**hi **F**inney **M**cDonald and **Q**uinn **E**manuel **U**rquhart & **S**ullivan. In short, it is alleged that Medibank engaged in misleading or deceptive conduct and breached its continuous disclosure obligations by not disclosing deficiencies in its cyber security systems, and that shareholders suffered loss when Medibank's share price fell following the occurrence of the data breach.

The joint plaintiffs in the proceeding applied for a group costs order (**GCO**) at the rate of 27.5%, to be split equally between PFM and QEU&S. Medibank did not oppose the application, but did identify certain matters upon which the Court may wish to hear from a contradictor.

Justice Attiwill briefly set out, at [11]-[12], the now familiar principles relating to the award of a GCO. His Honour held that it was unnecessary to appoint a contradictor, as proposed by Medibank, because "*the submissions and the evidence filed on this application enable the Court to understand and make an assessment of the relevant issues*" (at [24]).

His Honour concluded that it was appropriate to make the proposed GCO, for reasons which included:

- the simplicity and certainty which a GCO provides for class members;
- the fact that a GCO will avoid delay in the proceeding which would occur if other funding arrangements need to be put in place;
- the alignment of interests between the plaintiffs, the class members and the solicitors which a GCO creates;
- the fact that a GCO will be cheaper for class members than the most likely alternative, namely, third party litigation funding (and the possibility that the proceeding may not proceed at all if third party litigation funding could not be secured); and
- the proposed rate of 27.5% was prima facie reasonable and proportionate having regard to the complexity of, and risks involved in conducting, the proceeding.

Lastly, his Honour also determined that he would not require PFM and QEU&S to give an undertaking not to subsequently seek a higher rate as a condition of granting the GCO, and that such a condition was not a requirement of the statute.

Kilah v Medibank Private Ltd [2024] VSC 152	
Supreme Court of Victoria | Attiwill J | 28 March 2024	
Plaintiff's Solicitors:	Phi Finney McDonald / Quinn Emanuel Urquhart & Sullivan (QEU&S)
Defendant's Solicitors:	King & Wood Mallesons
Plaintiff's Funder:	Regency VI Funding Pty Ltd (QEU&S)
Austlii Link:	Available here

Optus data breach claim develops

This matter arose out of an alleged data breach by Singtel Optus Pty Ltd (**Optus data breach**). The *Privacy **Act** 1988* (Cth) contains a detailed regime for the lodgement of a 'representative' complaint under that Act with the **A**ustralian **I**nformation **C**ommissioner (in terms which, in many respects, closely resemble the regime under Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the commencement of a representative proceeding). Pursuant to that regime, on 4 October 2022 a representative complaint was lodged with the AIC in respect of the Optus data breach, by an applicant who is represented by Johnson Winter & Slattery (**JWS Complaint**). Subsequently, a second representative complaint was lodged with the AIC in respect of the Optus data breach, by the present applicant who is represented by Maurice Blackburn (and on behalf of substantially the same class members covered by the JWS Complaint) (**First MB Complaint**). At a later time, the same applicant lodged an identical representative complaint, after he had formally opted out of the JWS Complaint (which he had not done before lodging the First MB Complaint) (**Second MB Complaint**). The Second MB Complaint was, in effect, intended to replace the First MB Complaint.

The AIC declined to investigate the Second MB Complaint (or, for that matter, the First MB Complaint), on the basis that the Act does not permit the lodgement of a second (or subsequent) representative complaint in relation to the same subject matter, and on behalf of the same or substantially the same class members, as an existing representative complaint. In this proceeding the applicant sought judicial review of the AIC's decision.

In short, the applicant contended that there was nothing in the Act which expressly or impliedly prohibits the lodgement of a 'competing' or 'overlapping' representative complaint, and the AIC was therefore obliged to investigate the Second MB Complaint, and its decision not to do so was invalid. In the alternative, the applicant contended that if the Act does prohibit multiple representative complaints in relation to the same subject matter and on behalf of the same class members, then the AIC erred in treating the first in time as the sole criterion determinative of the question as to which of the representative complaints ought be treated as validly lodged and investigated by the AIC, and that the first in time was an irrelevant consideration.

In support of its position the AIC principally relied on s 39 of the Act, which provides that "*[a] person who is a class member for a representative complaint is not entitled to lodge a complaint in respect of the same subject matter*".

Justice Beach undertook a detailed analysis of the relevant provisions of the Act, and concluded that, when properly construed, none of the provisions supported the conclusion that only one representative complaint could be validly lodged in relation to a particular subject matter. In relation to s 39 specifically, his Honour held that the reference to "*a complaint*" in that section was (consistent with the heading to the section and other extrinsic materials) to be read as a reference to an 'individual complaint' only – in other words, a person who is a class member in relation to a representative complaint is prohibited from lodging an individual complaint in relation to the same subject matter, but is not prohibited from lodging a separate representative complaint in relation to that subject matter. As his Honour put it, s 39 "*was not introduced to deal with duelling representative complaints*" (at [90]).

In those circumstances, notwithstanding that the Second MB Complaint was lodged later in time than the JWS Complaint, it was nevertheless a validly lodged representative complaint. Further, although ss 38A and 41 of the Act gave the AIC a discretion to de-class the Second MB Complaint or otherwise not to investigate it, or investigate it further, there was no suggestion that the AIC had (at least as yet) purported to exercise that discretion – instead, the AIC's decision not to investigate the Second MB Complaint was based solely on the (erroneous) contention that it was not validly lodged.

Thus, his Honour made an order quashing the AIC's decision not to investigate the Second MB Complaint, with the result that the AIC is, in accordance with ss 36A and 40 of the Act (and subject to any later exercise of the AIC's discretion under ss 38A and 41 of the Act) "*required to investigate the act or practice*" which was the subject of the complaint.

Foley v Australian Information Commissioner [2024] FCA 169	
Federal Court of Australia | Beach J | 1 March 2024	
Applicant's Solicitors:	Maurice Blackburn
Respondent's Solicitors:	Australian Government
Solicitor Applicant's Funder:	N/A
Austlii Link:	Available here

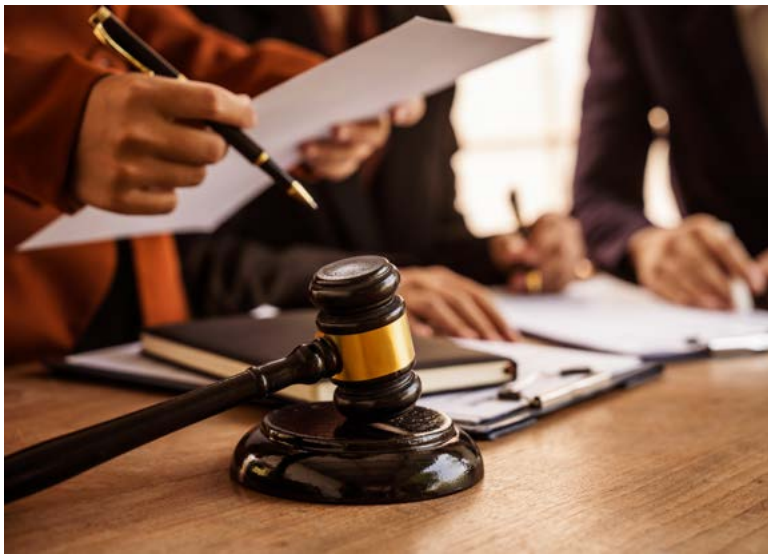
Soft class closure sought ahead of FX mediation

This judgment concerned an interlocutory application brought by the respondents seeking orders with respect to opt out and registration (in the form of 'soft class closure') and a mediation in the proceeding. The underlying proceedings are complex but, broadly, concern claims for damages in respect of alleged cartel conduct including an alleged arrangement or understanding between the respondents to cooperate with each other in relation to trading in FX Instruments.

Having regard to the decision of the Full Federal Court in *Parkin v Boral Ltd* (2022) 291 FCR 116; [2022] FCAFC 47, Beach J indicated that the issue for the Court when asked to make registration orders of the kind sought is not whether it has the power to make them, but rather whether it is an appropriate exercise of its power under s 33X of the *Federal Court of Australia Act 1976* (Cth). Further, his Honour was of the view that orders providing for 'soft class closure' do not in fact '*transmogrify*' an open class action into a closed class action, but rather proposes a demarcation between registered and unregistered class members that only has effect if a settlement is later reached by the parties and approved by the Court.

His Honour set out a number of considerations relevant to the exercise of the discretion (each of which will vary with the circumstances of the case), the paramount factor being the extent to which a registration process is likely to improve the prospects of achieving a reasonable settlement. Other listed considerations included, *inter alia*, whether it is in the interests of class members as a whole to require registration before any prospective settlement is on the table, the point which the proceeding has reached, the attitude of the parties, the complexity and likely duration of the case, with protracted litigation and greater complexity increasing the interests of class members in avoiding litigation risk through achieving a settlement, whether class members have adequate notice of the change and reasonable time to decide whether to register, and whether an estimate of the size and number of claims can be made.

Ultimately, his Honour was persuaded that, on any view, it was appropriate that both opt out procedures and mediation should occur now. His



Honour was likewise persuaded that any such mediation should be preceded by a registration process, and it was therefore appropriate to make the orders in the form sought by the respondents (and notwithstanding the opposition of the applicant). In arriving at this conclusion, his Honour was of the view that it is more efficient and effective to bring forward the inevitable process of registration with a view to exploring whether an early settlement can be reached now with the benefit of the information obtained through that process. In particular, his Honour had regard to the following factors:

- First, a mediation is significantly more likely to succeed when the parties can reasonably estimate the number of class members who will participate in any settlement, and the likely quantum of their claims. Here, the identity of a significant proportion of class members was not known or ascertainable by the parties and, absent that information, the risk of underestimating the number of class members who ultimately would seek to benefit from the settlement undermines confidence in any in-principle settlement that might be achieved.
- Second, consistent with the above, his Honour agreed with the respondents' submission that there was a clear inability to estimate the number of class members who will participate in any settlement and the quantum of their claims without a registration process (including identifying those already compensated in related overseas proceedings). And, even if the

total number of class members were identified, the parties still would not be able to reasonably estimate or agree on the number who will participate in any settlement and the quantum of their claims.

In respect of the applicant's key submissions:

- His Honour was not persuaded that publicly available information could be used as a proxy for making an informed estimate of matters not known to the parties, notwithstanding (in the applicant's submission) the respondents being demonstrably capable of estimating potential settlement parameters, including by utilising publicly available data, without the need for registration by class members having already settled overseas proceedings.

His Honour noted various limitations with this approach – described as having an 'air of unreality' and 'suboptimal' – and agreed with the respondents' submission that limiting them to the public information would mean that the parties have an uncertain baseline of information by which to then apply analysis, which analysis will itself be the subject of differing methodologies and assumptions. It would also mean that the respondents will have no individualized trading information by which to inform an estimate of the potential net loss suffered by class members. His Honour concluded the likely result is that an absence of a registration process will be a significant impediment to any potential resolution.

- His Honour was likewise unpersuaded that registration should not be required in circumstances where it was not suggested that class members will not understand the notice or registration process and, rather, that some class members "*will not want to register either because they wish to remain anonymous or because the effort to do so could not be guaranteed to yield compensation*" (at [86]). His Honour was critical of such reasons, which in his view did not align with the objectives of class action proceedings.
- His Honour was also unpersuaded that class members' interests stand to be prejudiced by the proposed class closure orders, it having been submitted to the effect that prejudice comprised: (1) the potential exclusion from any eventual settlement of a proportion of class members, including institutions with potentially large claims; (2) the registration process yielding an unrealistically small claim pool; (3) if an in principle settlement were reached, the risk of diluting any compensation following a flurry of late registrations; (4) the class closure orders proposed will likely affect a significant number of qualifying class members who are not directly notified; and (5) to the extent that the respondents suggest that there is no real difference between registration now and registration following settlement, there is likely to be greater publicity and greater interest in registration following settlement.

In respect of the expiry date of the proposed orders, his Honour was not prepared to make the orders in the form proposed by the respondents, the relevant expiry date being 'before final judgment'. Here, his Honour accepted the applicant's position that such 'open ended' class closure orders would, in effect, cap the respondents' liability for the purpose of any settlement agreed in the proceeding and, further, disincentivise meaningful engagement in the mediation process in circumstances where the class remained closed whether or not a settlement was achieved at mediation.

No formal orders were made, his Honour having indicated that he had 'largely acceded' to the respondents' application and gave the parties an opportunity to discuss further the detail of such orders in light of the reasons.

J Wisbey & Associates Pty Ltd v UBS AG (No 2) [2024] FCA 147	
Federal Court of Australia | Beach J | 27 February 2024	
Applicant's Solicitors:	Maurice Blackburn
Respondent's Solicitors:	Herbert Smith Freehills, Clayton Utz, Allens, Allen & Overy, King & Wood Mallesons (for the first to fifth respondents respectively)
Applicant's Funder	N/A
Austlii Link:	Available here

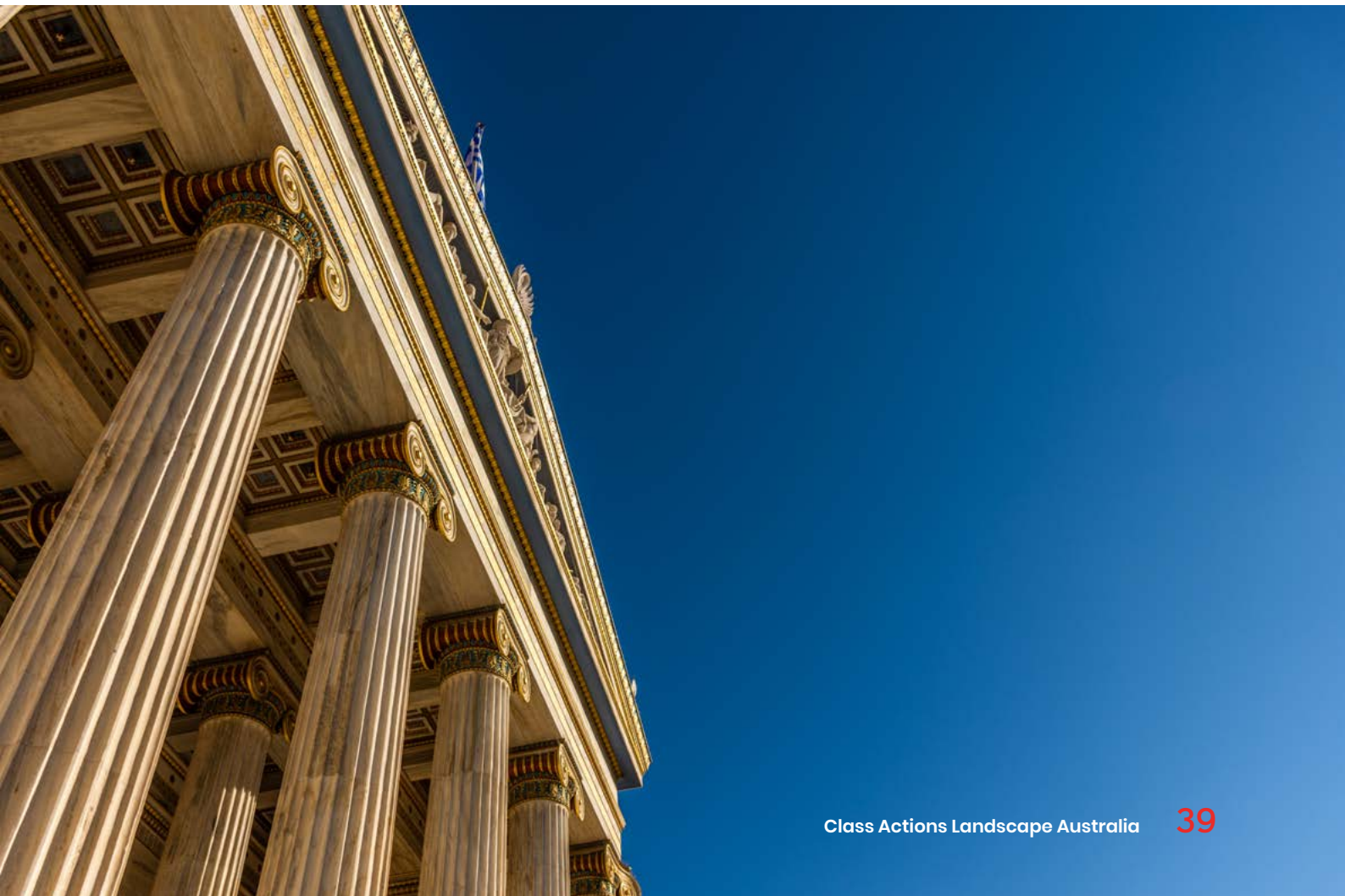
Medibank seeks to restrain Information Commissioner in data breach case

This matter arose out of an alleged data breach by the applicant (**Medibank**). *The Privacy Act 1988* (Cth) (**Act**) contains a regime for the lodgement of a 'representative' complaint under that Act, in terms which in some respects resemble the regime under Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the commencement of a representative proceeding. Pursuant to that regime, the second respondent to this proceeding lodged a representative complaint with the first respondent (**AIC**). Separately, a representative proceeding was commenced in the Federal Court against Medibank arising out of the same facts, but by a different party and represented by different solicitors (**Class Action Applicant**). Medibank sought an injunction against the AIC to restrain it from making a determination in respect of the representative complaint lodged with it (and also in respect of a separate investigation commenced by the AIC on its own initiative, which it was intended would be investigated concurrently with the representative complaint).

The Class Action Applicant intervened in the proceeding, in support of Medibank's application.

Medibank contended, in substance, that any determination made or enforced by the AIC poses a real risk of interference with the administration of justice having regard to the issues raised in the separate class action proceeding, including a real risk of inconsistent factual and legal findings being made in respect of the same or overlapping questions.

Justice Beach accepted that if there was a real risk of the AIC's investigation interfering with the administration of justice (in the sense of constituting a contempt), there was nothing in the Act which countenanced that, and therefore it would be open to the Court to grant an injunction. However, his Honour dismissed the application, finding in substance that, at least at this stage, any risk was speculative and theoretical, and was remote rather than immediate, and therefore



did not rise to the level of a 'real risk'. His Honour's reasons are lengthy, but a key component of his reasoning was that determinations of the AIC are not *per se* binding or enforceable, and can only be enforced by taking proceedings in, *inter alia*, the Federal Court, at which time, if it arises, the Court will be well placed to manage any issues that may arise. Thus, his Honour said (at [129], [157], [201], [203]):

> In my view the fact that the AIC's opinion about matters of fact or law might be different from the Court's findings and conclusions in respect of the same subject matter does not embarrass or prejudice the Federal Court representative proceeding in any way. Even though a power of inquiry and determination may be conferred on an administrative body which can encompass the formation and expression of an opinion about an existing legal right or obligation, the mere possibility of a difference of opinion between an administrative or executive body and a Court is insufficient to give rise to a contempt.
>
> I do not see anything which warrants granting an injunction at this stage on these various contingent and compounding possibilities... [A] theoretical tendency to interfere with the course of justice is not enough. The tendency must be a practical reality. The context before me is nowhere near that end of the spectrum. Whether it moves closer to that end at some later stage I cannot say at the present time. Medibank is not foreclosed from making a later application if there are relevant changed circumstances.
>
> The suggestion that the AIC's future processes will constitute a contempt by having a real and definite tendency to prejudice or embarrass the Federal Court representative proceeding is speculative.
>
> Even if there was some substance to Medibank's points, in my view it would be premature to grant an injunction. The relevant risk is not so immediate such as to justify an injunction now which for all practical purposes is likely to carry with it permanent consequences concerning the statutory processes under the Act ... When a determination would be made under s 52 by the AIC is uncertain. The content of such a determination is also uncertain. Further, whether and when there would be enforcement proceedings under s 55A is also uncertain. And the timing and disposition of the Federal Court representative proceeding is also uncertain. Generally, there is lacking the immediacy of any risk concerning inconsistent findings. But in any event, and as I have said, although that risk is important to the principal question it is not determinative as to whether there may be an interference with the administration of justice.

Medibank Private Ltd v Australian Information Commissioner [2024] FCA 117	
Federal Court of Australia | Beach J | 27 February 2024	
Applicant's Solicitors:	King & Wood Mallesons
Respondent's Solicitors:	DLA Piper Australia / Maurice Blackburn
Interveners' Solicitors:	Baker McKenzie
Applicant's Funder:	N/A
Austlii Link:	Available here

"Vastly superior outcomes" – Morabito's empirical study of Group Costs Orders

Earlier this year, Professor Vince Morabito of Monash University's Business School released his latest in-depth empirical report on class actions in Australia, this time looking at Victoria's Group Costs Order (**GCO**) regime. Enacted in 2020 under section 33ZDA of the *Supreme Court Act 1986* (Vic), GCOs allow legal costs to be a percentage of any award or settlement, shared among all group members. This change, recommended by the Victorian Law Reform Commission (**VLRC**), was designed to reduce the significant financial barriers victims of mass wrongs face in order to pursue justice.

> "The GCO rate constitutes the only deduction from the gross settlement sum"

The Morabito Report notes that unlike traditional funding arrangements where multiple deductions are made from the settlement sum, the GCO rate is the sole deduction, ensuring a higher proportion of the settlement is distributed to class members. The report also highlights that this structure more closely aligns the interests of solicitors and clients, promoting fairer outcomes. Morabito's analysis suggests a median GCO rate in shareholder class actions of 24%, with rates ranging from 14% to 40%.

Data provided in this report shows that since the introduction of GCOs, the median funding commission has decreased from 24.9% to 22.7%, which suggests that the availability of GCOs has exerted downward pressure on funding commissions, making litigation more affordable for plaintiffs. Additionally, this report notes that hybrid funding arrangements, where both GCOs and litigation funders are involved, have become more common, showing that by introducing a greater funding mix into the pool of options available to plaintiffs, competitive market pressures have indeed helped drive down legal costs and return more to group members affected by mass wrongs, as per the intended policy outcome of introducing GCOs to support class actions.

> "The GCO regime provides a vastly superior outcome for class members"

Professor Morabito highlighted in his report that the most crucial factor contributing to GCO's being a superior funding model to traditional third-party litigation funded cases, is that the GCO rate constitutes the only deduction from the gross settlement sum. This, he notes, stands in stark contrast to funded class actions in which the funding commission is only one of – and often the largest – deduction to be made, with further deductions often including legal costs, settlement administration costs and, on some occasions, After-the-Event Insurance.

Professor Morabito's work also showed a significant fact that 15 out of the 16 GCOs that had been released at the time of the report, would guarantee class members a higher proportion of the gross settlement sums or awarded damages than the minimum 70% that the former Morrison Government sought to secure for them via a Bill it introduced in the Commonwealth Parliament in 2021.

This report found that empowering judges has been effective in managing GCO applications, and that judicial scrutiny of GCO applications has been rigorous, particularly in cases involving competing class actions, where courts have employed a multiplicity process to determine the most advantageous GCO rate for group members. Prof. Morabito noted this competitive element has resulted in lower GCO rates, benefiting class members by reducing the cost burden.

As Prof. Morabito observed, the positive trends in the number and diversity of class actions filed, coupled with the reduction in funding commissions, highlight the success of this legislative reform in the first three-and-a-half years of its life.

Link to Full Report: Available here

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