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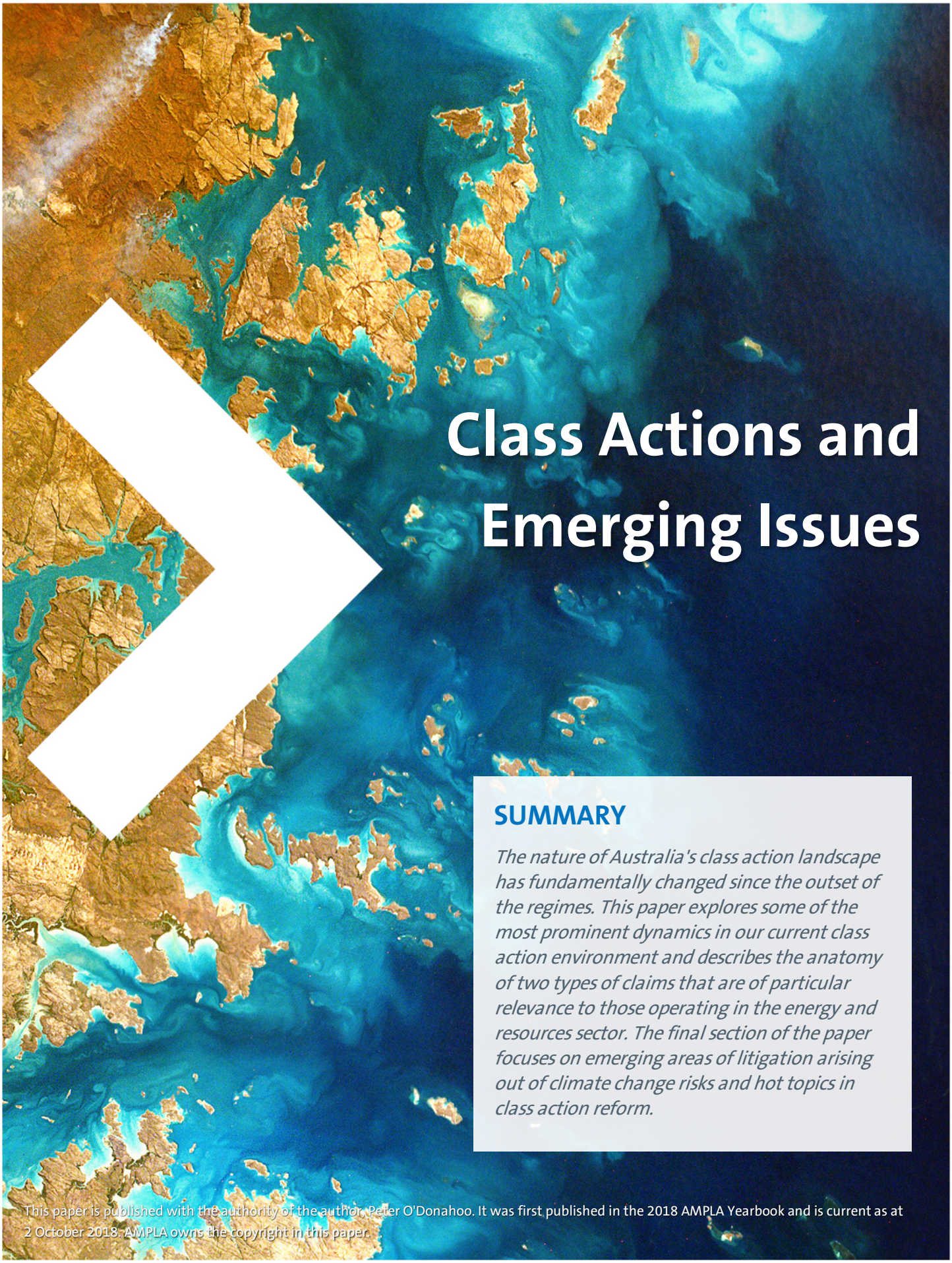


Class Actions and Emerging Issues

SUMMARY

The nature of Australia's class action landscape has fundamentally changed since the outset of the regimes. This paper explores some of the most prominent dynamics in our current class action environment and describes the anatomy of two types of claims that are of particular relevance to those operating in the energy and resources sector. The final section of the paper focuses on emerging areas of litigation arising out of climate change risks and hot topics in class action reform.

AUSTRALIA'S CLASS ACTION LANDSCAPE

Class Action Regimes – The Basics

The objectives of Australia's class action regimes are well known and have not changed. Class actions can increase access to justice, reduce the cost of litigation and promote the efficient use of resources by achieving finality for multiple claims.[1] Accordingly, the class action regimes has an important social utility.[2]

Australia's first class action regime was introduced by the Federal Court of Australia in 1992.[3] Since then, equivalent regimes have been introduced in the Supreme Courts of Victoria, New South Wales and most recently Queensland.[4]

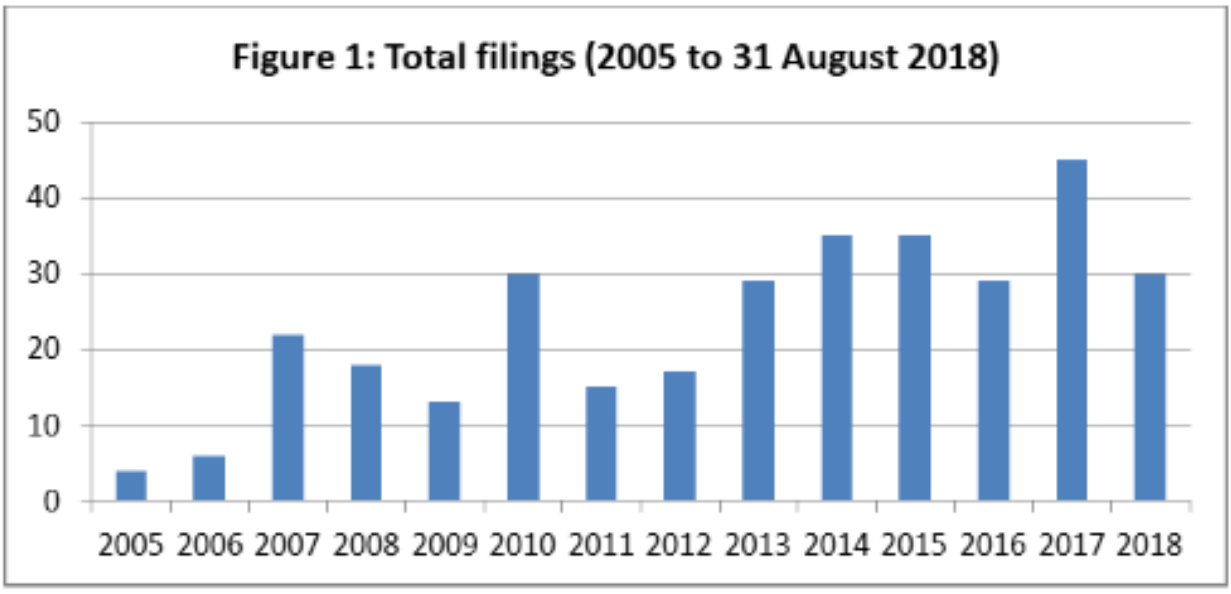
In very general terms, each of these regimes share the following key features:

- First, each regime requires certain threshold requirements to be met in order to commence a class action, namely that:[5]
  - (a) there must be claims by seven or more persons against the same person;
  - (b) the claims must arise out of the same, similar or related circumstances; and
  - (c) the claims of all of those persons must give rise to a substantial common issue of law or fact.
- Second, each class action is brought on behalf of all class members by one (or a small number of) representative(s).
- Third, it is not necessary to name each class member in a class action, nor is it necessary to specify the number of people in the class or the total value of their claims. Instead, the class is often defined by a set of criteria. This means that class action defendants often will not know the identity of all class members or the total quantum of the claim.
- Fourth, the Australian class action regimes adopt an opt-out procedure. This means that if a class member falls within the defined class and does not opt out then they are bound by the outcome of the class action.[6] It is possible however to commence an action with a 'closed' class, effectively creating an opt-in arrangement. A closed class will include a restrictive element in the class definition. For example, that the class members have signed a funding agreement with a particular litigation funder.[7]
- Finally, once a class action is commenced, the action may not be settled or discontinued without the approval of the Court.[8] In approving any class action settlement, the Court must be satisfied that the settlement is fair and reasonable and in the interests of class members.

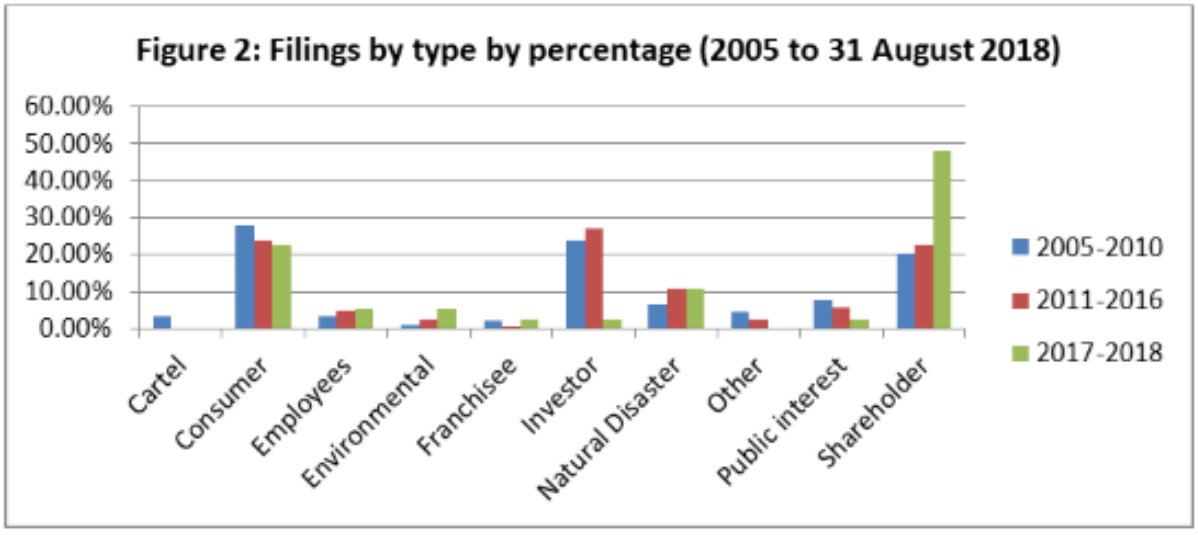
The Current Class Action Environment

Nature and numbers of claims pursued

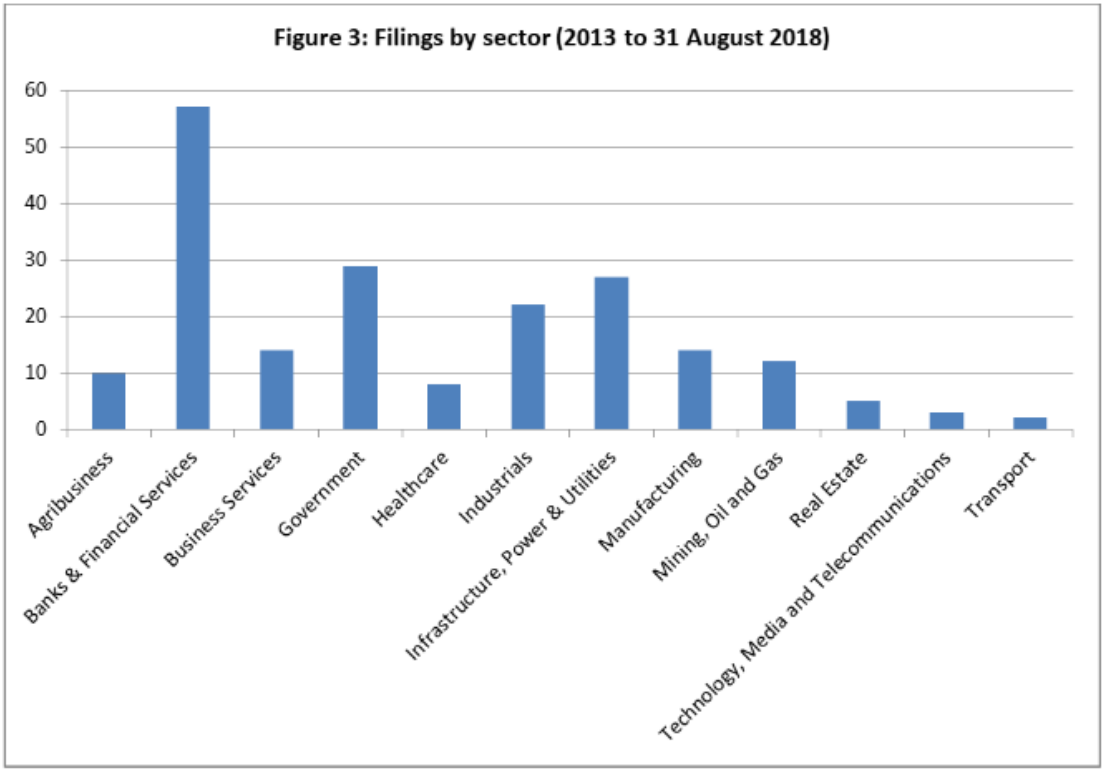
Analysis of class action filings demonstrates that the class action has significantly evolved since the introduction of the first regime. Figure 1 shows the trend in class action activity since 2005 (including competing class actions).[9] This graph shows that the number of filings each year has been variable, although there has been a marked increase in recent years.



Prior to the introduction of the first regime, the Australian Law Reform Commission (ALRC) thought that consumer claims, smaller business protection and trade practices matters would be the key type of claims that would be the subject of class actions.[10] Figure 2 shows that the class action regimes have been amenable to the broad range of claims that were envisaged (similar to Figure 1 this figure includes competing class action filings).[11] Most notably, this graph highlights a significant spike in shareholder class actions filed in the last two years.[12] Although the designers of the first class action regime foresaw the use of the regime to determine this type of claim,[13] since at least 2004 shareholder class actions have taken on an unexpected prominence and have accounted for more than half of all class actions filed over the past decade.[14] Another trend highlighted by Figure 2 is the steady number of environmental class actions (particularly flood and fire cases, as well as more recently a number of claims filed against the Commonwealth in relation to alleged contamination of groundwater on military sites). Environmental and natural disaster claims will continue to be a particular concern to government, power and utility companies and the operators of public infrastructure.



Although neither the 'mining, oil and gas' sector or the 'infrastructure, power and utilities' sector are the sector with the highest incidence of class action claims, it is clear from Figure 3 (which again includes completing class action filings) that these sectors still face material class action risk. Shareholder class actions account for the vast majority of claims against those in these sectors and this is discussed in further detail in a later section of this paper.



The rise of entrepreneurialism

The promotion of class actions has become an increasingly entrepreneurial endeavour over the course of the last decade.

Third party, non-lawyer litigation funders have had the most significant influence on the current class action environment. During the first decade of Australia's class action regimes, claims were funded by class members themselves, or by lawyers acting on a 'no win, no fee' basis. However, following the High Court's approval of the concept in 2006,[15] third party, non-lawyer litigation funders have become entrenched in, and had a significant impact on, Australia's class action landscape. For example:

- Despite the opt-out model, it is now common place for 'closed class' actions to be brought, limited to those that have signed a funding agreement.[16]
- Where a class action is not 'closed' by reference to a funding agreement, it is also common practice for 'funding equalisation' orders to be made in the context of settlements to ensure that the funded class members are not worse off in terms of recovery than the unfunded class members.
- Third party, non-lawyer litigation funders have successfully pressed for the acceptance of common fund style orders.[17] A common fund order, in general terms, involves a litigation funder receiving a Court-endorsed funding commission from all class members who participate in a settlement or a judgment, rather than just those who have signed funding agreements. The acceptance of this approach has made Australian class actions an even more attractive proposition for local and offshore funders.
- The number of competing class actions filed has substantially increased in recent years. For example, this year Courts have been required to grapple with three competing class actions against GetSwift and five competing class actions against AMP Limited.[18] As acknowledged recently by the Full Federal Court of Australia, the problem of competing class actions is one that results from 'the competing self-interests of those promoting and hoping to manage these proceedings', reflective of that increasing entrepreneurialism.[19]

Plaintiff law firms also contribute to the current environment. The 2014 proceedings brought by Melbourne City Investments (***MCI***) (controlled by Mark Elliott) against Treasury Wines Estate Pty Ltd, Worley Parsons Limited and Leighton Holdings Limited are examples of lawyer entrepreneurialism at its most ambitious. MCI had a 'business model' of purchasing small shareholdings in a number of listed companies with the objective of subsequently commencing class actions against some of them for breaches of continuous disclosure obligations. These class actions were ultimately held to be an abuse of process and were permanently stayed.[20]

While entrepreneurialism is not problematic in and of itself,[21] left unchecked it has the potential to promote the interests of third parties over the interests of class members. Given this environment, the final section of this paper briefly considers current reform initiatives which may go some way to ensuring that the Australian class action regimes have a renewed focus on balancing the interests of claimants and defendants.

SHAREHOLDER CLASS ACTIONS

The Anatomy of a Shareholder Class Action

Shareholder class actions are now a fact of Australian corporate life (and it is no different for those operating in the energy and resources sector). It is now par for the course that after any significant price drop, there is likely to be an announcement by at least one class action promoter that they are investigating the company's conduct and inviting shareholders to register their interest in participating in a class action.

Australian shareholder class actions typically relate to the circumstances in which shares (or other equity securities) are acquired and/or sold. It is often alleged that because of a deficiency in a company's market disclosures (whether in offer documents, earnings guidance, accounts or other market statements), the shareholders either: (i) acquired shares when they would not have done so but for the alleged conduct; or (ii) more likely, acquired shares at a higher price than they would have otherwise paid but for the alleged conduct.

The Key Causes of Action

These complaints generally materialise into two specific causes of action. The first cause of action is a breach of the company's continuous disclosure obligations under ASX Listing Rule 3.1, which is given statutory force by section 674 of the *Corporations Act 2001* (Cth) (the ***Corporations Act***). Companies listed on the ASX are required to immediately release to the market any information that a reasonable person would expect to have a material effect on the price or value of the company's shares, unless certain exceptions apply.

The second cause of action is usually an allegation of misleading or deceptive conduct. Depending on the circumstances, a number of different statutory provisions may be relevant: section 1041H of the Corporations Act, section 18 of the Australian Consumer Law or section 12DA of the *Australian Securities and Investment Commission Act 2001* (Cth).[22]

Regardless of which specific statutory prohibition is alleged to have been contravened, shareholders typically allege that they were misled by what a company did (or did not) say.

Neither cause of action requires proof of intent to mislead shareholders.[23] Thus, for example, it will not be a defence for the company to show that those responsible for making the decision on market disclosure honestly believed that the information was not market sensitive.

Causation and Loss

These causes of action only sound in damages if a causal link can be established between contravention and loss. In a continuous disclosure claim, this means that the loss must have 'resulted from' the contravention. For misleading or deceptive conduct claims, the loss must 'arise by' or be 'because of' the contravening conduct.

How causation is established is a critical issue in shareholder class actions. Currently, there is uncertainty as to whether: (i) each shareholder has to prove direct reliance on the contravening conduct; or (ii) causation can be established by general notions of reliance by the market affecting the price at which each shareholder purchased and/or sold their share (known as 'market-based causation'). If market-based causation is permissible, then causation can be treated as a common question in a class action and claimants will not have to come forward individually to establish that the company's contravening conduct caused their loss.

Two first instance decisions support the market-based causation approach.[24] However, it is generally accepted that the question of the validity of market-based causation will not be finally resolved until it is determined by the High Court. Given that to date, all shareholder class actions have been settled, the High Court's opportunity to do so may not arise in the short term.

ENVIRONMENTAL CLASS ACTIONS

Environmental claims also pose a class action risk for those in the energy and resources sector. As Figure 2 highlighted, natural disaster class actions have emerged as a significant class action risk. However, claims may also arise from a range of other scenarios such as a biosecurity breach, land contamination, remediation arising from mining operations and a failure of a government or regulatory body to properly regulate. As discussed in a later section of this paper, shareholder claims arising from climate change may also prove to be fertile ground for future class actions.

Common Causes of Action and Remedies Sought

For the purposes of a class (or individual) action, the causes of action upon which environmental claims might be predicated include:

- negligence — Generally speaking, negligence claims require claimants to establish that: (i) they were owed a duty of care; (ii) the circumstances amounted to a breach of that duty of care; and (iii) the claimants suffered damage or loss as a result of that breach. Claimants will often seek to advance claims in respect of three different heads of loss: (i) personal injury; (ii) property damage; and (iii) pure economic loss.
- nuisance — Actions may involve both public and private nuisance. Claimants must demonstrate: (i) an interest in the land affected by the nuisance; (ii) that the defendant has interfered with a property right of the claimant; and (iii) the interest was both substantial and unreasonable.[25] In order to bring a claim of public nuisance, the claimant must show that the defendant's interference with a public right has caused a loss which is particular, substantial and direct, and exceeds that suffered by the public at large.[26]
- breach of a statutory duty — For a breach of a statutory duty, claimants generally need to establish: (i) a mandatory duty imposed on the defendant; (ii) a legislative intention that the statute imposing the duty confers a private civil cause of action for breach of that duty; (iii) that they are a member of a class of persons for whose benefit the statutory duty was imposed; (iv) breach of that duty; (v) the breach caused damage of the kind the statutory duty was designed to prevent.[27] The content of the duty will be informed by any applicable regulatory regime. Breach of statutory duty is a tort of strict liability.[28]

Defences and Other Matters

The defences available will depend on the precise claim brought by the claimant or lead applicant. Other matters that will require consideration will include whether any of the claims brought against the defendant are 'apportionable claims' within the meaning of the relevant Act. If the claim is apportionable, the liability of the defendant will be limited to an amount reflecting the proportion of the loss or damage claimed that the Court considers reasonable having regard to the extent of the defendant's responsibility for that loss and damage. It may also be relevant to consider whether any limitation of actions issues arise (i.e., are some or all of the class members statute barred from bringing a claim).

EMERGING ISSUES IN CLASS ACTIONS

Climate Change

As litigation arising out of climate change continues to emerge as an issue for Australian companies,[29] directors are being encouraged to consider climate change as both an opportunity and a risk and, as a result, make appropriate disclosures. In this regard, in support of disclosure of 'climate change risks', at least to the extent that such risks 'intersect with the interests of the company', the legal opinion of Mr Noel Hutley SC and Mr Sebastian Hartford Davis is often cited.[30]

Having considered the various interpretations of 'climate change risk' , the term is aptly described as encompassing:[31]

- **physical risk** — the risk of damage to a company's property (or other assets) or other physical impacts that occur as a result of extreme weather events or arise as a result of long-term climate changes such as rising global aggregate temperatures;
- **transition risk** — the risk of indirect financial costs associated with the transition to a lower-carbon economy and consequential changes in the regulatory environment. Exposure to transition risks such as regulation and pricing of carbon emissions is particularly rife in the energy and resources sector and for companies that invest (directly or indirectly) in energy and resources companies;[32] and
- **litigation risk** —the risk that those who suffer damage caused by climate change, a failure to address climate change, or actions (or inactions) taken and disclosed in relation to climate change, seek redress from the company and/or its directors. These risks are illustrated below.

CURRENT OBLIGATIONS FOR AUSTRALIAN COMPANY DIRECTORS

The increasingly accepted view is that company directors' duties of care and diligence under general law and section 180(1) of the Corporations Act reasonably extend to the consideration of climate change risks.[33] In addition, there is consistency in the view that current provisions of the Corporations Act require companies to report on climate change risks. For example, the Senate Economic References Committee has asserted that the disclosure requirements for annual directors' reports under section 299(1) of the Corporations Act cover climate change risks.[34] Specifically, Mr Hutley SC and Mr Hartford Davis suggest that climate change risk should be disclosed under the requirement to give details of a company's performance in relation to any particular and significant environmental regulation to which its operations are subject.[35] As a further example, ASIC considers that an Australian listed company must include in its operating and financial review (within its annual report) any environmental and other sustainability risks to its prospects of achieving its disclosed financial outcomes, pursuant to section 299A(1) of the Corporations Act.[36]

For Australian listed companies, the ASX Listing Rules require disclosure of climate change risks.[37] For example, a listed company must make continuous (and immediate) disclosure to the ASX of any information concerning a company (once it becomes aware of such information) that, objectively, would be expected to have a material effect on the company's share price or value.[38] Notably, a company becomes 'aware' of information at the point that an officer of the company has or 'ought reasonably to have' come into possession of the information in performing his or her duties.[39] Companies in the energy and resources sectors must also report on the economic assumptions underlying production targets and the ore and petroleum reserves for material projects.[40] In addition, the ASX Listing Rules mandate that a listed company's annual report include a corporate governance statement, which discloses the extent to which the company has complied with the ASX Corporate Governance Council's recommendations on an 'if not, why not' basis.[41] Notably, these recommendations include that a listed company should disclose any material exposure to 'economic, environmental and social sustainability risks' as well as how it manages (or intends to manage) such risks with reference to publications of the Climate Disclosure Standards Board.[42] The consultation draft of the fourth edition of these recommendations identifies climate change risk (termed carbon risk) as an environmental risk that relates to climate change and encourages consideration of the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures (*TCFD*).[43]

REGULATORY OBSERVATIONS ON CLIMATE CHANGE RISKS

Recently, Australian regulators have had an increased focus on climate change risks. For example:

- ASIC's key priorities on climate change risks are to encourage company directors and executives to consider and manage climate change through a 'probative and proactive approach' to information gathering and ensure that material climate change risks are disclosed where required by law.[44] ASIC considers that climate change risks should be

disclosed in a clear, concise and effective way in relevant documentation to equip potential investors with the information necessary to make a fully informed decision.[45]

- APRA expects its regulated entities to consider climate change risks as, according to APRA Executive Board Member Mr Geoff Summerhayes, they are 'foreseeable, material and actionable now'.[46] While not at the top of any industry risk register,[47] APRA has also indicated its intent to build its understanding of the emerging best practice standard.[48] This may mean voluntary disclosure above what is strictly required under current law. While there are a number of frameworks for voluntary disclosure of climate change risks,[49] the TCFD's recommendations are receiving strong support across industry, government and regulators in Australia.[50] These include recommendations to disclose how a company's governance, strategy, risk management and metrics and targets manage climate change risks as well as recommendations for specific financial disclosures in respect of climate change risks.[51] APRA and ASIC have voiced support for companies to undertake scenario analysis to determine the resilience of its strategy in dealing with climate change.[52] If the voluntary uptake of these recommendations continues,[53] the TCFD recommendations could form a de facto disclosure regime specific for climate change risks.
- The Council of Financial Regulators (including ASIC, APRA and Treasury) has created a working group to consider climate change disclosure in the context of financial markets.[54]

LITIGATION RISK ARISING OUT OF CLIMATE CHANGE

Although Australia has experienced climate change-related litigation (including class actions for damage caused by extreme weather events),[55] there remains no judicial guidance addressing the disclosure of climate change risks. This lack of precedent coupled with the range of approaches to climate change risks disclosure makes litigation risk arising out of climate change broad and difficult to define.[56]

An example of the breadth of litigation risk arising out of climate change can be seen from the various actions brought against ExxonMobil Corp (***Exxon***) in the United States. Most relevantly, in a 'securities' class action commenced against Exxon in 2016, it is alleged that public statements made and reports released by Exxon were false and misleading as Exxon misrepresented that it was using carbon proxy costs to ensure none of its oil and gas reserves were or would become stranded.[57] As a result of this (and other) claims relating to climate change risks disclosure, the applicant has alleged that the price of Exxon's securities was artificially inflated during the period between 31 March 2014 and 30 January 2017 in which class members had purchased securities.[58] The mechanics of the claim are emblematic of the traditional shareholder class actions against companies.

In Australia, Environmental Justice Australia (***EJA***) has taken the lead in calling out alleged inadequate disclosure of climate change risks. Of most relevance for this paper is the 2017 proceeding brought by Guy and Kim Abrahams (represented by EJA) against the Commonwealth Bank of Australia (***CBA***), asserting that CBA was aware that climate change posed a major risk to its business, yet failed to adequately disclose the extent of these risks in its 2016 annual report, in contravention of relevant provisions of the Corporations Act.[59] Although reported as the first in the world to test the extent of companies' duties to disclose climate change risks,[60] the proceeding was soon discontinued when, days later, CBA published its commitment to address climate change in its 2017 annual report.[61] Corporate Australia paid particular attention when the proceeding prompted APRA's Prudential Inquiry into the 'frameworks and practices in relation to the governance, culture and accountability within the CBA group' and its subsequent very detailed report.[62] It is notable that CBA has made further disclosures and commitments to climate change in its 2018 annual report.[63] While there remains no judicial guidance on the application of these disclosure requirements to climate change risks, the CBA experience has made plain to corporate Australia the litigation risk associated with perceived inadequate disclosure.

Litigation risk arising out of climate change also exists for funds that invest in Australian companies exposed to climate change risks.[64] For example, a proceeding has been commenced against Retail Employees Superannuation Pty Limited (***REST***) by one of the Retail Employees Superannuation Trust's members (represented by EJA) for not adequately disclosing, in response to the member's request, how it is managing climate change risks.[65] Specifically, the claim has been brought on the basis that REST must address climate change risks in accordance with the general duties applicable to superannuation trustees and provide the member (as a 'concerned person') information requested if the member reasonably required it for the purposes of making an informed judgement about the management and financial condition of REST and the relevant sub-plan.[66] If successful, this case has the potential to provoke further climate change disclosure actions against superannuation funds.[67]

The overarching trend has sharpened community expectations for increased disclosure and

accountability — that is, community agitation for remedies arising out of inadequate disclosure by companies of climate change risks. As the trends of entrepreneurial class actions and litigation arising out of climate change risks disclosure continue, it would seem to be only a matter of time until these trends converge and class actions are brought in Australia on the basis of a breach of continuous disclosure obligations and/or misleading and deceptive conduct.[68]

Hot Topics of Reform

Class action reform is high on the agenda, with separate enquiries being conducted by both the ALRC and the Victorian Law Reform Commission (*VLRC*).[69] It is beyond the scope of this paper to explore each focus area of reform in any detail. However, it is worthwhile to note the matters below as they are likely to impact the class action landscape in the future.

- **Reform of Australia's continuous disclosure regime** — The ALRC is considering recommending that the Australian Government commission a review of the legal and economic impact of the continuous disclosure obligations of listed companies, as well as those obligations relating to misleading conduct. This is perhaps in recognition that some of the problems often identified with the class action regimes are most pronounced in the context of shareholder class actions.
- **Regulation of litigation funders** — Both the ALRC and the VLRC have recommended that a bespoke licensing regime be introduced for the litigation funding industry. Regard will likely be had to the Australian Financial Services Licence regime when developing any such regime for the litigation funding industry. There is also support for a requirement that licensees be subject to a regular audit program and that funders be subject to a duty of good faith.[70]
- **Contingency fees** — The question of whether the prohibition on lawyers charging contingency fees should be lifted has received considerable media attention. There appears to be momentum in favour of permitting contingency fee arrangements for plaintiff lawyers in certain contexts. For example, the VRLC supports in principle lifting the ban on lawyers charging contingency fees generally and in class actions, subject to appropriate conditions and regulatory measures.[71] This issue is also an area of focus for the ALRC. If the ban on contingency fees is to be lifted, these arrangements must be subject to tight regulation and close Court supervision. Such regulation should go beyond the types of measures canvassed by the ALRC,[72] and include measures such as minimum prudential requirements for sufficient capital reserves, provision of security for costs orders directly against lawyers charging contingency fees (with appropriate regulation as to how this occurs) and requiring contingency fee arrangements be in a prescribed standard form.[73]
- **Conflicts of interest** — Conflicts of interest in the class actions context are significant and pervading and arise as a result of the 'tripartite arrangement' that often exists between class members, lawyers and litigation funders. Unsurprisingly, the ALRC identified these conflicts of interests as a key area of focus in its inquiry. Proponents of reform advocate for the Court to be empowered to take an active and inquisitive role in supervising the management of the conflicts of interest that arise in the class actions context.[74]
- **Relaxation of the 'loser-pays' rule** — The VLRC has made recommendations that may see the relaxation of the 'loser pays' rule in 'low value claims' that concern a matter of public interest or a novel area of law.[75] Such a step would be a fundamental shift in our civil justice system (having an important effect on class actions) as the loser-pays rule has been considered to be a significant deterrent on speculative litigation and an important protection for (class action) defendants. Although the relaxation of the rule may be appropriate in certain very limited public interest cases from an access to justice perspective, broader application of the reform should be approached with considerable caution. The importance of the 'loser-pays' rule is only increased if contingency fee arrangements are permitted.
- **Management of competing class actions** — Both the ALRC and VLRC are considering the issue of competing class actions.[76] Competing class actions arise where there are two or more class actions brought against the same defendant either with: (i) an overlap in the class definition of the claim; or (ii) same or substantially similar subject matter, but no overlap of class membership. The ALRC is proposing a 'carriage motion' procedure whereby there is a limited amount of time to bring any competing class actions and then a hearing to determine which action should proceed. This process, in effect, is what the Federal Court of Australia recently employed in addressing the GetSwift class actions where the Court made orders permanently staying two competing shareholder class actions against GetSwift Limited and allowing a third class action to proceed.[77]

CONCLUSION

Class action risk is now a well-established issue for boards, senior management and general counsel. This paper highlights that this is no different in the energy and resources sector. In the current entrepreneurial environment, the sector faces a continuing and perhaps, heightened risk of shareholder and/or environmental class action claims. Climate change class actions may become a more prominent concern in the not too distant future.

CONTACT

Peter O'Donahoo*
Partner
T +61 3 9613 8742
M +61 411 596 178
Peter.O'Donahoo@allens.com.au

Endnotes

* LL.B. B.Ec. (Vic); Partner, Disputes & Investigations, Allens, Melbourne. I gratefully acknowledge the contribution and assistance of Kelly Roberts and Katerina Dandanis (Lawyers in the Disputes & Investigations team at Allens) for the preparation of this paper. This paper is current as at 2 October 2018.

[1] See, for example, Commonwealth, Hansard, Second Reading Speech, 14 November 1991, pp 3174-3175 (Duffy).

[2] Chief Justice Allsop AO, Class Actions Keynote Address (Law Council of Australia Forum, 13 October 2016).

[3] *Federal Court of Australia Act 1976* (Cth) pt IVA. For a concise summary of the history of the class action regime, see Justice Murphy, The Operation of the Australian Class Action Regime, The changing face of practice – adapting to the new landscape (Bar Association of Queensland, 8–10 March 2013).

[4] Supreme Court Act 1986 (Vic) pt 4A; Civil Procedure Act 2005 (NSW) pt 10; Civil Proceedings Act 2011 (Qld) pt 13A.

[5] Federal Court of Australia Act 1976 (Cth) s 33C; Supreme Court Act 1986 (Vic) s 33C; Civil Procedure Act 2005 (NSW) s 157; Civil Proceedings Act 2011 (Qld) s 103B.

[6] Federal Court of Australia Act 1976 (Cth) s 33J; Supreme Court Act 1986 (Vic) s 33J; Civil Procedure Act 2005 (NSW) s 162; Civil Proceedings Act 2011 (Qld) s 103H.

[7] Multiplex Funds Management Limited v P Dawson Nominees Pty Limited [2007] FCAFC 200.

[8] Federal Court of Australia Act 1976 (Cth) s 33V; Supreme Court Act 1986 (Vic) s 33V; Civil Procedure Act 2005 (NSW) s 173; Civil Proceedings Act 2011 (Qld) s 103R.

[9] Allens, Class Action Filing Analysis (31 August 2018). Each of the graphs in this paper rely on Allens' class actions filing analysis. This research is based on publicly available information in relation to class action filings between 2005 and 31 August 2018 in the Federal Court of Australia, and Supreme Courts of Victoria, New South Wales and Queensland (the Queensland's regime's commencement in 2017). This research will be published shortly. See also Allens, 25 years of class actions: where are we up to and where are we headed? (27 March 2017) <https://www.allens.com.au/pubs/pdf/class/papclass27mar17.pdf> and Allens, Class Action Risk 2016 (19 August 2016) <https://www.allens.com.au/general/forms/pdf/ClassActionRisk2016.pdf?sku=lklfkdl>.

[10] Just prior to the regime's introduction, the Australian Law Reform Commission identified a non-exhaustive list of the types of proceedings that it envisaged might be brought as class actions. See Australian Law Reform Commission, Grouped Proceedings in the Federal Court, Report No. 46 (1988).

[11] Allens, Class Action Filing Analysis, op cit.

[12] The category of 'shareholder class action' is limited to those cases that arise from an ASX listed company's disclosures to the market. References to a 'shareholder class action' in the remainder of this paper are references to these types of cases.

[13] Australian Law Reform Commission 1988, op cit, [65]; see also Commonwealth 1991, op cit.

[14] Allens, 25 years of class actions, op cit.

[15] Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006) 229 CLR 386.

[16] Multiplex Funds Management Limited v P Dawson Nominees Pty Limited [2007] FCAFC 200.

[17] The Full Federal Court of Australia accepted the validity of a common fund style order in *Money Max Int Pty Ltd. (Trustee) v QBE Insurance Group Ltd* [2016] FCAFC 148.

[18] Perera *v GetSwift Ltd* (2018) 127 ACSR 1 (at the time of writing this paper, this decision is the subject of an appeal); *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143.

[19] Wileypark Pty Ltd v AMP Limited [2018] FCAFC 143, [5].

[20] *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 351. In 2016, similar shareholder class actions brought by MCI against Myer were also stayed because the claims were found to be brought for an illegitimate or collateral purpose of generating income or revenue for a third party: see *Melbourne City Investments Pty Ltd v Myer Holdings Limited (No 2)* [2016] VSC 655.

[21] See, for example, Justice Finkelstein's comments in *Kirby v Centro* (2008) 253 ALR 65, [5] regarding the utility of shareholder class actions in facilitating redress for shareholders in circumstances when they would otherwise likely obtain none.

[22] For a more detailed discussion of these provisions, see, for example, Michael Legg, 'Shareholder Class Actions in Australia – The Perfect Storm' (2008) 31(3) UNSW Law Journal 669.

[23] *James Hardie Industries NV v ASIC* (2010) 274 ALR 85, [464] (Spigelman CJ, Beazley and Giles JJA).

[24] *Re HIH Insurance Ltd (In Liquidation)* [2016] NSWSC 482; *Grant-Taylor v Babcock & Brown Ltd (In liquidation)* [2015] FCA 149. For a more detailed discussion, see Jenny Campbell and Jerome Entwisle, 'The Australian Shareholder Class Action Experience: Are We Approaching a Tipping Point?' (2017) 36(2) Civil Justice Quarterly 177.

[25] RP Balkin and JLR Davis, Law of Torts (LexisNexis Butterworths Australia, 5th ed, 2013) [14.7]–[14.43].

[26] Carolyn Sappideen and Prue Vines (eds), Fleming's The Law of Torts (Lawbook Co, 10th ed, 2011), [21.30].

[27] See Byrne v Australian Airlines (1995) 185 CLR 410, 424; Alcoa of Australia Ltd v Apache Energy Ltd [2012] WASC 209, [89].

[28] Balkin and Davis, op cit, [16.10].

[29] The Climate Institute, Australia's Financial System and Climate Risk (2015), p 5.

[30] Mr Noel Hutley SC and Mr Sebastian Hartford Davis, "Climate Change and Directors' Duties – Memorandum of Opinion" (The Centre for Policy Development and The Future Business School, 2016), [11]; see also Mr Noel Hutley and Mr James Mack, "Superannuation Fund Trustee Duties and Climate Change Risk – Memorandum of Opinion" (Environmental Justice Australia and Market Forces) (15 June 2017).

[31] Hutley and Hartford Davis, op cit, [7]; Financial Stability Board, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (2017), pp 5–6; Geoff Summerhayes, Executive Member of APRA, Australia's new horizon: Climate change challenges and prudential risk (Insurance Council of Australia Annual Forum, Sydney, 2017); The Climate Institute, op cit, 1; ASIC, Report 593: Climate risk disclosure by Australia's listed companies (2018); ASX Corporate Governance Council, Consultation Draft of Fourth Edition of the Council's Corporate Governance Principles and Recommendations (2018), pp 43–44; see also Senate Economics References Committee, Report: Carbon risk: a burning issue (2017), [2.23], noting that the Senate Economics References Committee prefers the term 'carbon risk' albeit its meaning is not dissimilar – i.e., it describes the risks to a company of both the immediate effects of climate change and financial effects arising from climate change.

[32] Anita Foerster, Jacqueline Peel, Hari Osofsky and Brett McDonnell, "Keeping Good Company in the Transition to a Low Carbon Economy? An Evaluation of Climate Risk Disclosure Practices in Australia" (2017) 35 C&SLJ 154, p 158.

[33] Hutley and Hartford Davis, op cit, [2]–[3]; Senate Economics References Committee, op cit, [3.11]–[3.12]. Many Australian companies, particularly in the energy and resources sectors, are also subject to the National Greenhouse and Energy Reporting scheme established by the *National Greenhouse and Energy Reporting Act 2007* (Cth), which requires (among other things) disclosure of greenhouse gas emissions, energy production and consumption.

[34] These reports are required for all disclosing entities (as defined in *Corporations Act 2001* (Cth), s 111AC), public companies, large private companies and registered schemes. See *Corporations Act 2001* (Cth), s 292(1). See also Senate Economics References Committee, op cit, [3.4]–[3.5].

[35] Hutley and Hartford Davis, op cit, [12]; *Corporations Act 2001* (Cth), s 299(1)(f).

[36] ASIC, Report 593, op cit, p 4; ASIC, Report 539: ASIC regulation of corporate finance: January to June 2018 (2017), [190]–[192]; ASIC, Regulatory Guide 247: Effective disclosure in an operating and financial review (2013), [247.63]; John Price, Commissioner, Australian Securities and Investments Commission, Climate Change (Centre for Policy Development: Financing a Sustainable Economy, Sydney, Australia, 2018); ASIC, Report 567: ASIC regulation of corporate finance: July to December 2017 (2018), [154]; see also Senate Economics References Committee, op cit, [3.6]–[3.10].

[37] Hutley and Hartford Davis, op cit, [12]; Senate Economics References Committee, op cit, [3.17].

[38] Australian Securities Exchange, Listing Rules, r 3.1; Although there is an exception where the information 'comprises matters of supposition or is insufficiently definite to warrant disclosure', the information must be confidential and not reasonably expected to be disclosed for the exception to apply (r 3.1A.1); see also Price, op cit, and ASX Corporate Governance Council, Third Edition of the Council's Corporate Governance Principles and Recommendations (2014), Principle 5: Make balanced and timely disclosure.

[39] As defined in Australian Securities Exchange, Listing Rules, r 19.12; see also Australian Securities Exchange, Guidance Note 8: Continuous Disclosure.

[40] Australian Securities Exchange, Listing Rules, ch 5; Foerster, Peel, Osofsky and McDonnell, op cit, 163.

[41] Australian Securities Exchange, Listing Rules, r 4.10.3.

[42] See ASX Corporate Governance Council, Third Edition of the Council's Corporate Governance Principles and Recommendations (2014).

[43] The consultation period for the consultation draft released on 2 May 2018 closed on 27 July 2018 and the ASX Corporate Governance Council received 100 submissions. At the time of writing this paper, the Fourth edition had not been issued. See also Financial Stability Board, op cit.

[44] Price, op cit.

[45] Price, op cit; ASIC, Report 567, op cit, [155]; see also ASIC, Regulatory Guide 228: Prospectuses: Effective disclosure for retail investors (2016), ch E.

[46] Summerhayes, Australia's new horizon: Climate change challenges and prudential risk, op cit.

[47] Geoff Summerhayes, Executive Member of APRA, The weight of money: A business case for climate risk resilience (Centre for Policy Development, Sydney, 2017).

[48] Summerhayes, Australia's new horizon: Climate change challenges and prudential risk, op cit; Summerhayes, The weight of money: A business case for climate risk resilience, op cit.

[49] As described in Senate Economics References Committee Report, op cit, [3.18]–[3.35].

[50] Price, op cit; ASIC, Report 593, op cit, p 4; Summerhayes, Australia's new horizon: Climate change challenges and prudential risk, op cit; Senate Economics References Committee, op cit, [3.36]–[3.52]; ASX Corporate Governance Council: Review of the ASX Corporate Governance Council's Principles & Recommendations (2018), p 19.

[51] See generally Financial Stability Board, op cit.

[52] Price, op cit; Summerhayes, Australia's new horizon: Climate change challenges and prudential risk, op cit.

[53] See generally Summerhayes, The weight of money: A business case for climate risk resilience, op cit.

[54] Reserve Bank of Australia, Annual Report 2017 (House of Representatives Standing Committee on Economics Official Committee Hansard, 2018).

[55] Jacqueline Peel, Hair Osofsky and Anita Foerster, "Shaping the 'Next Generation' of Climate Change Litigation in Australia" (2017) 41 MULR 793, p 803; see also Meredith Wilensky, "Climate Change in the Courts: An Assessment of Non-US Climate Litigation", (2015) Sabin Center for Climate Change Law, pp 17–18.

[56] See, for example, survey results of small sample size survey of climate risk disclosure by Australian resource and energy companies as discussed in Foerster, Peel, Osofsky and McDonnell, op cit, pp 168–170. See also the results of ASIC's review on disclosures by companies in ASX 300 in ASIC, Report 593, op cit, as well as KPMG's review of ASX listed companies' reporting of sustainability risks in KPMG, Adoption of Third Edition Corporate Governance Principles and Recommendations: Analysis of disclosures for financial years between 1 January 2015 and 31 December 2015 (2016) 7.

[57] See *Ramirez v Exxon Mobil Corporation* (Case No: 3.16-cv-3111-K), Consolidated complaint (dated 26 July 2017), [2], [7]–[9]. See also the initial complaint, which alleged that Exxon's public statements during a six-month period in 2016 were false and misleading as Exxon failed to disclose internal reports recognising environmental risks caused by climate change: see *Ramirez v Exxon Mobil Corporation* (Case No: 3.16-cv-3111), Class action complaint (dated 7 November 2016), [3(a)].

[58] See *Ramirez v Exxon Mobil Corporation* (Case No: 3.16-cv-3111-K), Consolidated complaint (dated 26 July 2017), [1].

[59] *Abrahams & Anor v Commonwealth Bank of Australia* (VID879/2017), Concise statement (dated 7 August 2017), [18].

[60] See, for example, Gareth Hutchens (The Guardian), Commonwealth Bank shareholders drop suit over nondisclosure of climate risks (2017), <https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks>.

[61] See CBA Annual Report 2017, p 10, <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/annual-reports/annual_report_2017_14_aug_2017.pdf>.

[62] APRA, Prudential Inquiry into the Commonwealth Bank of Australia, Media Release and Final Report (30 April 2018) <https://www.apra.gov.au/media-centre/media-releases/apra-releases-cba-prudential-inquiry-final-report-accepts-eu>.

[63] See CBA Annual Report 2018 <https://www.commbank.com.au/content/dam/commbank/about-us/shareholders/pdfs/results/fy18/cba-annual-report-2018.pdf>.

[64] See Hutley and Mack, op cit.

[65] *McVeigh v Retail Employees Superannuation Pty Ltd* (NSD1333/2018), Concise statement (dated 24 July 2018); see also Environmental Justice Australia, Media Release (25 July 2018) <https://www.envirojustice.org.au/projects/a-23-year-old-is-taking-a-50bn-super-fund-to-court-over-climate-change/>.

[66] See *Superannuation Industry (Supervision) Act 1993* (Cth), ss 52(2)(b), (c) and (j) and *Corporations Act 2001* (Vic), s 1017C. See also *McVeigh v Retail Employees Superannuation Pty Ltd* (NSD1333/2018), Amended concise statement (dated 21 September 2018), [14]–[19] and Concise statement (dated 24 July 2018), [14]–[20].

[67] The first case management hearing is scheduled for 9 October 2018: see *McVeigh v Retail Employees Superannuation Pty Ltd* (NSD 1333/2018), Order of Perram J, 23 August 2018.

[68] See *Corporations Act 2001* (Cth), ss 1041E and 1041H.

[69] At the time of writing this paper the ALRC has only released its Discussion Paper containing 18 proposals. The VLRC has made 31 recommendations to the Victorian Government as a result of its inquiry.

[70] See, for example, Allens, Submission in Response to the ALRC Inquiry into Class Action Proceedings and Third Party Litigation Funders Discussion Paper (August 2018) [17] to [20], <https://www.alrc.gov.au/sites/default/files/images/52_allens.pdf>.

[71] For further information on the VLRC's position, see Allens, VRLC Takes First Cut at Class Action Reform (22 June 2018) <https://www.allens.com.au/pubs/ldr/fodni22jun18.htm>.

[72] Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third Party Litigation Funders Discussion Paper, op cit, proposal 5-1 and proposal 5-2.

[73] See, for example, Allens, Submission in Response to the ALRC Inquiry into Class Action Proceedings and Third Party Litigation Funders Discussion Paper (August 2018) [63] – [73].

[74] See, for example, Allens, Submission in Response to the ALRC Inquiry, op cit, [35]–[62].

[75] Victorian Law Reform Commission, Final Report Access to Justice – Litigation Funding and Group Proceedings (March 2018) [29].

[76] Ibid, [4.66] to [4.98]; Australian Law Reform Commission, Inquiry into Class Action Proceedings and Third Party Litigation Funders Discussion Paper, op cit, ch 6.

[77] *Perera v GetSwift Ltd* (2018) 127 ACSR 1. On 29 August 2018, the Full Federal Court ordered that the four AMP class actions filed in the Federal Court of Australia be transferred to the NSW Supreme Court, Chief Justice Allsop tasked the NSW Supreme Court with 'a careful and balanced case management analysis' to determine which one or more of the five class actions should continue to resolve the issue for the lead plaintiff: see *Wileypark Pty Ltd v AMP Limited* [2018] FCAFC 143, [23]. At the time of writing this paper, this issue had not yet been heard by the NSW Supreme Court.