Class Action Risk 2020

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It is an extraordinarily challenging time for companies to assess class action risk. The landscape is constantly changing and it's hard to sort the wheat from the chaff.

The last year has been characterised by a dip in filings, uncertainty around funding models and increasingly interventionist case management. There has been a significant spike in consumer claims, rising employment claims and a drop-off in shareholder claims.

A proper assessment of class action risk requires a holistic assessment of the broader class action landscape. To provide that broader context, and give practical guidance to those responsible for assessing and managing class action risk, in this latest edition of our Class Action Risk reports we have provided an overview of the indicators and drivers of class action risk, with a particular focus on the way in which the class action landscape has changed over the course of the last year.

Key points

FILINGS SOFTEN, BUT RISK ON PAR WITH RECENT YEARS

Class action filings fell slightly in 2019, following spikes in 2017 and 2018. That said, filings remained high compared to longer term trends. When 'competing' filings are taken into account, the number of companies that faced a new class action in 2019 was on par with recent years and well above the long-term average.

CONSUMER-FACING BUSINESSES AT HIGHEST RISK

Consumer class actions have overtaken shareholder class actions as the most common form of new filing. The major contributors to this trend are the post Financial Services Royal Commission class actions relating to financial products and services; as well as the product liability claims against manufacturers of cars and medical devices. Being a consumer-facing business is now the biggest indicator of class action risk. The banking/financial services and industrials sectors are the sectors most at risk.

SHIFTING SHAREHOLDER CLASS ACTION DYNAMICS

There has been a marked softening in shareholder class action filings. Our sense is that this is, at least in part, due to the uncertainty and competitive pressures arising from the courts' variable approach to competing class actions.

Late October saw the first decision in a shareholder class action after more than twenty years of claims. The decision provides important guidance that will affect the way shareholder class actions are run in the future, but we do not expect it to have a material impact on shareholder class action filings.

FUNDING UNCERTAINTY

Fewer new filings were third-party funded in 2019 than in the five years prior. This is the direct result of the uncertainty in the funding sector created by the High Court challenge to the power to make common fund orders (which was pending for most of the year), increased competitive pressures driving down commissions and increased judicial scrutiny of commissions. There has also been a corresponding increase in the cases funded by lawyers on a 'no win, no fee' basis.

WHAT DOES THE FUTURE HOLD?

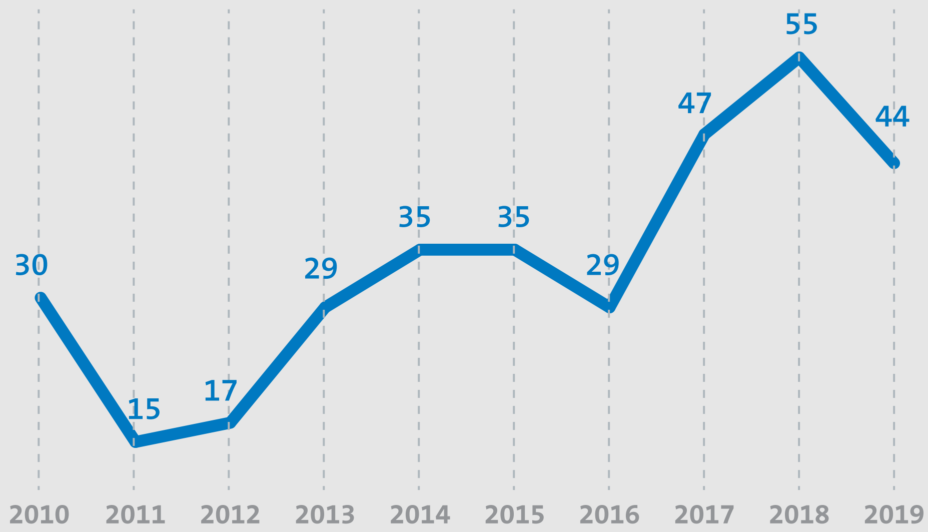
We expect to see a consolidation of the consumer class action trend (fuelled by the issues raised by a range of Royal Commissions) and a steady increase in employment claims. Likely new frontiers include data breach claims and shareholder claims relating to alleged non-disclosure of major business risks (such as climate change). The current uncertainties facing litigation funders may also have a significant impact on the shape of the class action landscape in the years to come; as does the likelihood of contingency fees being available in class actions in the Supreme Court of Victoria.

RESPONDING TO CLASS ACTION RISK

If a class action is commenced against your organisation, you are likely to face a period of difficult and sustained litigation (irrespective of the merits). Even in this entrepreneurial environment, it is important to resist knee jerk reactions and to instead engage in an objective assessment of risk from day one. As a preventative measure, it is also important to be conscious of the types of conduct that may give rise to class action risk in your business and to ensure appropriate systems are in place to minimise the risk of that conduct occurring. It is also prudent to have plans in place so that, should something goes awry, the response can be swift and based on an objective assessment of risk.

2019 in review

FIGURE 1 CLASS ACTION FILINGS



SHORT TERM SOFTENING, BUT FILINGS STILL HIGH

Class action filings have fallen from the historical levels seen in 2017 and 2018. 2019 filings were, however, the third highest on record and markedly higher than at any point prior to the spikes of 2017 and 2018.

Fluctuations in filings from year to year are to be expected, and while the recent softening is noteworthy, the 2019 figures still form part of a broader trend of increased activity compared with a few years ago. This is particularly the case when the reduction in competing claims is taken into account – see Figure 2.

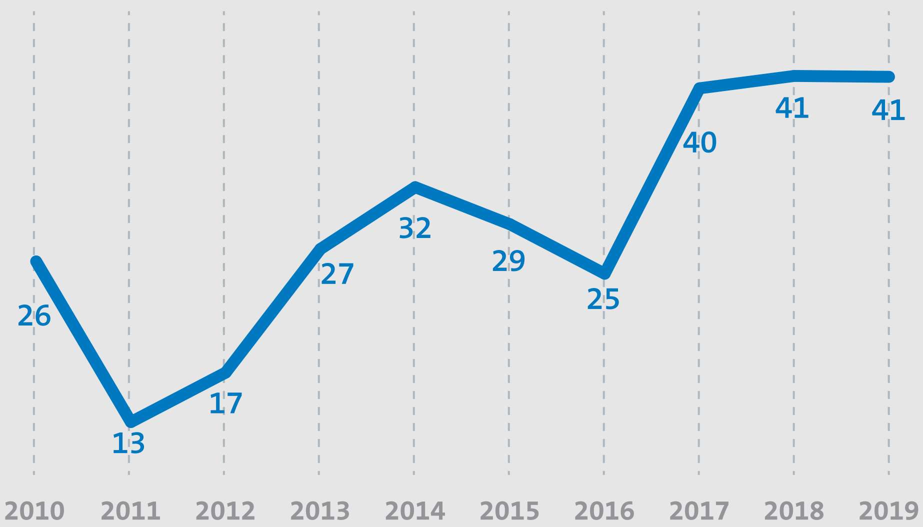
Aside from the reduction in competing class actions, another potential contributor to the slight downturn in filings is the increasing uncertainty that funders face in the current landscape due to:

- a challenge to the availability of the common fund model favoured by funders (as discussed on page 11); and
- the changing ways in which the courts are case managing class actions, including in relation to competing class actions and scrutiny of funding commissions (as discussed in the section starting on page 9).

New filings aside, class action activity is at an all time high as the cases filed in 2017 and 2018 (and before) make their way through the courts.

2019 in review

FIGURE 2 FILINGS WITH COMPETING CLAIMS EXCLUDED



STRIPPING OUT COMPETING FILINGS – KEY TO ASSESSING RISK

Understanding the extent to which the raw filings data is affected by competing class actions (two or more claims filed against the same company in relation to the same or similar issues) is crucial to understanding the changing nature of class action risk. This is because counting every 'competing' filing in respect of the same issue has the potential to overstate that risk, particularly given the increasing likelihood that the courts will permit only one of those competing cases to proceed or to require the competing cases to be run on a consolidated basis.

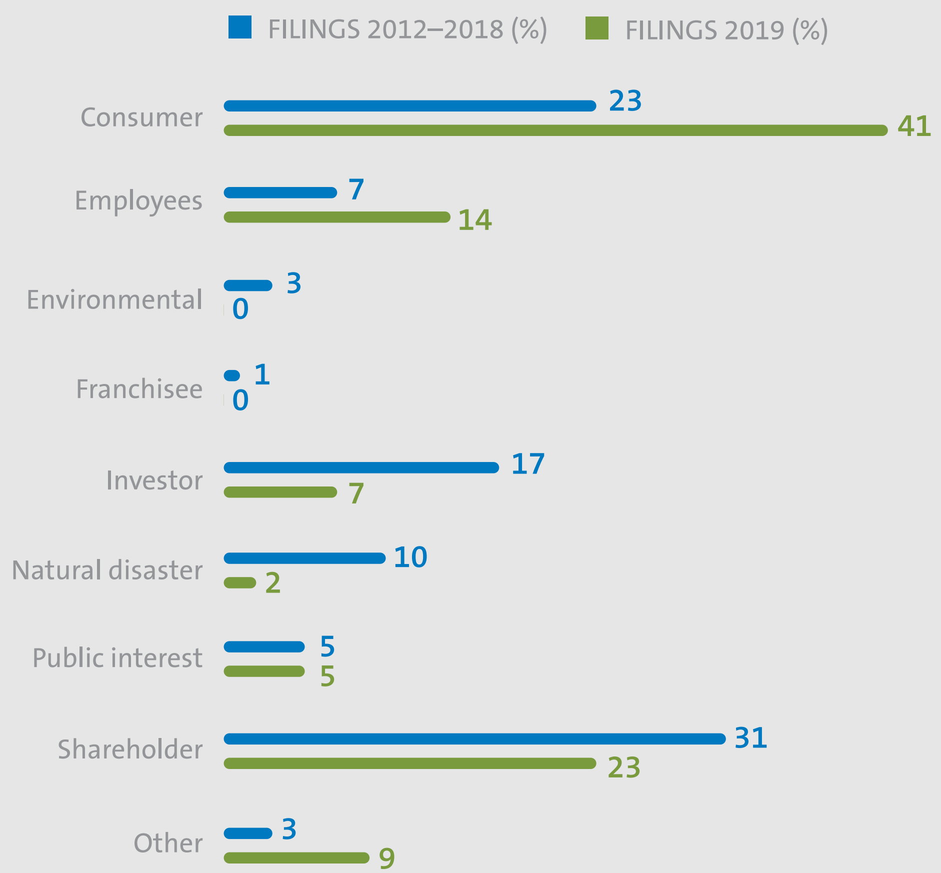
In Figure 2, we have taken the filings data from Figure 1 but counted each instance in which a company was faced with multiple claims in respect of the same or similar issues as a single event.

Tellingly, this shows that:

- the number of companies facing a new class action in 2019 was on par with recent years; and
- there has been a marked increase in the number of companies facing a class action since 2017 – as discussed further on the pages that follow, that increase is almost entirely attributable to consumer and shareholder claims.

2019 in review

FIGURE 3 FILINGS BY TYPE



CONSUMER CLAIMS SPIKE – SHAREHOLDER CLAIMS FALL

Figure 3 highlights the most noteworthy change in the class action landscape this year – the rise of the consumer class action.

Consumer claims represented 41% of class actions filed in 2019 compared to a longer-term average of 23%.

This shift is the result of:

- the significant number of consumer claims against banks, superannuation trustees and insurers following the Financial Services Royal Commission;
- a broad range of claims against the manufacturers of cars and medical devices, and in relation to the quality of building construction or related products; and
- falling shareholder class action filings.

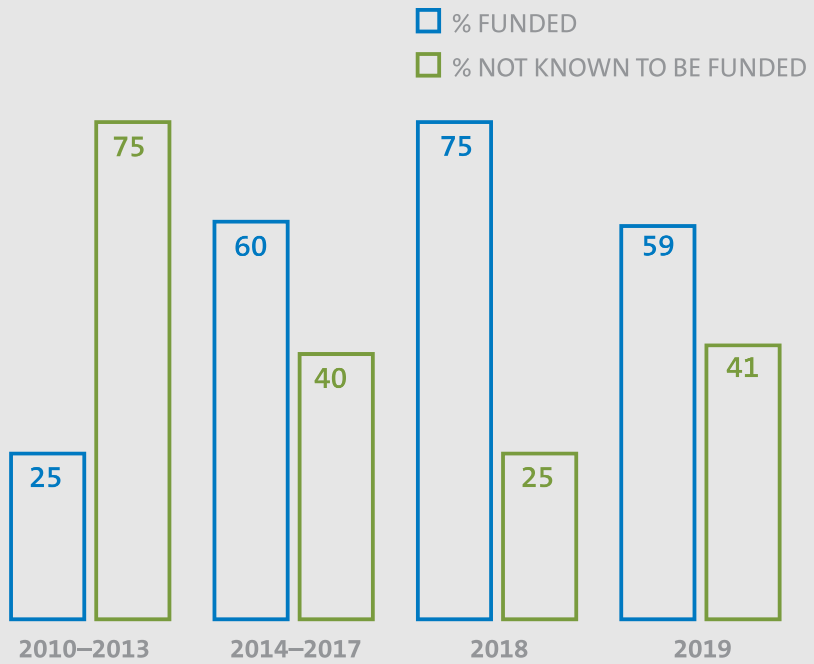
This is a significant change in the landscape from the same time last year, with the spike in 2017 and 2018 filings almost entirely driven by shareholder class actions. In 2019, shareholder class actions comprised 23% of filings – down from almost 50% in 2017 and 2018, and the longer-term average of 31%.

Between them, consumer and shareholder class actions represent 64% of the class actions commenced in 2019. The only other trend of any note is the growing number of employment-related class actions (which account for 14% of 2019 class action filings).

The growing risk posed by consumer claims is the focus of the next section.

2019 in review

FIGURE 4 THIRD PARTY FUNDING



UNCERTAIN TIMES FOR FUNDERS

Figure 4 shows that roughly 60% of 2019 filing were known to be funded – roughly on par with the longer term average, but down from 75% in 2018.

There are a number of factors likely to have contributed to softening in 2019 (and also to likely further softening in 2020) including the High Court's decision on the common fund model, competitive pressures on funding commissions in the context of the courts considering which competing class action they will permit to proceed (when that is the course they opt to take) and additional judicial scrutiny of funding commissions.

Anecdotally, we understand that the current uncertainty created by those developments is causing some funders to take a 'wait and see' approach or allocate their resources to other cases. It remains to be seen what (if any) impact these issues will have in the long run.

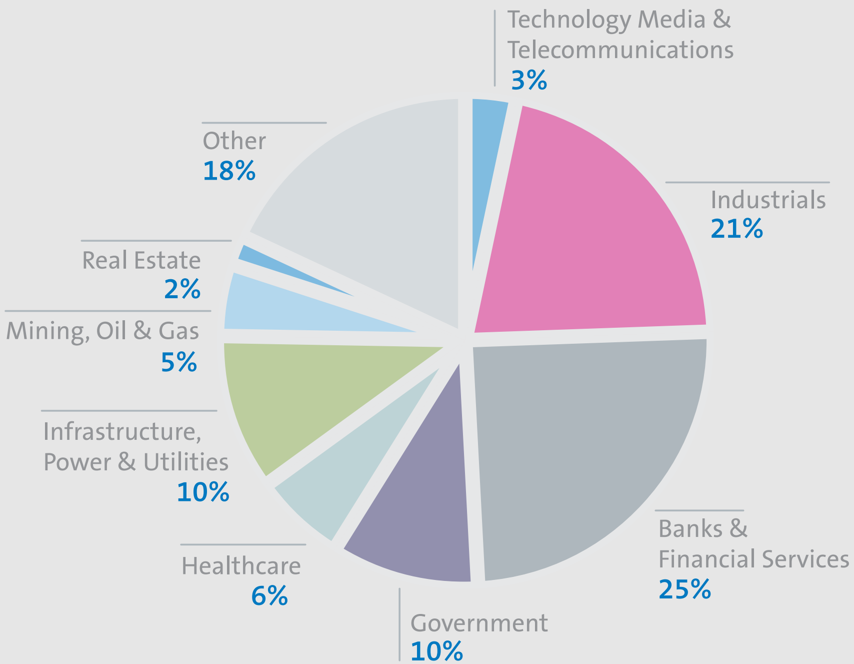
The competitive pressures created by the 'beauty parades' for competing class actions, and the likely availability of contingency fees, is also leading to cases that would previously have been funded being run by plaintiff firms on a 'no win, no fee' basis.

These issues are discussed further in the section starting on page 11.

Industrials & financial services sectors most at risk

As noted in the previous section, more than 40% of the class actions filed in 2019 were filed on behalf of consumers. Our expectation is that this trend will continue, making conducting a consumer-facing business now the biggest indicator of class action risk. This is a change from recent years in which being an ASX-listed company was the biggest indicator of risk. That said, there is no relief for listed companies as they still face a substantial risk (with shareholder class actions accounting for 23% of new filings in 2019).

FIGURE 5 FILINGS BY SECTOR (2017 TO PRESENT)



THE INDUSTRIALS SECTOR FACES SIGNIFICANT CLASS ACTION RISK

Class action filings against industrials companies have accounted for 21% of filings since 2017, up from 16% between 2010 and 2016. This increase is a result of a revival of product liability class actions and the continued exposure of ASX-listed companies to shareholder class actions.

A key trigger for product liability class action risk is regulatory action in Australia and overseas, as illustrated by the scrutiny from United States and Australian authorities of automakers, as discussed on the following page.

Overseas litigation is another potential trigger for product liability class action risk and provides an important insight into future class action risk in Australia. For example, the United States is currently in the midst of an opioid overdose crisis, which has resulted in significant litigation against supply chain participants. Opioid litigation represents the largest wave of product liability litigation in the United States since the tobacco litigation of the 1990s, and has resulted in significant settlements and verdicts. In April 2019, Purdue Pharma L.P. settled a claim by the State of Oklahoma for US$270 million and filed for Chapter 11 bankruptcy protection in order to raise money for the settlement. In August 2019, an Ohio court ordered Johnson & Johnson to pay Oklahoma US$572 million in the first opioid trial to proceed to verdict. And in October 2019, a multidistrict opioid litigation that would have been the largest civil trial in U.S. history was avoided when a US$260 million settlement was reached on the eve of trial. Despite public health, legal and regulatory differences between the United States and Australia, the wave of opioid litigation in the United States may point to similar litigation in Australia.

Our analysis of industrials includes companies whose businesses are primarily concerned with the provision of goods and services, including industrial manufacturing, retail and consumer goods, food and beverage, medical equipment and pharmaceutical goods, and consumer and professional services.

FINANCIAL SERVICES

Participants in the banking and financial services sector remain at high risk, with 25% of filings since 2017 being made against companies in the sector. Shareholder class actions against financial services entities continue to feature, but we are seeing an increasing focus on claims brought on behalf of customers against banks and financial services entities. Many of these claims arise from the evidence given at the Financial Services Royal Commission, and from increased regulatory activity, particularly ASIC with its new 'Why not litigate?' stance.

A flurry of claims were filed or foreshadowed during, or shortly after, the Financial Services Royal Commission. Examples include the shareholder class actions against AMP, and claims against banks and financial services entities relating to the 'fees for no service' issues, and alleged mis-selling and misrepresentations to consumers of insurance products, credit cards and superannuation. A number of claims have also been commenced or foreshadowed against financial sector entities relating to alleged excessive or uncompetitive fees for superannuation and insurance products. These include the 'Get Your Super Back' campaign commenced by Slater & Gordon against Colonial, BT Super and AMP Super.

We expect to see an ongoing stream of claims filed as a result of evidence given at, or findings made by, the Financial Services Royal Commission, and the regulatory investigations and action which continue to follow. The ability of plaintiff lawyers and litigation funders to use Royal Commission and regulatory materials as a form of 'road map' to identify potential claims is likely to create sustained class action pressure on participants in this sector in the coming years, particularly in respect of consumer facing issues.

SPOTLIGHT ON AUTOMAKERS

Australian automakers have seen a surge in class action activity over several years following regulatory action overseas and domestically, with proceedings commenced in relation to Volkswagen's diesel emissions issue and against a myriad of automakers in respect of Takata airbags. A separate class action is on foot in relation to Ford's PowerShift transmission, and a further class action has been filed against Toyota in relation to diesel particulate filters used in certain diesel vehicles, following a voluntary recall in 2018.

Large-scale voluntary recalls of Takata airbags began in Australia in 2013, amid concerns that, in certain circumstances, defective inflators could propel metal shrapnel at passengers, causing injury or death. In 2018, the Australian Competition and Consumer Commission (ACCC) announced the industry's first compulsory recall, with strict reporting and compliance deadlines.

In 2017 and 2018, Quinn Emanuel filed class actions in the Supreme Court of NSW against Toyota, Honda, Subaru, BMW, Nissan, Mazda and Volkswagen. The class actions are funded by US-based Regency Funding.

Broadly, the plaintiffs allege that the automakers breached statutory warranties requiring cars to be of acceptable/merchantable quality and engaged in misleading or deceptive conduct and/or unconscionable conduct by selling cars with allegedly defective airbags.

Similarly, the Volkswagen diesel emissions proceeding was commenced following intense scrutiny from global regulators. In November 2015, Maurice Blackburn commenced class actions against Volkswagen, Audi and Skoda in the Federal Court, alleging that certain diesel vehicles had been fitted with illegal 'defeat devices' designed to 'cheat' emissions tests. In September 2019, the parties sought the court's approval for a settlement, without admission of liability, of between $87 million and $127.1 million plus legal costs and other payments.

Ford has also seen a class action filed against it in the Federal Court in relation to the PowerShift transmissions in certain of its vehicles. This proceeding follows regulatory action by the ACCC and litigation in the US. Originally filed by Bannister Law in May 2016, the action is now being conducted by Corrs Chambers Westgarth after Bannister Law withdrew in September 2018. It is funded by Martin Place Litigation Services.

In August 2019, Bannister Law and Gilbert + Tobin joined forces to file a class action against Toyota in relation to diesel particulate filters in certain HiLux, Prado and Fortuner diesel vehicles, alleging that the filters can become blocked, causing environmental damage and harming the vehicle. The plaintiff alleges that by selling vehicles with defective diesel particulate filters, Toyota breached its statutory guarantee as to acceptable quality, and engaged in misleading or deceptive conduct and unconscionable conduct, in breach of the Australian Consumer Law.

Trends in class action case management

In 2019, in the continued absence of statutory reform, the courts developed increasingly proactive and interventionist approaches to managing class action proceedings. Three areas of judicial focus have been competing class actions, funding commissions and settlement terms. The courts' approach to these issues – and the resulting uncertainty – are having a material impact on the shape of the class action landscape and class action risk for potential defendants.

VARIABLE APPROACH TO MANAGING COMPETING CLASS ACTIONS

In the absence of a statutory mechanism for addressing the challenges and inefficiencies caused by competing class actions, courts have developed their own approaches to managing competing claims.

Several recent decisions have also provided guidance as to the general approaches a court may take to address the challenges created by competing class actions, however significant uncertainty remains for all class action stakeholders given the variety of different practical strategies adopted.

Over the past two years, these have included:

- at least initially, one proceeding being selected to proceed with the remaining proceedings permanently stayed (the GetSwift securities class action);
- two proceedings being consolidated (with the agreement from the relevant applicants) and the three remaining proceedings permanently stayed (the AMP securities class action);
- two proceedings being consolidated (without agreement from the relevant applicants), coupled with a common fund and related cooperation orders, including the establishment of a Litigation Committee and a court-approved Cooperative Litigation Protocol (the Brambles securities class action); and
- only cooperative case management orders being made (the Commonwealth Bank securities class action).

In December 2019, the Federal Court updated its Class Actions Practice Note to specifically address competing class actions. This Practice Note requires parties to inform the court immediately upon becoming aware that a competing class action has or is proposed to be filed, following which the competing class action (if filed) will be listed for a case management hearing. At that listing the court will ascertain a range of matters, including the suitability of the cases for joint or concurrent hearing of a selection process and the procedures for the approval of fee and cost proposals from legal representatives/ litigation funders.

From a defendant perspective, although it is apparent that courts are increasingly willing to adopt a 'hands on' approach to case management to prevent a multiplicity of actions, it is also clear that defendants cannot always rely on a court's preparedness to stay competing proceedings. At least for the time being, some class action defendants will have to continue to deal with the complications that arise from multiple class actions (including the associated increased costs).

From a promotor perspective, 'carriage motions' (to determine which firm(s) will be entitled to bring their claim) have been hard fought. In the past year we have seen two appellate decisions (in the AMP and BHP securities class actions), as well as an unsuccessful special leave application to the High Court (in the GetSwift securities class action). As the law in this area is developed and promoters are better able to assess the risks involved, we may well see a revival in the number of competing class actions filed (although perhaps not to the level seen in 2018). For the moment, however, we understand that the current uncertainty is causing some funders to allocate their resources to other types of cases. Questions have also been raised (including by representatives of the ACCC) as to whether coordination between plaintiff law firms and funders in the context of competing class actions may give rise to competition issues.

SCRUTINY OF FUNDING MODELS

In the competing class actions context, the determining factor for which case should proceed while others are stayed (where that is the approach taken) has often come down to the relative economic merits of the various funding proposals. This scrutiny has led to increased competition and downward pressure on commission rates, as well as the emergence of alternative funding models, as promoters fight to have their case selected as the one to proceed. These competitive pressures are also resulting in lower funding commissions across all class actions.

For example, in the competing class actions against AMP, the various promoters proposed commissions in the range 10 – 20% of net proceeds (well below the market average). However, the Supreme Court of NSW selected the Maurice Blackburn case to proceed on the basis that its 'no win, no fee' proposal would impose fewer costs on class members than any of the third party funded proposals.

On a similar note, the Federal Court selected the Phi Finney McDonald case against GetSwift to proceed because its funding model was based on a multiple of costs incurred rather than a percentage of the outcome.

These competitive pressures have driven down the funding rates the courts have been willing to approve when, for example, making common fund orders (prior to the High Court's decision in respect of their power to do so). The previously 'standard' rate of around 40%, would now seem to be banished to history, with rates in the 20 to 30% range becoming the norm. We are also seeing increasing consideration of the total amount of the commission (and not just the percentage) – eg in the KPMG Discovery Metal shareholder class action, the NSW Supreme Court was concerned that the funder's proposed commission would yield a 'stratospheric' return, due to the fact the funder sought a 30% uncapped commission calculated on the gross value of the settlement sum.

EVOLVING JUDICIAL APPROACH TO CLASS ACTION SETTLEMENTS

The past few years have also seen an evolving judicial approach to the settlement approval process. Settlement continues to be the predominant way class actions are resolved.

One key trend is that judges are more frequently seeking the assistance of a contradictor – that is, a lawyer, typically a barrister, appointed by the court to provide an opinion on whether the proposed settlement is fair and reasonable, including with respect to the payment of legal fees and litigation funding fees. This practice reflects the fact that, once a settlement is reached, the interests of the plaintiffs and defendants are usually aligned (ie to see the settlement approved).

Courts are also taking a harder line in relation to confidentiality in the settlement context. While confidentiality in class actions was never assured (having regard to the public settlement approval process), there has historically been a reasonable prospect of it being ordered in relation to certain aspects of the settlement arrangements when the parties could point to good commercial reasons for certain information remaining confidential. That is becoming increasingly uncommon, however, and it should now be assumed that it is highly unlikely that settlement terms can be kept confidential. That said, the position is not yet so beyond doubt that applications should not be made where there are clear and compelling reasons as to why confidentiality should be ordered.

Common fund and contingency fees: uncertain times for class action funding

The framework for funding class actions has never been particularly stable. Over the last 15 years, there have been questions (and answers) in relation to the legality of third party funding, the availability of closed classes, the availability of a common fund model, the relevance of funding terms to the manner in which the courts have managed competing class actions and the power of the courts to impose a different funding commission to the contracted amount and/or adjust the legal fees payable upon settlement – to name just a few.

Late 2019 saw two further developments that have given rise to new (and heightened) uncertainties:

- a successful High Court challenge to the courts' power to make a common fund order prior to the resolution of the proceedings; and
- the introduction of a bill to the Victorian Parliament which, if enacted, would permit the Supreme Court of Victoria to make orders allowing the lawyers bringing class actions to be remunerated on a contingency fee basis.

WHERE TO NOW FOR COMMON FUND ORDERS?

A common fund order gives a third party funder the right to take a percentage from a settlement or judgment amount. It differs from the traditional approach to litigation funding under which the funder's entitlement to a commission is derived from a contractual relationship with individual class members. In essence, the common fund model is said to avoid the need to undertake a costly book-building process and to overcome the perceived problem of so-called 'free riders' (ie class members who participate in open-class proceedings without signing a funding agreement).

In 2016, after a number of unsuccessful applications, the Full Federal Court made the first common fund order in the Money Max class action. It has been suggested that as many as 80 common fund orders were made in class actions in the three years following that decision.

In December 2019, in separate challenges made by BMW and Westpac in relation to the power of the courts to make common fund orders, the High Court (by a majority of 5:2) held that the Money Max decision was wrong and that the courts did not have the power to make common fund orders during the interlocutory stages of a proceeding.

In essence, the basis for the High Court's decision is that the power relied upon – which empowers the courts in class actions to make any order necessary or appropriate to do justice in the proceeding – was directed to how proceedings are run and not the anterior question as to whether it is commercially viable for a proceeding to be run.

There have been various responses to the High Court's decision – including, most notably:

- commentary (including from judges) as to whether it is still open to the courts to make a common fund order once a class action is settled under, for example, the statutory power to make such orders as are just with respect to the distribution of any money paid under a settlement; and
- an indication by the Federal Court in a revised version of its Class Actions Practice Note that it would be willing to make an order akin to a common fund order to prevent unjust enrichment and to equitably and fairly distribute the burden of reasonable legal costs, fees and other expenses (including reasonable litigation funding charges or commission) amongst all persons who have benefited from a class action.

In our opinion, there are various indicators in the majority judgments in the High Court's BMW/Westpac decision to indicate that courts do not have a power to make a common fund order (or something similar) at any stage of the proceedings. This is, however, an open question that will not be finally resolved until it is directly considered by the High Court.

CONTINGENCY FEES

Victoria's parliament is currently considering a bill which would allow law firms to charge contingency fees in class actions. This would allow lawyers to recover a percentage of the amount recovered in a successful claim. Such an amendment was recommended by the Victorian Law Reform Commission as a means to expand the availability of funding to cases that are uneconomic for litigation funders, reduce costs to plaintiffs and ensure that client interests are not sidelined in favour of the funder's interests.

If passed into law, the Supreme Court of Victoria would be empowered to make a 'group costs order' under which the representative plaintiff's lawyers would be remunerated by reference to a percentage of any amount recovered, rather than being limited to recovering their fees plus an uplift. The percentage of the amount recovered would be subject to approval by the court.

It is possible the bill could be enacted as early as April. It may, however, be revisited in light of the High Court's recent decision in respect of common fund orders which considered the scope of very similar language as that contained in the bill (in particular, the scope of 'appropriate or necessary to ensure that justice is done in the proceeding').

HOW DO THESE ISSUES AFFECT CLASS ACTION RISK?

The High Court's decision has given rise to considerable angst in the funding industry, which has also flowed through to the plaintiff firms whose actions they fund. Those concerns are perhaps somewhat appeased by the possibility of common fund (or similar) orders being available upon resolution, but not having certainty around the funding model until the end of the proceedings gives rise to considerable (and possibly unpalatable) risk for funders. Accordingly, we are likely to see (at least in the interim) a return to book building – much to the funders' chagrin. The time and costs associated with book building, and also generalised uncertainty, may result in a downturn in class action filings in the short to medium term.

As we see it, book-building is an important check in the process. It means the promoters of class actions are required to assess whether there is a critical mass of group members who actually want a claim to be brought on their behalf before a class action is commenced. That, in our opinion, is a positive (and sensible) development.

The impact of the likely availability of contingency fees remains to be seen. The fact is there are few plaintiff firms that will be able to self-fund class action proceedings (and it is yet to be resolved whether they will be able to rely on a third party funder in the background). As the current proposal would only make contingency fees available in the Supreme Court of Victoria, the most likely effect is more class actions being filed in that court (a trend that is already starting to emerge, even though the power does not yet exist). It may also help to drive down the costs of funding the higher-value, lower-risk claims already targeted by law firms and funders.

The other likely impact is that firms acting on a contingency basis may be more open to settlements at an earlier stage – as they will be remunerated by reference to a share of the proceeds rather than by reference to the work done (although the amount of work done will likely be a relevant consideration in the court's consideration of the appropriate contingency fee).

OTHER DEVELOPMENTS ON THE HORIZON

The Commonwealth Attorney-General has announced that the Government is considering reforms targeting litigation funders in response to what it has called a greater number of highly politicised class actions against companies in the mining and resources sector. The work is said to be in its early stages, with the Government looking at a number of proposals as a matter of urgency.

More broadly, the Federal Government is yet to provide its response to the ALRC's recommendations for reform of the class action regime.

The future of class action risk

Class action risk is evolving. This is the natural and direct corollary of the fact that most class actions are an entrepreneurial pursuit for the plaintiff lawyers and/or litigation funders who bring them.

With that in mind, a comprehensive assessment of class action risk involves consideration of the factors likely to affect the shape of that risk in the short to medium term.

CONSOLIDATION OF EXISTING TRENDS

Australia's class action landscape is currently dominated by class actions brought on behalf of consumers and shareholders (with claims on behalf of workers running a distant third). We expect that trend to continue for the foreseeable future.

Within that context, we expect two particular types of claims to loom even larger in the short term:

- **Royal Commission claims** – As previously discussed, we have seen a steady stream of class actions arising from issues exposed in the Financial Services Royal Commission and we expect that trend to continue for at least the next few years. We also expect to see a range of claims inspired by issues arising from the Royal Commissions into Aged Care and the Treatment of People with a Disability.
- **Employment claims** – Class actions relating to employment relationships (in the general sense of that term) have steadily increased over the course of the last decade, to now constitute almost 15% of claims. The most common cause of action relates to whether workers are in fact employees and entitled to the benefits of an employment relationship – in this respect, the Fair Work Commission decision from 2018 that a delivery person engaged by Foodora was an employee can be expected to continue to inspire such cases. We are, however, also seeing an increasing array of commenced and foreshadowed claims in relation to working conditions, underpayment of wages and illness/injury sustained at work.

NEW FRONTIERS

Particularly having regard to current regulatory trends and the types of class actions brought in the United States (both reliable markers for developments in Australian class action activity), we see the potential new frontiers in the coming years as including:

- **Data breach** – Class actions arising out of data breaches have been common in the US for some time, but have yet to become a feature of the Australian class action landscape. While there is no direct cause of action for breach of privacy in Australia, claims could be based on allegations of negligence, breach of contract and/or misleading or deceptive statements. There may, however, be significant obstacles in the identification and quantification of any compensable loss – which is, of course, the ultimate driver for most class actions. That said, at least one small class action has been brought and recently settled (in relation to the confidential information of employees of the NSW Ambulance Service), and we think it is only a matter of time before other claims are pursued, particularly in the light of the (relatively) new breach reporting obligations.
- **Climate change & other material business risks** – While the most obvious fodder for shareholder class actions is earnings surprises, we have seen a growing number of shareholder claims based on the non-disclosure of other information. The next potential trend in this respect may be claims based on a failure to disclose the potential impact of material business risks including, for example:
  - **Climate change** – This may include the risks associated with not lowering carbon emissions and/or the costs associated with making the transition to lower emissions.
  - **Adequacy of corporate governance processes** – We expect to see more claims that directly focus on an alleged inadequacy in a company's corporate governance processes. Such claims focus on the failure of internal systems to prevent an event that caused a share price dip when made public, with a core allegation that the market understood that the company's systems and controls could reasonably be expected to prevent such an event. In that context, the core allegation is that the systems inadequacy is material information that should have been disclosed to the market.

Current examples of such claims relate to the failure of internal systems to prevent alleged foreign corrupt practices and the charging of 'fees for no service'.

- **Environmental issues** – An increase in the number of class actions relating to property damage and/or human health concerns arising from environmental contamination is also on the cards. The highest profile example is the claims against Bayer in relation to issues arising from the use of the ubiquitous RoundUp. Aside from contamination, water rights are also looming as a potential issue with one class action filed and at least one other multi-party case making its way through the courts.

ONGOING UNCERTAINTY FOR FUNDERS

Over the course of the last decade, Australian class actions have become a magnet for third party funders from around the world due to the absence of barriers to entry (no registration or licencing requirements) and possibilities of returns not available in other developed jurisdictions.

Against that background, any significant changes as a result of the pressures and uncertainties mentioned in the section starting on page 11 (and, in particular, the uncertainty surrounding the common fund model), can be expected to dampen offshore funders' interest in the Australian market.

THE FUTURE OF SHAREHOLDER CLASS ACTIONS

Shareholder class actions played second fiddle to consumer class actions in 2019. They still, however, constituted roughly 20–30% of the class actions filed and present a significant risk for ASX-listed companies.

Much has been said about the future of shareholder class actions following the Federal Court's decision in the case against Myer in late October 2019. The decision was momentous if for no other reason than it was the first judgment in a shareholder class action, more than 20 years after the first case was filed.

While the shareholders were successful in establishing that Myer contravened its continuous disclosure obligations, the case failed because the court found that there was no evidence the disclosure contraventions inflated Myer's share price. That is, the group members had not suffered a loss. However, the October judgment is not necessarily the final word on the matter – in a recent development, shareholders have been afforded the opportunity to file additional loss assessment evidence, leaving the door open for further proceedings on damages.

The Myer case also confirmed that the market-based causation approach may be used to establish loss caused by a disclosure contravention. This means that it is not necessary for each shareholder to prove they relied on an impugned disclosure, so long as they can prove it distorted the share price.

The nature of the findings in Myer is such that we don't expect the judgment to have a material impact of the level of shareholder class action activity. Most shareholder class actions have been run on the basis that market-based causation is likely to be available to the plaintiffs and, in that respect, the decision preserves the status quo. That said, the finding in respect of no inflation and, therefore, no loss, should provide food for thought for those who think any updating disclosure that triggers a price decline is solid grounds for a shareholder class action.

There is, however, plenty in the decision for board members and senior executives to consider in the application of the continuous disclosure laws. In particular, it emphasises that heightened disclosure obligations will apply where companies give forward-looking guidance (however informal) to ensure the market is promptly informed when questions arise as to whether that guidance can continue to be supported.

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