**Civil Justice Reforms in Class Actions and Litigation Funding**

**ALFA Class Action Litigation Funding Reform Conference – 26 October 2018**

The Hon. Justice Bernard Murphy, Federal Court of Australia

As we find ourselves at another conference focused on reform of class actions and litigation funding, and awaiting yet another government-commissioned report on the issue, it is hard not to have a sense of déjà vu. The same arguments, dressed up in different overcoats, have been discussed and considered in various reviews and innumerable conferences for more than a decade.

There have been seven reviews into Part IVA-type regimes in the last 10 years, on average about every one and a half years, by the Commonwealth Attorney-General’s Department, the Department of Treasury, the Productivity Commission, the Western Australia Law Reform Commission, two by the Victorian Law Reform Commission and we are now awaiting the report of the Australian Law Reform Commission. None have pointed to any serious or systemic problems in the operation of Part IVA-type regimes. Justice Sarah Derrington who heads the ALRC Inquiry has said that she considers the regime works reasonably well, and the proposed reforms are better described as “repair” rather than “revolution”.

The adoption of Part IVA-type regimes by state legislatures – Victoria in 2000, NSW in 2010 and Queensland in 2016, and the pending adoption in WA – also indicates those governments consider the regime operates reasonably well. Empirical data produced by Professor Morabito bears this out, as does the vast number of successful claimants and the diversity and variety in their claims.

It is also plain from the views expressed by judges experienced in the regime’s operation. In 2016, on making orders paving the way for the distribution of almost $700 million to many thousands of class members devastated by the Kilmore East-Kinglake and Murrindindi bushfires, Justice Jack Forrest of the Victorian Supreme Court said:

*This demonstrates that the class action process works. It shows that when it is properly managed, many substantially disadvantaged and affected people can recover compensation that they would otherwise not have been able to obtain.*[[1]](#endnote-1)

In 2017 in a book chapter I co-authored with Prof Morabito we wrote:[[2]](#endnote-2)

*[T]he procedure provides real, practical and broad-based access to justice, which must be seen as a substantial improvement, and it has proved flexible and adaptable in meeting challenges to the utility of the regime as they appear. The regime seems appropriately balanced. We can see few signs of systemic problems in its operation and there are reasons to be confident that the courts will deal with any serious problems that may later emerge.*

That remains my view. But that does not mean that I consider the operation of the regime is perfect. Nor does it mean that the regime will continue to operate reasonably well in the absence of further reforms. The operation of Part IVA-type regimes is constantly evolving and history shows that some remediation is necessary from time to time. Key stakeholders are presently raising concerns which centre on shareholder class actions, which concerns deserve careful consideration.

1. **Court-instituted reforms**

It is important to understand that one of the reasons Part IVA-type regimes have worked well is the steps courts have taken to address problems in the operation of the regime as they are identified. I will start by addressing some of those steps and then I will turn to outline and offer some commentary on some of the likely recommendations in the ALRC report.

The court-instituted reforms follow two broad themes. *First*, cost and efficiency measures in aid of the overarching purpose of facilitating the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. *Second*, measures directed at ensuring the regime continues to reflect the legislative intent of enacting an ‘open class’ opt-out procedure.

1. **Cost and efficiency measures**

In the past five years numerous measures have been introduced which are aimed at reducing legal costs and funding charges and improving efficiency, including:

* First, *case management by experienced judges*.

The Court identified in 2015 that allocating judges experienced in class actions to case management meant that matters were listed for trial more quickly, where they usually settle. Allocation of experienced judges has become standard practice where it can be accommodated.

* Second, *case management of competing class actions*.

When dealing with overlapping or competing class actions the Court has repeatedly said that it will not countenance increased legal costs, wastage of court resources, delay, and unfairness to respondents through such cases.[[3]](#endnote-3) For example:

* In *Cantor v Audi Australia Pty Limited (No 2)*[[4]](#endnote-4), the VW class action, Foster J allowed two competing class actions to remain on foot but ordered a joint trial of the cases and made orders directed at reducing wastage of costs.
* In *McKay Super Solutions v Bellamy’s Australia Ltd*[[5]](#endnote-5) two overlapping open securities class actions were filed. Beach J closed the class in one proceeding and allowed the other proceeding to remain as an open class. His Honour ordered a joint trial of both proceedings and required the opposing applicant’s lawyers and funders to cooperate.
* In *Perera v GetSwift Limited*[[6]](#endnote-6)(***GetSwift***) Lee J conducted a tender process between three competing solicitors and funders. He found that there was no significant difference between the cases in terms of scope, pleadings, preparation, experience or competence of the legal practitioners or the number of group members. In this context he made orders for the Webb proceeding to continue as its funding model was “very likely to produce a better return for class members in the vast bulk of realistic scenarios at all stages of the proceeding”.[[7]](#endnote-7) The other two proceedings were stayed. The decision in *GetSwift* has been appealed and the judgment of the Full Court is reserved.

The Court has and will continue to address the problems of wasted costs and resources, delay, and unfairness to the respondent through competing cases.

Where competing proceedings are commenced in the Federal Court and a State Supreme Court respectively, there are obvious difficulties. Recently, one open securities class action against AMP arising out of matters raised at the Financial Services Royal Commission was filed in the NSW Supreme Court and another four open securities class actions in relation to the same issues were filed in the Federal Court. We saw the unhappy spectacle of an anti-suit injunction being raised in relation to the four cases before the Federal Court, in response an anti-anti-suit injunction was raised, and in further response an anti-anti-anti-suit injunction was filed: see *Wileypark Pty Ltd v AMP Limited*[[8]](#endnote-8) (***Wileypark***).

The case illustrates the shortcomings in the cross-vesting procedure when applied to class actions because a court cannot ‘pull’ a proceeding across to it, and the respondent – as the only common party in the competing cases – is the only party that can apply to ‘push’ the case to another court. As the Full Court said in *Wileypark*, there is a risk of procedural arbitrage based on the view of the applicant’s lawyers and funders about the approach of different judges in different courts to the facts and law, as well as to lawyer’s fees and funder’s charges.[[9]](#endnote-9) These risks are increased when a respondent submits that it would prefer to be sued in one Court than another.[[10]](#endnote-10)

A protocol has been drafted to address this issue. Although the final form of the protocol is still being discussed, the essential proposal is that when competing class actions are filed in different courts, senior judges of those courts will convene a joint case management hearing to decide questions such as the case or cases to go forward and the forum in which the proceeding will be heard.

* Third, *striking out abuses of process.*

In the last five years the courts have found various models used to fund class actions and to act for the applicant and class members constituted an abuse of process. These generally involved the same or associated entities acting as the applicant, litigation funder and solicitor for the applicant. Those models are now no longer used.

* Fourth, *enhanced disclosure of litigation funding charges.*

Since 2016 the Court has required the applicant to confidentially file with the Court any litigation funding agreement, and to serve on the respondent a funding agreement redacted to conceal confidential “war chest” information, and has discouraged the use of undisclosed side letters between the funder and a representative applicant.[[11]](#endnote-11) Through this requirement any contentious features of the funding agreement will come to the attention of the docket judge.

* Fifth, *increased judicial scrutiny of litigation funding charges and legal costs.*

In settlement approval decisions in the great majority of class actions the courts have found the legal costs and funding charges to be reasonable and proportionate. In such cases the class action regime is a relatively efficient mechanism for dealing with mass claims and distributing compensation to the claimants.

There is, however, a problem with which the Court is presently grappling, in which settlements are reached where the quantum of legal costs and funding charges is seriously disproportionate to the recoveries by class members. I agree with Justice Derrington’s observation that “the legitimate use of the court’s processes…should not be undermined by proceedings that disproportionally benefit the funder and solicitor rather the litigants.”[[12]](#endnote-12) The Court is now scrutinising the proportionality of costs and funding charges more closely:

* *Funding charges*

A number of judges of the Federal Court (including myself,[[13]](#endnote-13) Justice Beach[[14]](#endnote-14)) and Justice Middleton[[15]](#endnote-15) have held that the Court has power to vary the funding commission required to be paid by class members pursuant to the funding agreements, and that it is appropriate to review the funding commission sought by reference to criteria developed by the Full Court in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*[[16]](#endnote-16)(***Money Max***). More recently Justice Lee has doubted the Court’s power to effectively vary the contractual bargain between a funder and a class member.[[17]](#endnote-17).

Funding charges may also be reduced through common fund orders which require court approval of the funding rate. In *Money Max* this led to a reduction in the funding rate from 32.5% - 35% down to 23.2%, such that upon settlement class members were between $12.3 and $15.6 million better off.[[18]](#endnote-18) The tender process in *GetSwift* also resulted in a significant reduction in the funding rates offered to class members.

* *Legal costs*

The court scrutiny of the legal costs charged or proposed to be charged to class members has increased significantly over the last five years. The methods of scrutiny include:

* appointing a contradictor to represent class members’ interests in relation to costs;[[19]](#endnote-19)
* referring costs to a Registrar, costs referee or a court-appointed expert rather than rely on the report of the applicant’s costs expert;[[20]](#endnote-20)
* auditing the report of the applicant’s costs expert;[[21]](#endnote-21)
* expressly considering the proportionality of costs;[[22]](#endnote-22)
* appointing persons other than the applicant’s solicitors to undertake the settlement administration work after requiring quotations or a tender process;[[23]](#endnote-23)
* in competing class actions, conducting a tender processes that requires costs budgets be provided.

Some judges of the Court are also considering piloting a cost budgeting approach, modelled on the *English Civil Procedure Rules* Part 3 Section II Practice Direction 3E. This would require both sides to prepare costs budgets for the different stages of the litigation, with only approved budgeted costs recoverable from the other side. This would give the court greater control over expenditure of unnecessary costs, should allow funders and insurers to more accurately estimate costs, and would put downward pressure on both parties’ legal costs.

1. **Measures to ensure the operation of the regime reflects legislative intent**

These measures have taken several forms:

* First, *increasing use of* *common fund orders.*

The most fundamental of these measures has been the Full Court decision in *Money Max* to allow common fund orders. As we know, the advent of litigation funding has produced a fundamentally different class action landscape today than that envisaged by the ALRC and the drafters of Part IVA. The ALRC in 1988 expressly cautioned against allowing third parties who fund class actions to receive a share in the proceeds or subject matter of the action.[[24]](#endnote-24) Limiting classes to funded members clearly undermines one of the key rationales for an opt-out regime.[[25]](#endnote-25)

The rationale for the decision in *Money Max* was the interests of justice in the proceeding, including that class members would have the benefit of Court supervision of the funding rate, and would pay a lower funding rate. As I have said, the orders ultimately resulted in class members being better off by between $12.3 and $15.6 million.

The Full Court also said that taking a common fund approach was likely to enhance access to justice by encouraging ‘open class’ representative proceedings. There can be no question that open class actions are more consistent with the opt-out representative procedure envisaged by the legislature in enacting Part IVA.[[26]](#endnote-26) Professor Morabito’s recent Seventh Empirical Report shows that, in the period following the *Money Max* decision in October 2016 up to September 2018, only seven (or 13.2%) of funded federal class actions were commenced as closed classes, whereas in the period before the decision 36% of funded federal class actions were commenced on that basis.[[27]](#endnote-27) In the case of shareholder class actions, the change is even more pronounced. In the few years immediately preceding *Money Max* almost all shareholder class actions were commenced as closed classes, and now very few or none are. Commencing cases on an open class basis is consistent with legislative intent and enhances access to justice.

* Second, *a changing approach to class closure orders.*

The Court has also addressed the practice of seeking consent class member registration orders which operate so that class members who neither registered nor opted out were bound into any settlement, but precluded from sharing in any settlement *or judgment*. Such orders were said to be necessary to facilitate settlement.

In *Melbourne City Investments Pty Ltd v Treasury Wine Estates Limited*[[28]](#endnote-28) the Full Court accepted that a preclusion from sharing in the settlement might be appropriate because the requirement to register claims would allow both sides to have a better understanding of total quantum of claims, and therefore facilitate settlement. However it said that it was not appropriate for class closure orders to be made that, in the event a settlement was not achieved, operated to lock class members out of any entitlement to share in a judgement. That is, facilitation of settlement is a good reason for a class closure order but, if settlement is not achieved, an order to shut out class members who do not respond to the chosen deadline is not.

More recently, in *Kuterba v Sirtex Medical Limited*[[29]](#endnote-29) I declined the respondent’s application for class closure because I considered settlement would be sufficiently facilitated by a class member registration process conducted using the share register. I concluded that informing class members that they should register – but not requiring them to do so on threat of being excluded from participating in the case – was unlikely to make a significant difference to the level of registration.

* Third, *increased acceptance of the importance of judicial scrutiny of settlements.*

The legislature conferred power on the Court to protect class members’ interests through the requirement of judicial approval for any settlement and, particularly in recent years, judges of the Court have taken their role in scrutinising settlements more seriously. Settlement approval judgments are more detailed[[30]](#endnote-30) and give close consideration of a wider range of matters,[[31]](#endnote-31) there is a greater use of a contradictor or amicus curiae where the Court has concerns with aspects of the settlement,[[32]](#endnote-32)and there seems to be a greater judicial willingness to refuse settlements that have unjust or unreasonable features.[[33]](#endnote-33)

1. **alrc Reform Proposals**

The main reform proposals include the following.

1. **Express powers in relation to litigation funding agreements**

*The ALRC is likely to recommend that Part IVA be amended to provide that litigation funding agreements with respect to class members are enforceable only with the approval of the Court, and that the Federal Court have an express statutory power to reject, vary, or amend the terms in third-party funding agreements.*

In circumstances where 100% of shareholder class actions and 50% of all other class actions have litigation funding, funding charges have become a standard cost for class members. There is no reason in principle for treating litigation funding costs incurred to achieve a settlement differently from legal costs incurred to achieve a settlement,[[34]](#endnote-34) and the interests of class members and the utility of the regime weigh strongly in favour of court supervision. The Court’s power to vary the quantum of litigation funding charges as part of settlement approval has been doubted, and it is appropriate that the power be put beyond question. This is all the more so given the growing number of cases in which funding charges have been disproportionate to the recovery for class members.

It is understandable that litigation funders may be uncomfortable with a power to vary funding agreements when they agree to take on the substantial burden involved in funding a class action in return for a specified funding rate. However, similarly what was said in *Money Max*,[[35]](#endnote-35)I expect that such concerns will diminish as the case law develops. In the absence of misleading conduct or unfair contract terms I would expect the variation power to be used only in relation to setting a fair and reasonable funding rate. The courts are already doing this, and there is no sign it has reduced the willingness of funders to provide funding.

The utility of the regime will also be reduced if the Court does not have power to deal with disputes about funding terms. That power too has been doubted[[36]](#endnote-36) and it is appropriate that it be put beyond question.

1. **The requirement that all class actions be initiated as ‘open’ class actions**

*The ALRC is likely to recommend that Part IVA be amended to provide that all class actions be initiated as open class actions. It is likely to recommend that the Federal Court Class Action Practice Note be amended to provide criteria for when is appropriate to order class closure during the course of a class action and the limited circumstances in which a class may be reopened.*

These changes can be seen as consistent with legislative intent, but in my view the Court must have discretion to allow a closed class in an appropriate case. In some cases it may be that an open class proceeding would be so inefficient that it would not be commenced, while the proceeding would be commenced with a closed class. Allowing this would provide some measure of access to justice as against none.

Further, as Professor Morabito noted in his Seventh Empirical Report, the expression “open class actions” is unclear. Does it mean, for example, that class actions will not be permitted where they are brought only on behalf of the members of a trade union or unincorporated association? One can readily understand the reluctance of a trade union or association to underwrite the costs and risks of a class action if it meant they were forced to also pay for persons who are not members. Alternatively, does it mean that cartel class actions will not be permitted if the class is defined to exclude consumers who suffered losses below a specified minimum? A requirement that a cartel class action must be ‘open’ so as to include consumers who suffered losses less than, say, $500 is likely to mean that the action will be very inefficient. The transaction costs of achieving compensation for such class members would exceed the losses they suffered.

Further, any criteria limiting class closure must leave the Court with a broad discretion. There are many circumstances in which class closure may be in the interests of class members and consistent with legislative intent.

1. **Express powers to deal with competing class actions**

The appeals against the decision in *GetSwift* include the contention that in the absence of showing abuse of process the Court lacked power to stay a non-preferred competing class action. It is appropriate that the power to do so be put beyond question.

1. **Express power to make a common fund order**

There are two appeals against common fund orders on foot, in which it is contended that the courts do not have power to make such orders. It is appropriate that the power to do so be put beyond question.

1. **Lifting the prohibition on contingency fees**

*The ARLC is likely to recommend the prohibition on contingency fees be lifted, subject to two conditions: (a) that it will be by leave of the Court; and (b) that the Court have power to reject, vary or amend the terms of any such agreement. Solicitors who fund class actions under contingency fee arrangements will be subject to a statutory presumption that they will be required to provide security for costs. Litigation funders will not be permitted to fund a case in which a contingency fee is also being charged.*

As could be expected, this recommendation has attracted some controversy. The objections include that it would give the applicant’s lawyers a personal stake in the litigation which might lead the lawyers to prefer their own interest to the interests of the applicant and class members. It is also argued that the applicant’s lawyer presently acts as a bulwark protecting class members’ interests against the funder’s commercial imperatives.

The ALRC has noted that the introduction of contingency fees is likely to result in a material reduction in the total amount charged to class members. Importantly the ALRC recommendation includes two critical safeguards. First, that a contingency fee can only be charged by leave of the Court. Second, that the percentage fee rate will be subject to Court supervision and the Court may vary it.

In relation to one of the main arguments against allowing contingency fees, the ALRC and VLRC have both noted that, even absent contingency fees, the lawyers for the applicant in no-win-no-fee class actions already have a substantial stake in the litigation. For example, in the Kilmore East – Kinglake bushfire class action which settled for $494 million after a 12 month trial, the applicant’s lawyers had incurred costs and disbursements of $60 million payable only upon a successful outcome. They argue that introduction of percentage-based contingency fees would make any such stake more transparent and allow improved Court supervision. Also, litigation funders are currently permitted to charge on a percentage basis without owing the professional and ethical duties that the applicant’s lawyers owe to the class members.

There is broad support for lifting the prohibition on contingency fees in the submissions: 71% of submissions supported the lifting the prohibition. This level of support is most likely because the introduction of contingency fees is likely to lead to a material reduction in the total amount paid by class members and because of the two critical safeguards to which I have referred.

Provided the two safeguards remain I support this recommendation. I expect that the Court would only grant leave to charge contingency fees where the solicitors could demonstrate that they properly understand their professional and ethical duties, put appropriate arrangements in place to address any conflicts of duty and interest, and that the contingency rate is reasonable. I do not suggest that this will always be appropriate, but in my view it is likely to be better if the Court approves the rate at the stage of settlement approval or judgement because at that point it will be armed with better information as to the important considerations, including:

* the litigation risks of conducting the case on a contingency basis, avoiding the risk of hindsight bias in this assessment;
* the amount or likely amount of any settlement or judgment;
* the quantum of adverse costs exposure and any security for costs provided;
* the time-based legal costs, and what they would be if the case proceeded to hearing;
* the security for costs provided and to be provided;
* the percentage fee agreed by sophisticated class members and the number of such class members who agreed;
* the information provided to class members as to the percentage rate;
* a comparison of the percentage rates applied in other class actions;
* class members’ likely recovery.

1. **Regulation of litigation funding**

*The ALRC is likely to recommend that the definition of ‘financial service’ in the Corporations Act should be amended to include litigation funding for a class action, so that the licensing regime is based on holding an AFSL. It is likely to recommend that the Corporations Act be amended to provide that persons that provide litigation funding in class actions under an AFSL must maintain capital adequacy*;

I will leave a detailed discussion of these likely recommendations to the speakers on the relevant panel. I would though note that the ALRC Discussion Paper is incorrect to relate the proposed requirement for capital adequacy to the funder’s obligation to pay the applicant’s legal fees. It is standard practice in funded class actions that the applicant and class members have no obligation to pay any legal costs that are not paid by the funder. The applicant’s lawyers assume any risk that they will not be paid and they have recourse to the usual legal remedies against the funder. There is no requirement to create a regulatory regime to protect the interests of lawyers that act for applicants.

The proposed requirement for capital adequacy is primarily relevant to the capacity of the funder to meet its contractual promise to pay the respondent’s costs if the case is unsuccessful. In my experience a number of competent and reputable funders prefer to meet that obligation by putting on security for costs, rather than holding funds to demonstrate capital adequacy. I can see little reason to choose a regulatory model which excludes competent and reputable funders who are able to meet their obligations as they arise when doing so may (a) operate to diminish the availability of funding and thereby reduce access to justice; and (b) reduce competition between funders, which is one of the factors presently putting downward pressure on funding rates.

In my view it would be best to require that:

1. funders may demonstrate capital adequacy and thereby avoid the need pay security; or
2. if funders do not demonstrate capital adequacy, they must provide sufficient security in an acceptable form.

I keep in mind that the debate about the necessity for greater regulation of litigation funding has gone on now for more than a decade and, as far as I am aware, there is still no example of a class action funder failing to meet its obligation to pay adverse costs. Even so, in the post-Financial Services Royal Commission era it is unlikely that self-regulation will be seen to be sufficient. I support appropriate regulation of litigation funding but I find it hard to see this as a first-order issue.

**III. CONCLUSION**

The requirement to address any emerging difficulties in the operation of Part IVA-type regimes is a continuing one. It did not start with the likely ALRC recommendations and it will not end with them, but the proposals are the result of a great deal of conscientious and detailed work and are worthy of careful thought. The guiding considerations should include the objectives of: (a) enhancing access to justice while avoiding the operation of regime becoming “overheated”; (b) avoiding the stifling of litigation funding while protecting against excesses; and (c) ensuring the regime operates in accordance with the overarching purpose of facilitating the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

1. Some parts of this paper draw upon a chapter by the author and V Morabito entitled *The First 25 Years: Has the Class Action Regime hit the Mark on Access to Justice?* in D Graves and H Mould (ed)*, 25 Years of Class Actions in Australia*, The Ross Parsons Centre of Commercial, Corporate and Taxation Law Publication Series, 2017 at 13 (**25 Years of Class Actions in Australia**).

   Supreme Court of Victoria, ‘Court approves distribution of almost $700M in 2009 Black Saturday bushfire class actions’, 7 December 2016, quoting Justice J Forrest. [↑](#endnote-ref-1)
2. 25 Years of Class Actions in Australia at 14. [↑](#endnote-ref-2)
3. *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148 at [196]. [↑](#endnote-ref-3)
4. [2017] FCA 1042 at [38]-[79]. [↑](#endnote-ref-4)
5. [2017] FCA 947. [↑](#endnote-ref-5)
6. [2018] FCA 732; (2018) 357 ALR 586. [↑](#endnote-ref-6)
7. Ibid at [305]-[324]. [↑](#endnote-ref-7)
8. [2018] FCAFC 143. [↑](#endnote-ref-8)
9. Ibid at [15]. [↑](#endnote-ref-9)
10. Ibid at [19]. [↑](#endnote-ref-10)
11. *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [216] (***Caason***). [↑](#endnote-ref-11)
12. M Pelly*, Judge takes aim at class action ‘trafficking’*, Australian Financial Review, 26 October 2018. [↑](#endnote-ref-12)
13. *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [113]-[132] (***Earglow***). [↑](#endnote-ref-13)
14. *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 at [101]. [↑](#endnote-ref-14)
15. *Mitic v OZ Minerals Limited (No 2)* [2017] FCA 409 at [27]-[29]. [↑](#endnote-ref-15)
16. *Money Max* [2016] FCAFC 148 at [82]-[83]. [↑](#endnote-ref-16)
17. *Liverpool City Council v McGraw-Hill Financial, Inc (now known as S&P Global Inc)* [2018] FCA 1289 at [148]. [↑](#endnote-ref-17)
18. *Money Max* [2016] FCAFC 148 at [8](c). [↑](#endnote-ref-18)
19. *Kelly v Willmott Forests Ltd (in liquidation) (No 5)* [2017] FCA 689. [↑](#endnote-ref-19)
20. *Caason* [2018] FCA 527 at [111]-[124]; *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 at [40]-[41]; *Dillon v RBS Group Pty Ltd (No 2)* [2018] FCA 395; *Matthews v AusNet Pty Ltd & Ors (Ruling No 40)* [2015] VSC 131 at [29]; *Rowe v Ausnet Electricity Services Pty Ltd (Ruling No 9)* [2016] VSC 731 at [1]-[7]; *Downie v Spiral Foods Pty Ltd & Ors* [2016] VSC 411 at [20]; *Matthews v AusNet Pty Ltd & Ors (Ruling No 44)* [2016] VSC 732 at [13]. [↑](#endnote-ref-20)
21. *Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2018] FCA 1030 (***Money Max Settlement Approval***) at [160]-[180]*.* [↑](#endnote-ref-21)
22. *Petersen v Bank of Queensland*; *Clarke v Sandhurst Trustees Limited (No 2)* [2018] FCA 511. [↑](#endnote-ref-22)
23. *Caason* at [157]. [↑](#endnote-ref-23)
24. Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, 1988, at [318]. [↑](#endnote-ref-24)
25. *Money Max* [2016] FCAFC 148 at [193], citing *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* [2007] FCAFC 200; (2007) 164 FCR 275 at [116]-[117] (Jacobson J). [↑](#endnote-ref-25)
26. *Money Max* [2016] FCAFC 148 at [14]. [↑](#endnote-ref-26)
27. Morabito, V, *Closed Class Actions, Open Class Actions and Access to Justice* (Seventh Empirical Report), 9-10. [↑](#endnote-ref-27)
28. (2017) 355 ALR 392; [2017] FCAFC 98 at [75]-[76]. [↑](#endnote-ref-28)
29. [2018] FCA 1467 at [13]. [↑](#endnote-ref-29)
30. *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626 (***Modtech***); *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663; *Downie v Spiral Foods Pty Ltd* [2015] VSC 190; *Kelly No 4* (2016) 335 ALR 439; *Hodges v Waters (No 7)* (2015) 232 FCR 97; *Earglow* [2016] FCA 1433; *Newstart 123 Pty Ltd v Billabong International Ltd* [2016] FCA 1194; *Stanford v DePuy International Ltd (No 6)* [2016] FCA 1452. [↑](#endnote-ref-30)
31. *Casey v DePuy International Ltd (No 2)* [2012] FCA 1370 at [15]; *Winterford v Pfizer Australia Pty Ltd* [2015] FCA 426 at [25]; *Modtech* [2013] FCA 626; *Kelly No 4* (2016) 335 ALR 439; *Earglow* [2016] FCA 1433. [↑](#endnote-ref-31)
32. *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* (2016) 335 ALR 439 at [4]; *Bolitho v Banksia Securities Ltd (in liquidation) (receivers and managers appointed)* Order 13, Orders of Justice Robson, Supreme Court of Victoria, 2 June 2016. [↑](#endnote-ref-32)
33. *ASIC v Richards* [2013] FCAFC 89; *Peterson v Merck Sharp & Dohme (Aust) Pty Ltd (No 6)* [2013] FCA 447; *Modtech* [2013] FCA 626; *Kelly No 4* (2016) 335 ALR 439. [↑](#endnote-ref-33)
34. *Money Max* [2016] FCAFC 148at [71]. [↑](#endnote-ref-34)
35. [2016] FCAFC 148 at [82]-[83]. [↑](#endnote-ref-35)
36. *Caason* [2018] FCA 527 at [232]-[250]; *Caason Investments Pty Ltd v International Litigation Partners No.3 Ltd* [2018] FCAFC 176 at [26]. [↑](#endnote-ref-36)