Class Actions Landscape Australia

Mid 2023 Edition

maurice blackburn lawyers

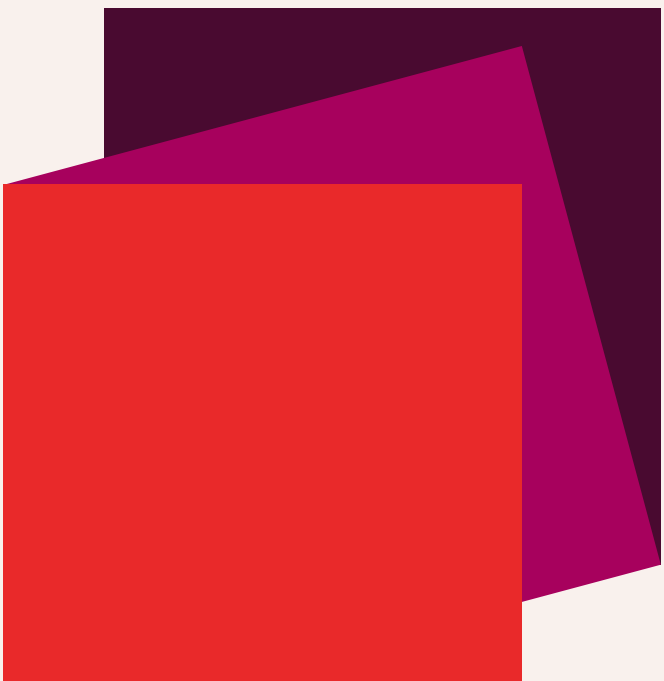
Introduction

Maurice Blackburn's leading role in advocating for contingency fees in Victoria has already delivered substantial benefits to class action participants. That is the clear and irrefutable message to be taken from three years of contingency fee billing in class actions, and at Maurice Blackburn, we are not the least bit surprised at the results.

For a long time, Maurice Blackburn took the lead in advocating for lawmakers to follow the evidence of multiple independent bodies and make the simple change that enabled contingency fee billing – or Group Costs Orders (GCO) – to be a part of the billing and funding mix in class actions.

Why? Because it was clear that on any rational economic assessment, it would deliver greater clarity to clients on billing methods, and importantly, it would play a significant role in driving down costs and returning more to clients who were seeking remedies for mass wrongs they had suffered.

We now have a data set that shows the trend is clearly for a GCO at around the 25% range. This is increasing downward pressure on pricing, delivering better outcomes for clients, as we said it would and should – and of course, the sky has not fallen in as opponents of contingency fee billing claimed it would.



The courts and parties continue to grapple with the issue of multiplicity and carriage contests. A key lesson in 2023, is the importance of being represented by a plaintiff firm with a strong track record, which is particularly relevant to institutional investors selecting who they want to run a case.

Underdone budgets and overblown loss estimates might be good marketing tools on the surface, but they are no match for strong recoveries. Our recently settled AMP Shareholder class action – which no less than 5 firms were vying to run – was yet another of our hard-fought matters to have resolved for in excess of $100 million ($110m). We are proud to say that we are the only Australian plaintiff firm to have resolved listed securities class actions for more than $100m, having done so on 10 occasions to date.

Finally, data privacy continues to be a major issue in 2023, not only owing to the number of significant data breaches exposing vulnerabilities in the privacy protection of large organisations, but also because it has exposed the need for substantial improvement in the legislative framework for dealing with such serious and widespread breaches. There is a lot more work that must be done in this important space.

Andrew Watson
National Head of Class Actions
Maurice Blackburn Lawyers

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Sims shareholder settlement successful – Court approves

This was an application to approve a proposed settlement in a shareholder class action. In this judgment, Wigney J approved the settlement in the amount of $29.5 million, and also approved the following deductions from the settlement sum:

- $5,461,430.45 in respect of legal costs to be reimbursed to the funder;
- $798,085.19 in respect of an ATE insurance premium to be reimbursed to the funder;
- $5,440,557.67 in respect of commission to be paid to the funder (pursuant to a funding equalisation order, and not a common fund order);
- $3,022,684.49 in respect of unpaid legal costs to be paid to the applicant's solicitors;
- $241,123.95 in respect of settlement administration costs to be paid to the applicant's solicitors; and
- $10,000 in respect of a reimbursement payment to be paid to the applicant.

There were no objections by class members to the proposed settlement, although his Honour indicated that that was not determinative. His Honour described the total legal costs in the case as a "*staggeringly large amount*" (at [23]), but ultimately accepted the opinion of the Court-appointed costs referee. His Honour also had some initial misgivings about the funder receiving both a funding commission and reimbursement of its ATE insurance premium, but ultimately concluded that that was, in the circumstances, fair and reasonable in this case.

Lastly, his Honour indicated that although the total deductions amounted to just under 50% of the total settlement sum, that did not mean, in the circumstances of this case, that the settlement was not fair and reasonable.

Eckardt v Sims Ltd [2022] FCA 1609	
Federal Court of Australia | Wigney J | 23 December 2022	
Applicant's Solicitors:	William Roberts Lawyers
Respondents' Solicitors:	Herbert Smith Freehills
Applicant's Funder:	ICP Capital Pty Ltd / Investor Claim Partner Pty Ltd
Austlii Link:	Available here

Self-represented class action claim falls at early hurdle

This was a class action filed by a self-represented aged pensioner against the Secretary of the Department of Social Services (**Secretary**), Services Australia and the Commonwealth Ombudsman (**Ombudsman**) in relation to the way in which relevant officers of the Commonwealth government approach the assessment of the value of 'curtilage' for the purposes of determining whether a person meets the asset test requirements for obtaining a pension. The applicant sought to bring the proceeding on behalf of some 2,567 persons whose aged pension, he alleged, had been wrongly cancelled on the basis of an assessable amount of curtilage. He alleged that the Secretary had acted in a manner inconsistent with its statutory authority and that the Ombudsman acted improperly in failing to deal with his complaints about the practice of the Secretary. The applicant claimed that class members who were wrongly refused the aged pension were entitled to some form of 'backpay' from the respondents.

In this decision, Colvin J ordered that the proceeding be dismissed for three reasons.

First, his Honour refused to grant the applicant leave to conduct the proceeding without legal representation. His Honour said that, for the reasons outlined in *Wilkinson v Wilson Security Pty Ltd (No 2)* [2022] FCA 1161 (**Wilson Security**), "*it is to be expected that leave would be refused in almost all instances*" (at [8]). His Honour found that there was no exceptional reason that would justify leave being granted in the present case.

Second, his Honour found that the applicant had not demonstrated a sufficient personal interest to bring the proceeding as a representative applicant. Indeed, the applicant is receiving the aged care pension and was therefore not adversely affected by any decision made concerning his entitlement to the pension. His Honour said there was also no evidence to suggest he would be adversely affected in the future.

Third, his Honour found that the applicant's claims against the Ombudsman fell within the immunity afforded by s 33 of the *Ombudsman Act 1976* (Cth) (**Ombudsman Act**), which, in effect, provided an immunity from suit for any act done or omitted to be done in good faith.

Finally, his Honour rejected the applicant's submission that notice ought to be given to class members before the proceeding was dismissed. His Honour distinguished the present case from the circumstances in *Wilson Security* (in which notice was ordered) on the basis that the only issue that arose in *Wilson Security* was whether the self-represented applicant ought to be given leave to conduct the proceeding without legal representation. In the present case, his Honour also found that the applicant did not have a sufficient personal interest to bring the proceeding, and that the Ombudsman was covered by the immunity afforded by s 33 of the *Ombudsman Act*. Further, in *Wilson Security*, numbers of class members had communicated to the Court that they wished the proceeding to continue as a representative proceeding. There was no such evidence in the present case.

Paschke v Secretary, Department of Social Services [2023] FCA 6	
Federal Court of Australia | Colvin J | 12 January 2023	
Applicant's Solicitors:	The Applicant appeared in person
Respondents' Solicitors:	The Respondents did not appear
Applicant's Funder:	**N/A**
Austlii Link:	Available here

Court warns on unrealistic case budgets in small settlement

This was a shareholder class action which arose out of what Murphy J described as a "*scandalous episode of corporate misconduct*" (at [2]), and was a case which, at least on liability, was a "*slam dunk*" (at [5]). Following a long and expensive multiplicity contest, Phi Finney McDonald (**PFM**) was awarded carriage of the proceeding. Separate civil penalty proceedings brought by the Australian Securities and Investments Commission against the respondents were determined adversely to the respondents. And then, after several years of litigation, the parties ultimately agreed to settle the class action for $1 million, due to the respondents' insolvency (and the lack of any relevant insurance cover). In this judgment, his Honour was asked to approve the proposed settlement pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth), which his Honour did.

His Honour also approved the following distribution of the settlement sum:

- $100,000 to PFM (leaving them with approximately $3 million in unpaid costs);
- $6,130 to the lead applicant;
- $393,870 to the funder, Therium, as part reimbursement of an ATE insurance premium paid by it (leaving it more than $5.5 million out-of-pocket on account of costs paid to PFM); and
- $500,000 for distribution to registered class members.

Lastly, his Honour also made the following observations about the costs incurred by PFM (notwithstanding that a large portion of those costs will in any event go unpaid) (at [55]):

> There is, though, one matter in relation to the applicant's legal costs which should not pass without comment. The Costs Referee's report shows that PFM ran up costs which substantially exceeded the case budget that the firm put forward when it won carriage of the proceeding in the multiplicity hearing in April 2018. The Costs Referee, however, opined that this did not show that PFM's costs were not fair and reasonable because of various matters that arose in the course of the proceeding that PFM could not have anticipated. It is unnecessary to decide, but I am disinclined to accept that. It is important that case budgets that are proposed by competing law firms in a carriage motion are realistic and not a "race to the bottom". I accept that some of the issues that confronted PFM in the litigation were unexpected, but the case budget PFM put forward was low and very difficult to achieve unless the case could be speedily settled, and obtaining a speedy yet adequate offer of settlement from GetSwift was not within PFM's control. Unless there is good reason to think this will eventuate (and that is expressed as an assumption) a realistic case budget should not be based on a prediction that the opposing party will make a reasonable settlement proposal at an early stage, and it should include a significant buffer for costs that may arise from unforeseen events in the litigation. Such costs are "known unknowns"; they commonly arise in strenuously contested class action litigation and they are often substantial.

Webb v GetSwift Ltd (No 7) [2023] FCA 90	
Federal Court of Australia | Murphy J | 12 February 2023	
Applicant's Solicitors:	Phi Finney McDonald
Respondents' Solicitors:	**N/A**
Applicant's Funder:	Therium Litigation Finance A IC
Austlii Link:	Available here

Carriage fight unlocks potential for Federal contingency fee workaround

This was a judgment given by Lee J in a carriage fight, in which his Honour was critical of delays by the applicants' solicitors in giving effect to an agreement already reached to consolidate two proceedings. However, what is most notable about the brief judgment is his Honour's observations about the Federal Court's power to make a 'solicitors common fund order' (at [17]) (echoing observations his Honour made on the same topic in *Klemweb Nominees Pty Ltd (as trustee for Klemweb Superannuation Fund) v BHP Group Ltd (2019)* 369 ALR 583; [2019] FCAFC 107):

> It has been suggested recently that there is no power to make any type of common fund order under Pt IVA of the FCA Act: see Davaria Pty Limited v 7-Eleven Stores Pty Ltd (No 13) [2023] FCA 84 (at [190] per O'Callaghan J). Although it is unnecessary to decide such a point for the purposes of these reasons, I doubt that this is the case. I also doubt that the making of such an order is necessarily restricted to funders. Even leaving aside the question of statutory power in the context of "Settlement CFOs", as I indicated in Klemweb, this Court, as a Court of equity, will apply fundamental equitable principles in the execution of its jurisdiction, including the maxim that equity is equality...

However, his Honour was unimpressed by the proposal that, in the absence of a 'solicitors common fund order' being made, a transfer of the proceedings to the Supreme Court of Victoria may be sought in order to secure a 'group costs order' instead, saying (at [20]-[21]):

> It should be obvious to all concerned that such a step will mean that the substantive progress of these proceedings will be frustrated. This reinforces a concern that one often has about Pt IVA proceedings, namely that solicitors and funders are focussed so intently on their own position that they forget that it is their duty to advance the claims of the applicant and group members towards a swift resolution of the substantive matter...

> Although I have no firm view about the matter and will hear any application if it is made on the merits, in the light of the overarching purpose, it is presently difficult to reconcile further delay of the proceeding by countenancing the transfer of the matter to the Supreme Court of Victoria only to procure more favourable financial arrangements for the solicitors and funders in the proceeding.

R&B Investments Pty Dtd (Trustee) v Blue Sky Alternative Investments Ltd (in liq) (Carriage Application No 2) [2023] FCA 142	
Federal Court of Australia | Lee J | 14 February 2023	
Applicant's Solicitors:	Banton Group / Shine Lawyers
Respondents' Solicitors:	Arnold Bloch Leibler / GRT Lawyers / Corrs Chambers Westgarth
Applicant's Funder:	**N/A**
Austlii Link:	Available here

Defendant fails to exclude hire car drivers from Uber class action

In an earlier judgment in this case (*Andrianakis v Uber Technologies Inc (Ruling No 3)* [2021] VSC 744), Macaulay J made orders requiring the identification of several sample class members, reflecting the different industry segments to which class members in the proceeding belong.

After several extensions of time, and despite extensive efforts, the plaintiff's solicitors were unable to identify a 'hire car driver' who was willing to act as a sample class member. The defendants therefore applied for the claims of all class members falling into that industry segment to be struck out. In this judgment, Nichols J refused the defendants' application, essentially for the following reasons:

- the order sought by the defendants would not be an order that is appropriate or necessary to ensure that justice is done in the proceeding, within the meaning of s 33ZF of the *Supreme Court Act 1986* (Vic);
- there was sufficient evidence that class members who are hire car drivers do exist and do wish to have their claims prosecuted in this proceeding, but for various (legitimate) reasons do not wish to take on the role of being a sample class member – as such, "*striking out those parts of the proceeding would cause real prejudice to hire car driver group members and would not facilitate the efficient determination of their claims: it would prevent them from having their claims heard and determined in this proceeding*" (at [14]); and
- although calling evidence from a sample class member from the 'hire car driver' industry segment was seen as desirable, it was not essential to enable the defendants to properly defend the claims against them, and was ultimately a case management question.

Her Honour concluded (at [34]):

> Returning to the essential question, namely whether an exercise of power under s 33ZF to make the order sought by the defendants, meets the statutory criterion for its exercise, I have concluded that it does not. Bringing to an end the prosecution in this proceeding of the claims of hire car driver group members who do exist in not insignificant numbers and who do wish to have their claims determined in the proceeding, in circumstances where the defendants do not say that their claims have no real prospects of success or cannot be understood, is neither appropriate nor necessary to ensure that justice is done in the proceeding. The balancing of the relevant interests does not favour the defendants. It plainly favours the plaintiff, who brings the proceeding on behalf of group members. I reject the defendants' submission that there will be no efficiencies gained by facilitating the determination of claims for these group members by these proceedings, and that the risk of any real prejudice to group members is very low. The proposed order would diminish efficiency by leaving hire car drivers to pursue their claims individually and would cause real prejudice by requiring them to so do so [sic]. I accept the submission that that result would occur because of an inability to comply with the case management order and not because of any relevant identified underlying deficiency in the claim. that the respondents' proposed amendments were inadequately pleaded.

Andrianakis v Uber Technologies Inc (No 4) [2023] VSC 56

Supreme Court of Victoria	Nichols J	20 February 2023	
Plaintiff's Solicitors:	Maurice Blackburn		
Defendants' Solicitors:	Herbert Smith Freehills		
Plaintiff's Funder:	**N/A**		
Austlii Link:	Available here		

Cryptocurrency class action continues

This is a class action against multiple respondents alleging misleading conduct and unconscionable conduct which induced investors to acquire or invest in a cryptocurrency known as 'Qoin'. Qoin was illiquid and not easily convertible into fiat currency or goods and services and ultimately lost all of its value, thereby resulting in loss and damage to the investors.

The Australian Securities and Investments Commission (**ASIC**) has commenced a civil penalty proceeding against the first respondent in respect of substantially the same conduct. On that basis, several of the respondents applied for a stay of the class action pending the conclusion of the civil penalty proceeding. Specifically, the respondents pointed to difficulties in defending the class action arising from possible claims of penalty privilege by two key witnesses (who are themselves respondents to the class action); the possibility of the first respondent having to expose its defence to the class action and thereby exposing its defence to the ASIC proceeding; the wastage of costs and the practical burden of defending two overlapping proceedings; and the risk of inconsistent findings.

Although the ASIC proceeding is not a criminal proceeding per se, Rangiah J considered that the guidelines set out in the context of overlapping civil and criminal proceedings, as well as in two overlapping civil proceedings, were still relevant. Ultimately, the question to be determined was "*whether the interests of justice would be served by ordering a stay of the [class action], taking into account all relevant factors*" (at [38]).

His Honour considered that:

- the possibility that the two key witnesses (who are respondents to the class action but not (at least yet) to the ASIC proceeding) may seek to claim 'penalty privilege' in the class action did not warrant the grant of a stay;

- a stay of the class action pending conclusion of the ASIC proceeding may reduce overall costs and minimise the prospect of inconsistent findings, which did favour a stay;
- however, the preferable course, as favoured in other cases, was "*to deal with issues arising from concurrent proceedings through appropriate case management, rather than the more drastic remedy of a stay*" (at [49]).

His Honour therefore refused the application for a stay (and indicated that he would recommend to the Chief Justice that both proceedings be managed by the same judge so as to facilitate their appropriate case management).

Its Eco Pty Ltd v BPS Financial Ltd [2023] FCA 110

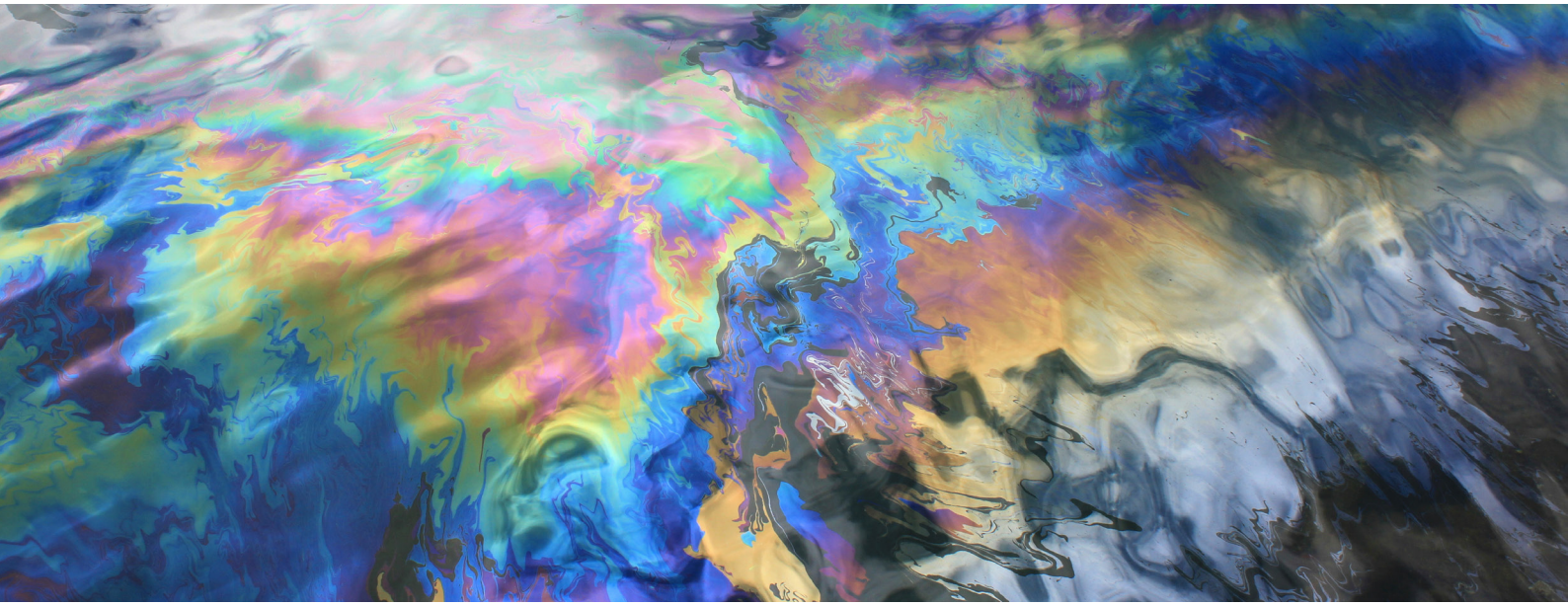
Federal Court of Australia	Rangiah J	20 February 2023
Applicant's Solicitors:	Banton Group	
Respondents' Solicitors:	HWL Ebsworth / Enyo Lawyers	
Applicant's Funder:	**N/A**	
Austlii Link:	Available here	

Montara oil spill settlement gets $192million approval

This was an application to approve a proposed settlement in the Montara oil spill class action. Because of the unprecedented situation of the lead applicant supporting the proposed settlement but, represented by separate legal representatives, seeking to oppose the legal costs claimed by his own solicitors (which Lee J described as "*a form of litigious dissociative identity disorder*" (at [3])), this judgment was confined to approval of the settlement itself, and did not deal with approval of the proposed deductions from the settlement sum.

The total settlement sum was $192.5 million, which his Honour had no hesitation in approving. Although the approval of any deductions from that sum was to be determined at a later hearing, his Honour considered that such bifurcation of the settlement approval process in this particular case was appropriate because it was "*possible to form a view that the proposed settlement is of such a character as to commend settlement, irrespective of the precise quantum of funds which will be approved by the Court as just deductions from the proceeds of any judgment or settlement sum*" (at [19]ff). That view was supported by the funder's undertaking not to seek a funding commission greater than 30%, and not to seek recovery of ATE insurance premiums paid by it.

Following approval of the settlement, his Honour made an order substituting a different person as lead applicant in the proceeding, in order to cure the 'litigious dissociative identity disorder' and enable the original lead applicant to oppose, at a later hearing, approval of the legal costs.



Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd (Settlement Approval) [2023] FCA 143	
Federal Court of Australia | Lee J | 23 February 2023	
Applicant's Solicitors:	Maurice Blackburn
Respondent's Solicitors:	Allens
Applicant's Funder:	Harbour Fund II L.P.
Austlii Link:	Available here

Class actions a reality in WA, and the High Court gets active on appeals

WA Class Action Regime

On 25 March 2023 the Civil Procedure (Representative Proceedings) Act 2022 (WA) came into operation. The Act introduces a class action regime in Western Australia which, unsurprisingly, is closely modelled on Part IVA of the Federal Court of Australia Act 1976 (Cth) (with only minor, immaterial drafting differences). In addition, the Act contains (in s 36) an express abolition of the torts of maintenance and champerty.

High Court Special Leave Applications

In March and April, the High Court dealt with three separate applications for special leave to appeal in class action related matters, namely:

1. On 17 March 2023 the High Court granted special leave to appeal from the decision of the Full Federal Court in Carnival plc v Karpik (Ruby Princess) (2022) 404 ALR 386; [2022] FCAFC 149 concerning whether a class action waiver clause was an 'unfair term' (Karpik v Carnival plc [2023] HCATrans 33).
2. On the same day, the High Court granted special leave to appeal from the decision of the Queensland Court of Appeal in Redland City Council v Kozik [2022] QCA 158, in which the Court of Appeal held that the appellant council was liable to repay the full amount of special rates invalidly imposed on a cohort of ratepayers, notwithstanding that part of those rates had already been expended for the specific benefit of those ratepayers before the invalidity was discovered (Redland City Council v Kozik [2023] HCATrans 34).
3. On 13 April 2023 the High Court refused special leave to appeal from the decision of the New South Wales Court of Appeal in SunWater Ltd v Liberty Mutual Insurance Co [2022] NSWCA 273, in which the Court of Appeal held that SunWater Ltd was not entitled to indemnity from its insurers in respect of the amount which it paid to settle the Queensland floods class action (SunWater Ltd v Liberty Mutual Insurance Co [2023] HCASL 49).

Victoria flexes muscle on adopting contingency fees (group costs orders)

Group costs order – Previous application for group costs order refused – Further application made on the basis of revised costs / funding arrangements – Relevant considerations – Group costs order fixed at 24.5% made

These are three class actions in relation to "flex commissions" paid to car dealers by Westpac, St George, ANZ and Macquarie Leasing. Although the claims in the proceedings are not identical, the issues raised in each proceeding are substantially similar. In each case, the plaintiffs allege that the car dealers were acting on behalf of the lenders and engaged in conduct that was, among other things, unfair within the meaning of s 180A(1)(b) of the *National Consumer Credit Protection Act 2009* (Cth).

In this judgment, Nichols J made a group costs order (**GCO**) of 24.5% sought by the plaintiffs in each proceeding, pursuant to s 33ZDA of the *Supreme Court Act 1986* (Vic) (**SCA**).

In an earlier decision, her Honour refused to make a GCO of 25% in the Westpac and ANZ proceedings (*Fox v Westpac Banking Corporation* [2021] VSC 573). That decision turned, in large part, on her Honour's finding that the plaintiffs were beneficiaries of existing funding arrangements in which Maurice Blackburn was acting on a no-win no-fee (**NWNF**) basis and had indemnified the plaintiffs against the risk of adverse costs. Her Honour found that, notwithstanding a subjective intention on the part of Maurice Blackburn to seek third party funding in the event that GCOs were not made, the NWNF agreements were not expressly interim or conditional, in the sense that they would cease to bind Maurice Blackburn in the event that a GCO was not made. In these circumstances, her Honour was not persuaded that the appropriate comparator for the proposed GCOs was third party litigation funding in which a funder would charge a commission in addition to reimbursement of legal costs. Ultimately, her Honour held that the plaintiffs' contention that class members would be "better off" under the proposed GCOs, including (and especially) financially better off, was not made out on the evidence.

Following that decision, Maurice Blackburn entered into new retainers and costs agreements with the plaintiffs that express a clear objective contractual intention for costs to be governed by way of a GCO (with the current NWNF arrangement being interim in nature and made for the purposes of facilitating an application for a GCO) and if a GCO is not made, a preparedness

to enter into a funding agreement with a third-party funder consistent with the terms of each plaintiff's retainer. Maurice Blackburn also entered into an amended costs sharing agreement with Vannin, which provides for costs and fee sharing where a GCO is made and sets out the terms on which a related entity will fund the proceedings in the event that a GCO is not made. Each of the plaintiffs also filed evidence expressing their reasons for seeking a GCO, which had not been filed in support of the initial GCO applications.

On this occasion, her Honour was satisfied that fixing a GCO of 24.5% was appropriate or necessary to ensure that justice is done in each of the proceedings, including because:

- The GCO will provide certainty to class members, including by guaranteeing that class members recover 75.5% of any settlement sum or damages award, which protects against costs and funding fees disproportionately eroding compensation.
- The GCO will deliver funding at a cost that is clearly no worse and in fact marginally better than the alternative third-party funding arrangement negotiated with Vannin, pursuant to which the impost on the plaintiffs and class members would be 25% of any recovered amount, subject to the funder obtaining a common fund order. Her Honour also observed that this alternative arrangement was itself reasonable or competitive by relevant measures, including by reference to publicly available data establishing the mean and average returns to class members in class actions with third-party funding.
- The GCO will provide, from the outset, equality between class members in the sharing of liability for legal and funding costs.
- The GCO could reasonably be regarded as promoting the alignment of the interests of the lawyers and the interests of the plaintiffs and class members in maximising recoveries and conducting the proceeding efficiently.

Fox v Westpac Banking Corporation (No 2) [2023] VSC 95

Supreme Court of Victoria | Nichols J | 3 March 2023

Plaintiffs' Solicitors:	Maurice Blackburn
Defendants' Solicitors in S ECI 2020 2946:	King & Wood Mallesons
Defendants' Solicitors in S ECI 2020 3365:	Herbert Smith Freehills
Defendants' Solicitors in S ECI 2020 3924:	Gilbert + Tobin
Plaintiffs' Funder:	Costs sharing arrangement with Vannin
Austlii Link:	Available here

Will a GCO withstand jurisdictional transfer?

Shareholder class action – Group costs order (GCO) previously made – Application by defendant to transfer proceeding to Supreme Court of New South Wales – Whether existence of GCO is relevant to determination of transfer application – Whether, if proceeding was transferred, GCO would be enforceable in and by the Supreme Court of New South Wales – Whether the proceeding should be transferred – Referral of questions to Court of Appeal

This is a shareholder class action on behalf of persons who purchased shares in Arrium Ltd between August 2014 and April 2016. The plaintiffs allege that during the relevant period Arrium's financial accounts did not give a true and fair view of its financial position and performance or comply with Australian accounting standards, and that Arrium's directors and its auditor (**KPMG**) made misleading statements of opinion supporting the reports.

In this decision, Nichols J made orders reserving the following three questions for consideration by the Court of Appeal:

1. In exercising the discretion to transfer proceedings to another court under s 1337H(2) of the *Corporations Act 2001* (Cth) (**Corporations Act**), is the fact that the Supreme Court of Victoria has made a group costs order under s 33ZDA of the *Supreme Court Act 1986* (Vic) relevant?
2. If the proceedings are transferred to the Supreme Court of New South Wales (**NSWSC**):
    a. will the Group Costs Order (**GCO**) made by the Supreme Court of Victoria on 3 May 2022 remain in force and be capable of being enforced by the NSWSC, subject to any order of that Court; and
    b. if the GCO will remain in force, does the NSWSC have power to vary or revoke the GCO?
3. Should this proceeding be transferred to the NSWSC pursuant to s 1337H of the Corporations Act, as sought by KPMG?

The above questions arose because KPMG sought an order transferring the proceeding to the Supreme Court of New South Wales (**NSWSC**) under s 1337H(2) of the Corporations Act. In relation to question (1), KPMG intends to challenge the correctness of several first instance decisions characterising procedural advantages to a plaintiff as relevant to a transfer application. It will also contend that that the making of a GCO is not relevant in the exercise of the discretion under s 1337H(2) of the Corporations Act, either generally or in this case. In relation to question (2), KPMG will contend that, even if the existence of a GCO might permissibly be considered, it should be assessed as a neutral factor because it is capable of being enforced by the NSWSC.

Her Honour was satisfied that it was appropriate to reserve questions (1), (2) and (3) for consideration by the Court of Appeal, including because: question (1) is of general importance; question (2) is of real importance to the parties, because a single judge of the NSWSC would be bound by a decision of the Victorian Court of Appeal unless persuaded it was clearly wrong, but would not be bound by the decision of a single judge; and question (3) would not require the resolution of factual disputes by the Court of Appeal (because of the effect of an agreed statement of facts filed by the parties), and the answers to questions (1) and (2) would likely be significant in the disposition of KPMG's transfer application as a whole. contractual intention for costs to be governed by way of a GCO (with the current NWNF arrangement being interim in nature and made for the purposes of facilitating an application for a GCO) and if a GCO is not made, a preparedness

Bogan v The Estate of Peter John Smedley (deceased) (No 3) [2023] VSC 103

Supreme Court of Victoria	Nichols J	7 March 2023
Plaintiffs' Solicitors:	Banton Group	
Fifth Defendant's Solicitors:	Ashurst	
Applicant's Funder:	Equite Capital No 1 Pty Ltd	
Austlii Link:	Available here	

Hundreds object in pelvic mesh class action settlement

This was an application to approve a proposed settlement of the pelvic mesh class action. As is well known, the applicants' claims (for misleading or deceptive conduct, statutory product liability and negligence) were successful, following a lengthy trial before Farrell J (*Gill v Ethicon Sarl (No 5)* [2019] FCA 1905). An appeal by the respondents to the Full Court was subsequently dismissed (*Ethicon Sarl v Gill* (2021) 288 FCR 338; [2021] FCAFC 29), and so too an application for special leave to appeal to the High Court (*Ethicon Sarl v Gill* [2021] HCATrans 187).

The 'headline' settlement sum was $300 million. Notwithstanding that the applicants' solicitors had already recovered approximately $41.3 million from the respondents by way of adverse costs orders made in the proceeding, they sought approval to deduct from the settlement sum further costs of approximately $38.1 million, as well as approximately $26 million on account of accrued interest under a disbursement funding facility that was used to fund the proceeding, and estimated settlement administration costs of up to approximately $36.9 million.

There were hundreds of written and oral objections to the proposed settlement from class members. However, after considering the potential value of class members' claims by reference to evidence of sampling and extrapolation, and in light of the legislative regimes restricting recovery of damages for economic and non-economic loss in cases of this kind, Lee J approved the proposed settlement, albeit not without "*some hesitation*" (at [2]). His Honour stated that the overall settlement sum was not "*sufficiently generous as to be self-evidently fair*" (at [4]), that "*the proposed settlement sum is within the range of fair and reasonable outcomes, albeit at the lowest end of that scale*" (at [131], [170]), and that the "*reasonableness of the headline figure is far from obvious*" (at [132]). However, his Honour said (at [140]):

> … my concerns are somewhat assuaged by the fact that the real problem in the settlement (such as it is) is not the headline figure, but the amounts to be deducted from the fund before the balance goes to group members.

His Honour deferred to a later hearing the approval of the amounts sought to be deducted

by the applicants' solicitors on account of costs. His Honour also deferred the approval of the proposed settlement distribution scheme. Pursuant to earlier orders, his Honour had, over the opposition of the applicants' solicitors, conducted a tender process for the role of scheme administrator. In a separate judgment (*Gill v Ethicon Sarl (No 11)* [2023] FCA 229) his Honour indicated that he would refer the assessment of the tenders received to a referee for inquiry and report. His Honour said:

> [9] At least in very large settlements, it seems to me we have reached the stage where it is incumbent upon the Court to examine closely process and administration costs, which appear to be burgeoning, and to be open to innovative ways in which the interests of group members may be protected at all stages of the settlement process. It is easy to spend other peoples' money, even when solicitors administering a fund act conscientiously and remind themselves of their duties. Class actions necessarily throw up conflicts between interest and duty. The Court relies upon practitioners to manage those conflicts appropriately and (save for some notable and rare exceptions) close attention by practitioners to managing conflicts appropriately has been a hallmark of the Australian class action experience over the last thirty years. But it must be recognised that the Court demands a great deal of solicitors, no doubt often vexed by billing targets (a *fortiori* employed solicitors of listed companies with announced revenue forecasts), to ensure they put the minimisation of costs at the forefront of undertaking work for the benefit of non-clients, including administering schemes for the distribution of funds.

> [13] The conduct of settlement distribution schemes can be a commercial opportunity of some real value and should not just be presented on a platter, without appropriate scrutiny, to the solicitors who have acted for the applicant.

Lastly, his Honour was critical of the applicants' solicitors in several respects, including the amount of time which it took them to finalise a deed of settlement following the 'in principle' settlement, and the adequacy of the first draft of the proposed settlement notice to class members which required substantial reading.

Gill v Ethicon Sarl (No 10) [2023] FCA 228

Federal Court of Australia	Lee J	16 March 2023
Applicants' Solicitors:	Shine Lawyers	
Respondents' Solicitors:	Clayton Utz	
Applicant's Funder:	**N/A**	
Austlii Link:	Available here	

Walk-away settlement against individuals in Tomlinson class action, but company case remains

Proceedings were brought against RCR Tomlinson Ltd (in liquidation) and two of its former directors (the second and third defendants), alleging breach of continuous disclosure obligations and that each of the defendants engaged in misleading or deceptive conduct by statements made concerning the performance and prospects of RCR's business in the months leading up to external administration.

Offers of settlement were made with the second and third defendants on the basis of certain deficiencies in the claim; broadly, the statements made were in a company ASX announcement (therefore likely the conduct of the company) and the statements made were said to be of opinion as to the outlook of the business and the intended audience would not have been misled by the statements.

The proceeding against the company itself was to continue.

Broadly, the terms of Deeds of Release and Settlement provided for:

- release of the plaintiff and class members' claims against the second and third defendants;
- each party to bear their own costs; and
- the proceedings to be dismissed.

The settlement was approved notwithstanding that the representative plaintiff gained more from the settlement than the class members (i.e. the plaintiff reduced their exposure to adverse costs while class members received nothing). The Court held that it was still appropriate to approve the settlement, taking into consideration that no objections had been received from any class member.

Ashita Tomi Pty Ltd as trustee for the Esskay Super Fund v RCR Tomlinson Ltd [2023] NSWSC 344	
Supreme Court of New South Wales | Rees J | 5 April 2023	
Plaintiff's Solicitors:	Quinn Emanuel Urquhart & Sullivan
Second Defendant's Solicitors:	Mark O'Brien Legal
Third Defendant's Solicitors:	Johnson Winter & Slattery
Plaintiff's Funder:	Omni Bridgeway and Burford Capital
Austlii Link:	Available here

Court votes YES to stolen generation class action settlement

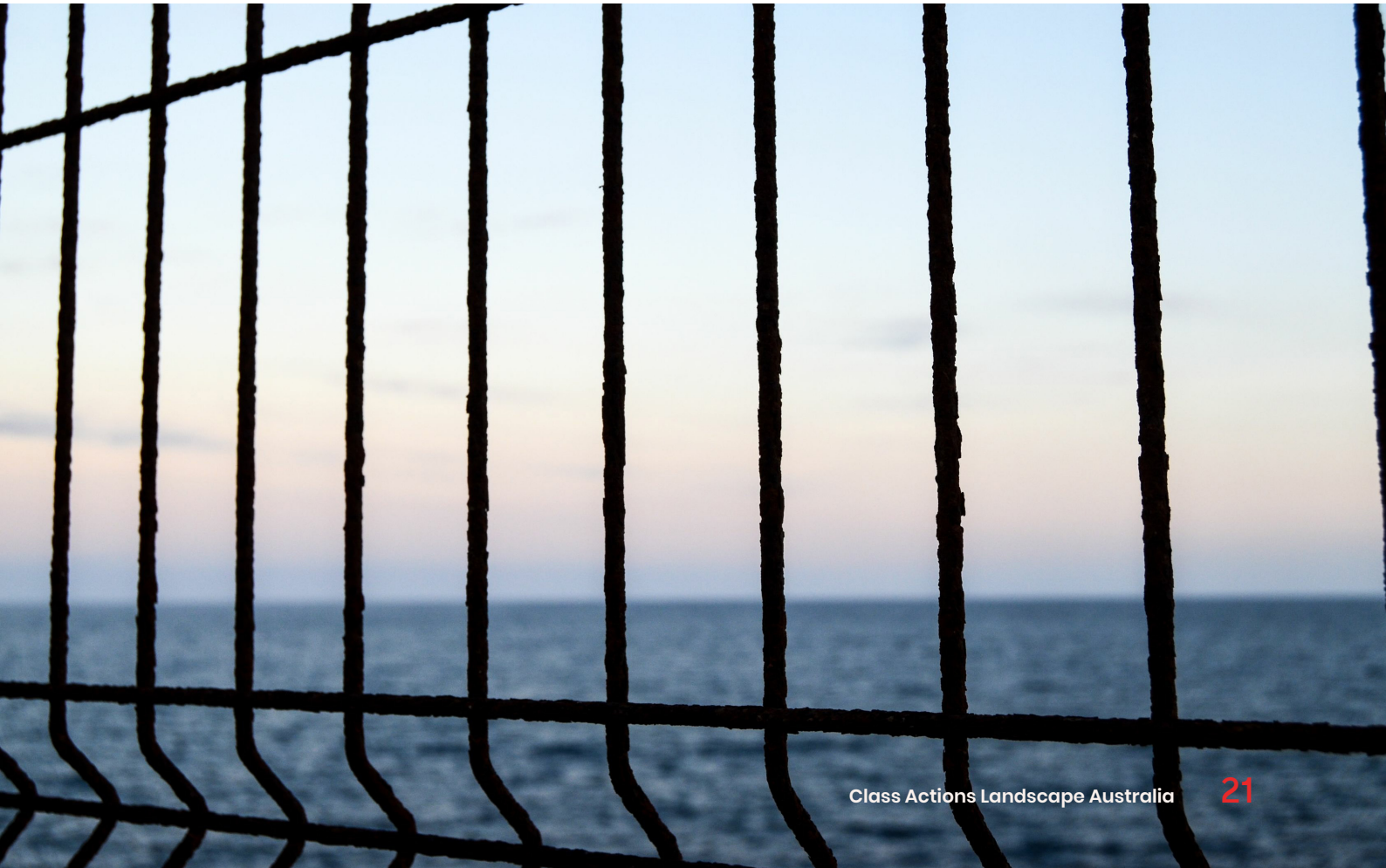
This was a class action on behalf of persons the subject of, or affected by, the stolen generation in the Northern Territory on and after 8 January 1912. Following the commencement of the proceeding, the Commonwealth government introduced a redress scheme for certain victims. As a result, the class definition in the proceeding was amended so as to exclude those persons who were eligible to participate in the scheme. Thus, the class ultimately comprised, in essence:

- those members of the stolen generation who were deceased as at the date of inception of the redress scheme (Group 1);
- living parents and siblings of the victims of the stolen generation (Group 2); and
- deceased parents and siblings of the victims of the stolen generation (Group 3).

The parties agreed to a settlement of the proceeding in the amount of $50.45 million. Justice Beech-Jones approved the proposed settlement having regard to the significant (though not necessarily insurmountable) legal and practical obstacles which the claims faced, and stated:

> [7] It suffices to state that, although at one level the payouts to group members will be relatively modest compared to the harm that was suffered, they still represent a very good outcome when consideration is given to the many legal and evidential hurdles the claims faced and the significant delay that was likely to ensue had the matter been litigated. The costs and fees that are deducted from the settlement are reasonable given the risks involved. This case represents a positive example of the benefits of representative actions.

> [8] The First Nations children who were taken from their families in the Northern Territory during the period the subject of the plaintiff's claim form part of what is commonly referred to as the "Stolen Generation". That phrase refers to those First Nations children who



> were stolen from their families, communities and culture. However, that is far too brief a statement of the suffering that was occasioned. Cataloguing everything that was taken, and from whom, is simply not possible. The practice of removing First Nations children from their families and the reasons for that practice remain highly controversial. For many, this period of removals represents another dark chapter in this country's treatment of its First Nations people. However, like many other instances in our history, such injustices do not necessarily sound in a legal remedy or vindication. Injustices within the law are not an unknown feature of this country's treatment of First Nations people. Hopefully, this settlement will provide some measure of justice, or at least recognition of the harm that was done.

His Honour also approved:

- the proposed settlement distribution scheme, which provided for a 'base amount' to be paid to those class members in Group 3, twice that amount to be paid to class members in Group 2, and three times that amount to be paid to class members in Group 1 – based on the number of registrants, it was estimated that the 'base amount' would be approximately $11,800;
- legal costs of approximately $2.9 million (including reimbursement of $1 million paid for ATE insurance), and settlement administration costs of up to $3 million;
- a 'special' payment of $10,000 to the original lead plaintiff in the case, and $5,000 to the substituted lead plaintiff; and
- a funding commission of $5.5 million (representing 10.9% of the settlement sum (or 12.88% including the ATE premium reimbursement referred to above)).

The latter was sought on the basis of a 'common fund order'. His Honour was satisfied that the Court has power to make such an order at the time of approving a settlement (at [51]), and was "*overwhelmingly satisfied*" that the total amount payable to the funder (including reimbursement of the ATE insurance premium) was reasonable (at [53]).

Ellis v Commonwealth of Australia [2023] NSWSC 550

Supreme Court of New South Wales | Beech-Jones CJ at CL | 25 May 2023

Plaintiff's Solicitors:	Shine Lawyers
Defendant's Solicitors:	Australian Government Solicitor
Plaintiff's Funder:	LLS Fund Services Pty Ltd
Austlii Link:	Available here

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