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Class Actions Update 2015

Presentation to the USA Pacific Legal Conference

New York, USA, December 2015

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Overview

- Class actions in Australia
  - Number and type of class actions
  - Settlements and outcomes
- Class action basics
- Issues
  - Litigation funding and the role of lawyers
  - Competing claims (VW)
  - Claims against regulators
  - Reliance in shareholder class actions
- Emerging issues for 2016

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Class action basics

- Part of the Australian legal landscape since 1992
  - Allows small claims to be aggregated
  - Aim is access to justice and efficiency
  - Federal Court (1992), Victoria (2000), NSW (2011)
- Australia more plaintiff friendly than US
  - Wide prohibition on misleading and deceptive conduct
  - Continuous disclosure regime
  - Very difficult to strike out a class action at an early stage
  - No requirement for class certification

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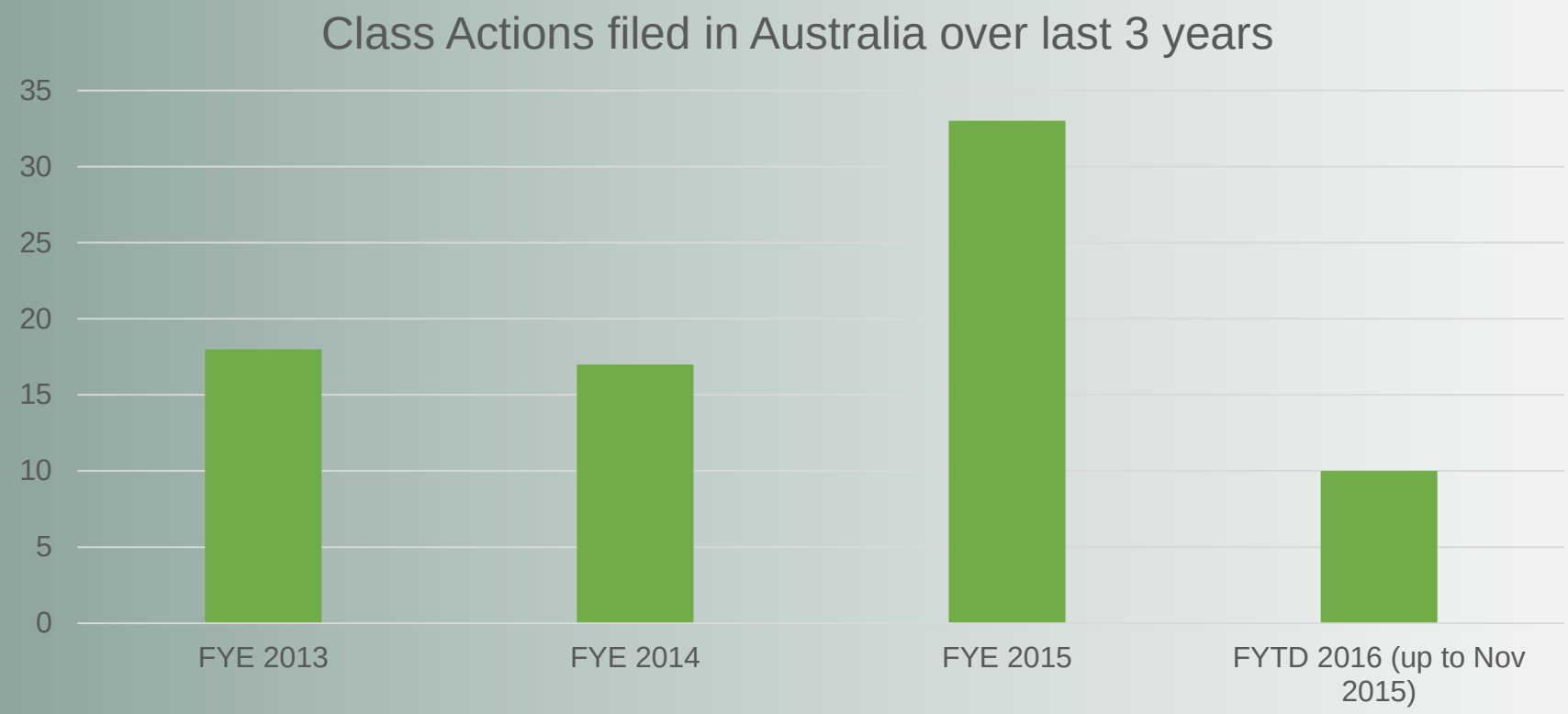
Class actions are steadily increasing



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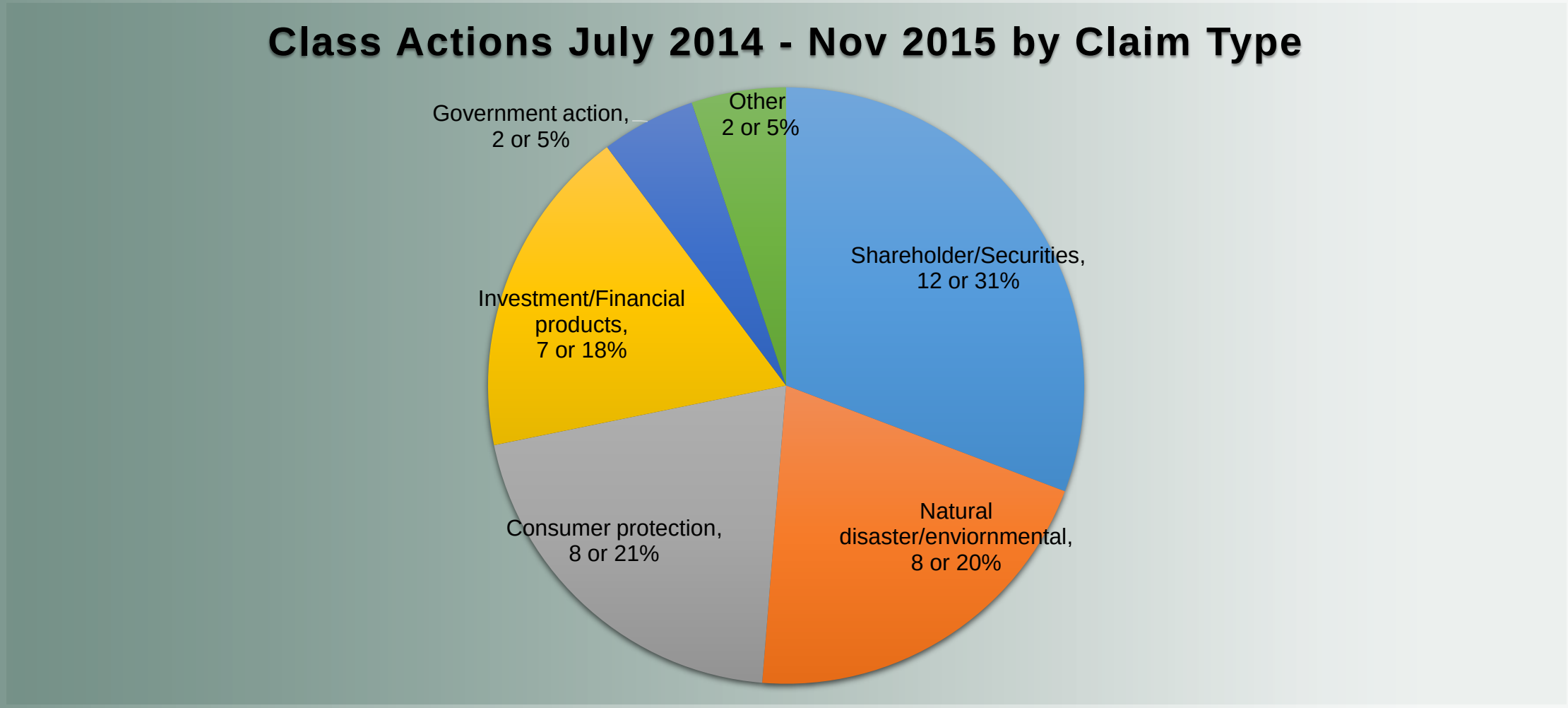
Types of class actions



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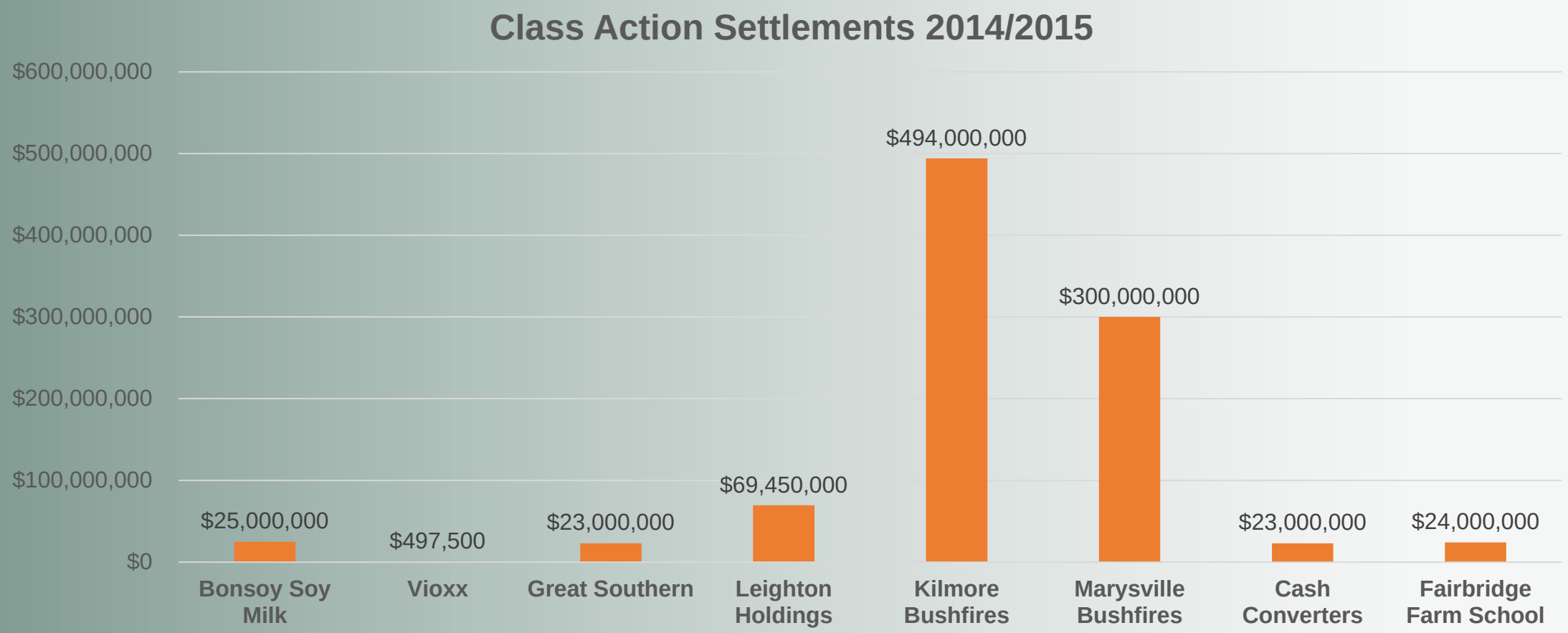
Recent Settlements



Several other class actions were settled over this time period but the amounts were either not disclosed or the settlement terms did not involve financial compensation

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Requirements for a class action in Australia

- At least **7 persons have claims** against the same person or persons
- The claims arise out of the **same, similar or related circumstances**
- The claims of all those person give rise to at least one **substantial common issue of law or fact**
- All class members must have **claims against at least one defendant** (separate actions)
  - Note change in NSW: (sec. 158(2) CPA (NSW))
- Must **describe or identify group members** to the degree a person can determine if they are a member of the group
  - *Example*: All persons who purchased a VW Golf in Australia between 1 January 2000 and 31 December 2015

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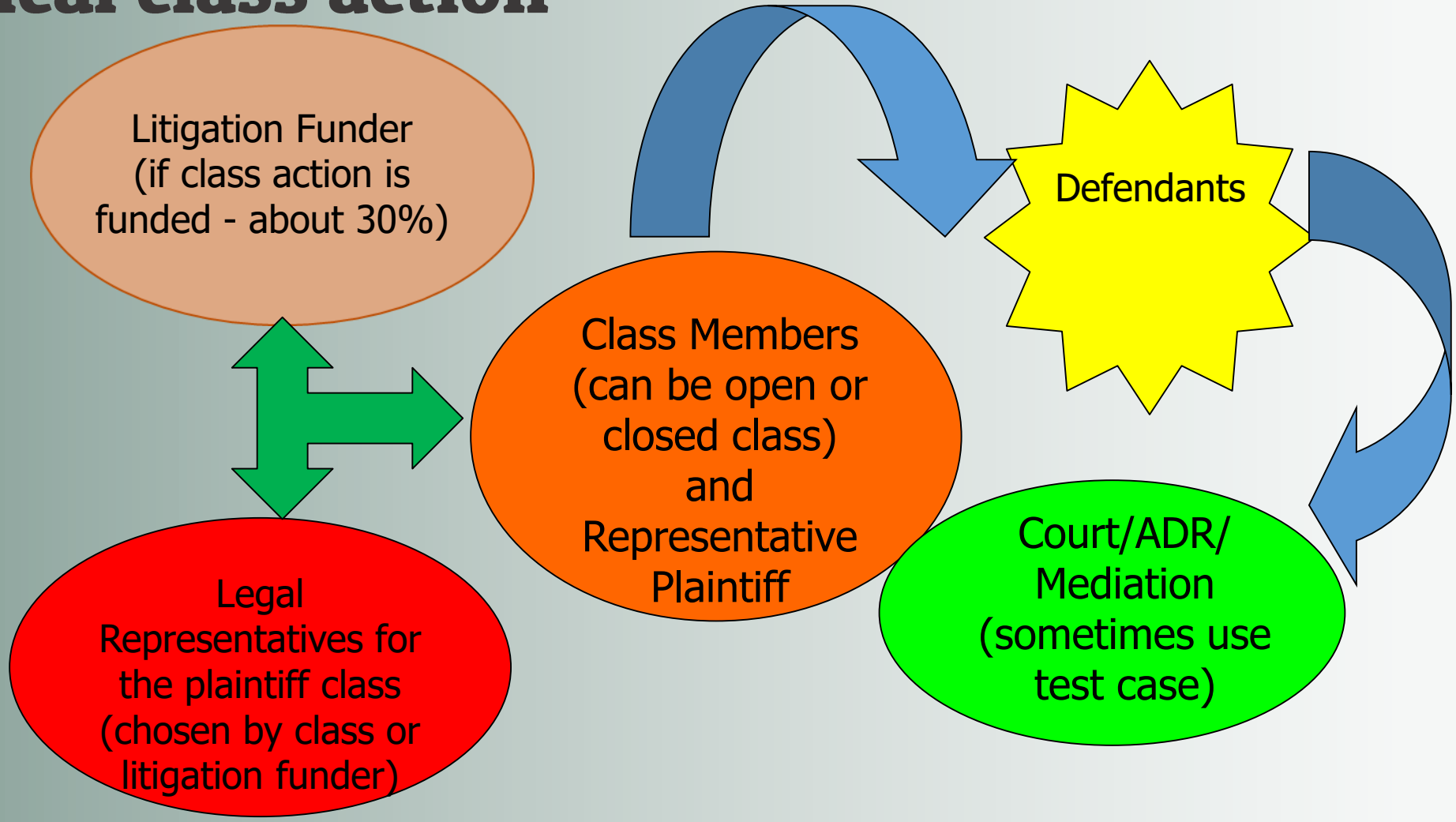
Typical class action



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Differences between closed and open classes

- **Open classes** include everyone meeting the class description. *Example*:
  - All persons resident in Australia who had a cheque account with the ANZ during the period 1 September 2004 to 1 September 2010 and whose account was debited for an honour or dishonour fee and/or a fee for late payment and/or an over limit fee
- Notice will be given to class members and those not wishing to participate can opt out
  - Important because judgment on or settlement of claims will extinguish all class members' rights
- **Closed classes** limit the class to those who have signed a retainer agreement with the litigation funder prior to the class action commencing.
  - Pre-filing book building
  - Prevents "free riding"
  - Only extinguishes claims of claimants who have signed a retainer agreement - leaves way open for additional claims
  - Sec 166(2) subject to Court's discretion on utility and efficiency

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Representative Party & Litigation Funder

- **Representative party**: Commences the class action on behalf of the group
  - Is liable to pay costs if unsuccessful but this has been mitigated by litigation funding
  - Will usually receive an extra payment from the settlement or judgement to compensate for extra effort
- **Litigation funder**:
  - Litigation funder pays lawyer's fees and provides an indemnity for adverse costs order
  - Provides security for costs if necessary
  - Out of any favourable settlement or judgment, litigation funder has all costs and disbursements paid and a fee of between 20% to 40% of the recovery.
    - No statutory cap on the amount of fee which can be charged
    - Fee normally reduces the earlier the litigation is resolved
  - Usually selects the lawyers to act for the class
  - If plaintiff unsuccessful, litigation funder pays adverse costs order and doesn't receive fee.

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Issue: Litigation funding and role of lawyers

- Approximately 30% of class actions in Australia funded by litigation funders
  - usually shareholder or large consumer class actions
  - “public interest” class actions not usually funded
- Concerns about
  - conflict of interest
  - control over litigation
  - solvency
  - fee rates
- “Light touch” regulation by ASIC says:
  - litigation funder not required to hold AFSL or conform to MIS regime
  - has to manage conflicts of interest.
  - No capital adequacy requirements
- Litigation funders attempt to impose US style “common fund” approach
  - Rejected in *Allco Finance*

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Lawyers as funders

- Lawyers unable to take cases on damages (contingency) basis
- Can take case on conditional fee agreement basis (“no win, no fee”)
  - Uniform Legal Profession Law removes prohibition on charging uplift fee in NSW.
  - Can charge up to 25% on success
  - Plaintiff still liable for disbursements and adverse costs order
- Cases where lawyer has a financial or family connection with litigation funder decided on facts:
  - *Bolitho v Banksia Securities* (removed)
  - *Moore v Scenic Tours* (allowed to continue)

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Lawyers as funders

- Lawyers Maurice Blackburn create own litigation funder and propose to fund class action where they would also represent class
  - Sought approval from Federal Court but withdrew application after AG's adverse comments
- Mark Elliot & Melbourne City Investments (**MCI**)
  - Mark Elliot sole director and shareholder of MCI
  - MCI bought small parcels of shares in 162 listed companies
  - MCI commence class action as representative party for alleged breach of continuous disclosure (5 class actions so far)
  - Mark Elliot acting as class counsel
  - Vic Court of Appeal issued permanent stay in Leighton proceedings for abuse of process (proceedings having been commenced for the main purpose of generating legal fees for Mr Elliot)

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Productivity Commission Recommendations

- Remove restrictions on damages based (contingency) billing for lawyers
  - Criminal and family matters excluded
  - Disclosure requirements, including % charged, who will be liable for disbursements and adverse costs orders
  - % capped on sliding scale for retail clients (similar to New York)
  - No % cap for sophisticated clients
  - Damages based fees can’t be combined with hourly rate billing
- Litigation funders’ Licence
  - Capital adequacy requirements to be included
  - Obligations to properly inform clients of relevant obligations
  - Adequate systems for managing risk and conflicts
  - Membership of external dispute resolution scheme
- Court rules to be amended to ensue that discretionary power to aware costs against non-parties and obligations to disclose funding agreements apply equally to lawyers charging damages based fees and litigation funders.

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Issue: Competing class actions (example: VW emissions)

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VW Class Actions – Competition between lawyers

- Over 400 class actions filed in US so far
  - MDL in Detroit, Michigan
  - Selection of lead plaintiff
- In Australia competing class actions between Bannister Law and Maurice Blackburn
  - Bannister Law first filed, funded by litigation funder, associated with overseas firm, Quinn Emanuel
  - Maurice Blackburn self funded, open class, argues more experienced, cheaper
- In Australia, previous cases of competing class actions (eg: *Centro*)
  - No “beauty parade”
  - Run cases concurrently (one trial but two sets of class lawyers)
  - Join together as co-counsel
  - Court stays one set of proceedings.

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Issue: Claims against a regulator (Lock & Ors v ASIC)

- Class action commenced by former investors in Storm Financial Services
  - Class members are persons who received advice from Storm between 1 November 2007 and 31 January 2009
- First class action to allege duty of care by regulator and claim breach of that duty for inadequate action by regulator
- Claims ASIC knew Storm was operating a business model which posed substantial risk to group members for over a year before ASIC took action to investigate Storm
  - Alleges misfeasance and negligence by ASIC
  - Alleges preferment of the CBA's interests
- Motion to dismiss has been heard and judgment reserved

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Issue: Reliance in shareholder/securities cases (Caason Investments & Babcock & Brown)

- *"fraud on the market"* doctrine in US securities class actions
  - A presumption that the price of a stock which is trading in an efficient market will incorporate and reflect all material information (including misrepresentations) and that investors who buy or see shares do so in presumptive reliance on any misrepresentation made by the company.
- Uncertainty if the "*fraud on the market*" presumption will be applied in Australia
  - In *Caason Investment Pty Ltd v Cao*, Full Court of Fed Court the concept of "market based causation" is at least arguable to support the plaintiffs' claims.
  - In *Grant Taylor v Babcock & Brown* comments of Perram J support application of market based causation in non-disclosure or misrepresentation cases
- Ultimately will be decided by High Court

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2016 watch list

- High Court hearing and determination in bank exception fees case
  - Many class actions against a range of corporations waiting in the wings
- Harper review recommendation makes consumer/competition class actions easier
  - May make regulatory matters (ASIC/ACCC) harder to resolve
- Adequacy of bank financial advice ADR/remediation schemes
  - Will these evolve into class actions?
- New areas for claims:
  - Pleading alternative corporate claims (*Wealthsure*)
  - Data breach claims (*Target*) – proposed mandatory data breach reporting
  - Shareholder claims arising from bribery or corruption (*Petrobras/Avon*)
  - Royal commission into Child Sexual Abuse (*Fairbridge Farm School*)
- Public v private enforcement